

**AN ANALYTICAL STUDY OF THE REGULATION OF SOUTH AFRICAN
DIAMOND TRADE FROM 1994 TO 2009
WITH REFERENCE TO ASPECTS OF THE 1996 CONSTITUTION**

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I **Fikile Portia Ndlovu** declare that

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ABSTRACT

This study forms a unique study of South African diamond laws as developed in the context of the South African constitutional dispensation. This study is therefore a contribution to legal research and academia which forms an in depth consideration of international trade practices that influence the diamond industry which is used in this study specifically as a sample market. The diamond industry in South Africa provides a relatively comparatively small¹ but resilient source of economic activity through trade in diamond products as luxury items and items used for industrial purposes.

It is therefore crucial that laws related to the regulation of this industry are comprehensively and analytically studied for the purposes of understanding South African national and international diamond trade regulatory framework. This is done with the aim of illustrating that there has been a significant shift of prevailing wisdom in the South African diamond trade industry. It is now evident that more constitutionally justifiable and internationally sound diamond trade practices have been adopted and applied.

This study not only serves to benefit South Africa as a diamond producing country but it will also add required knowledge related to the international trade context particularly having regard to the fact that South Africa plays a significant role in the global economy and its diamond trading activities do not occur in a vacuum. Therefore the international trade aspect of this study lends it a dual purpose analysis of diamond regulation laws.

¹ Report of Task Team Appointed by the Minister of Minerals & Energy to Analyze the Memoranda and Evidence Laid Before The Commission of Inquiry into the South African Diamond Industry, 20 December (1999). Chapter 5. This was stated in the submissions by Mr. L.A. Lincon, a director of De Beers. He stated that South Africa had 10% by volume of the world total of around 105 million carats. South African mines are no longer major producers of all desired qualities. As a result it was agreed in 1992 that rough diamonds destined for South African factories could be provided from the CSO's (Central Selling Organization) full range of diamonds available in London from sources world-wide.

Since this study is essentially a legal qualitative critique, it is aimed at providing academic insight into the policy of the law and an understanding of whether or not the regulations as they exist are effective. This is important in the understanding and possibly, further development of the legal regulatory framework surrounding trade in diamonds particularly. This study is also being carried out at a time when the global economy is in a recession and due regard of this global phenomenon will be taken in the body of this work.

Further, this study seeks to demonstrate some of the internationally approved measures at diamond trade regulation which have emanated from South Africa. In so doing, the writer seeks to illustrate the role and part played by South Africa in combating the international plague of conflict diamonds through such mechanisms as the Kimberley Process Certification Scheme which has formed a powerful international legal regulatory tool in diamond trade.

Focus has therefore been given to the adoption of legal methods of dealing with conflict diamonds and how other diamond producing countries in Africa have responded to the international call for combating illicit diamond trading. Some of the diamond regulations of African countries considered in this work includes countries such as Angola, the Democratic Republic of Congo and Sierra Leone. These countries have dealt with conflict diamonds within their countries and have therefore become a primary example of gross human rights violations and illicit diamond trading.

With regard to other matters pertaining to diamond regulations of other African countries not necessarily based on considerations of conflict diamond, this study also includes the diamond laws of States such as Botswana, Tanzania and Nigeria. Some of these African States' diamond laws have been considered briefly to give African perspective on some diamond related legal issues. The purpose of including those laws in this study is to provide a comparator for South African diamond laws.

Further, it is intended in this broader part of the study that the national and international diamond trade laws be considered widely from the perspectives of both developed and in particular developing countries in order to ensure that diamond laws generally are used to uplift human dignity and achieve general socio-economic empowerment. It is submitted that a study of equity based diamond laws will inspire a desire to achieve development as established by international benchmarks. The benchmarks referred to above include, for example, the use of knowledge on diamond trade laws to inspire ideas of development such as job creation and eradication of poverty initiatives while undertaking to have sustainability and conservation of the environment. These ideals are at the core of this study.

Unfortunately conflict diamonds and illicit diamonds still continue to be a threat in international diamond trade through the existence of illicit markets and corrupt governments. These compromises clearly are a nemesis to the legal regulatory frameworks in place. There is hope however despite the negative cloud of conflict diamonds. This study will demonstrate such optimism in combating loopholes and weaknesses that allow the scenario of conflict diamonds to be generated to the detriment of existing legal and policing systems.

Apart from the threat posed by conflict diamonds in the legal regulation of diamond trade, there is no doubt that the diamond industry and the laws applicable to it have drastically been altered by the new constitutional dispensation in South Africa. Historically South Africa was marked by a protection of unfair capitalism, market dominance and the legal protection of monopolies. Even the social sciences and political commentary on the subject in history makes little mention of equal access and benefit to the country's resources in diamond trade, however, in this study it becomes evident that the law illustrates a radical change of trends in trade. One of the most evident changes in South African diamond trade involves the promotion of freedom of

trade, within the bounds of constitutional fairness and protection of free competition in the market.

While considering the changes in the law pertaining to diamond regulation, this study specifically identifies the international trade nature of the diamond industry and consequently analyzes the regulatory systems and the law applicable to transactions relating to diamonds as subjects of international trade. This gives insight to the trade practices that influence the relationships between South Africa and other nations that are actively involved in trade while investigating the common trade principles that promote uniformity and harmony in the international regulation of diamond trade.

There are several international instruments which have reformed international trade law although not all of these have been adopted or applied in much detail by the South African legislature and the courts in general. This study will attempt to discuss the effect of ratification and future accession of some of these by South Africa. A discussion of the regulatory systems of other jurisdictions and the extent to which these have adopted and dealt with the international instruments will be done. This is done in order to provide useful academic insight on the practical effects of accepting uniform rules of international trade in the South African legal system and more specifically the diamond industry. This aspect of the study is aimed at investigating, commenting and making recommendations on the contributions made by these international trade reformatory instruments to the constitutional ideals sought to be achieved during the constitutional dispensation of diamond trade in South Africa.

This study also covers the role of relevant trade and other unions in the diamond industry. The role of Unions within the context of South African diamond trade is extremely crucial as these pressure groups are an important socio economic tool in the country. An investigation into their endeavors will be done, including their part in supporting legitimate diamond trading free from corrupt activities. The

purpose will be to present them as a dynamic force in the industry that has contributed to the sustainability of the diamond industry in South Africa by reflecting the voice of the mine workers.

This illustration is based on the argument illustrated in the metaphor that a palm is limited and of little use without its healthy fingers. Therefore the diamond industry needs the contributions not only of the State and commercial entities, but also needs the contribution of the diamond work force as duly represented by trade unions that are relevant to diamond trade.

In conclusion this study is intended to provide insight and knowledge on some of the purely practical commercial legal aspects involved in diamond trade regulation. The crucial commercial activities involved will be investigated both in the domestic and international context. The investigation will also extend to other connected issues incidentally important and involved in domestic and international diamond trade regulation such as transportation and insurance aspects, international contracts and agency predominant in diamond trading.

It is intended in this study that a thorough investigation and analysis of these and other aspects of the diamond industry from a legal perspective will add to current knowledge and academic appreciation of diamond trade legal regulation as applied in the South African context. The whole study will be considered specifically in light of the constitutional values and objectives which have significantly altered the practical, figurative and commercial change in the landscape of diamond practices and law. Further, this work is intended to contribute to the elimination of the academic knowledge gap concerning one of South Africa's trademark sectors.

METHODOLOGY

The methodology employed in this study for the purposes of achieving the goals as set out in the abstract and hypothesis of this study can be explicated as follows. The study has based its primary structure by looking at the applicable history and development of national diamond trade laws and an eventual influence of international trade law on South Africa's diamond industry. There is an extensive review of legal literature in the form of statutes, case law, international model laws and uniform customs, relevant legal academic submissions and other international instruments that have been used to inform what has occurred in the national and international diamond trade context covering historical periods, to formulate a yardstick to measure diamond law development in order to focus primarily on modern times as intended in the study in the most descriptive manner.

The conterminous part of the deliberation of this study contains a review of South African diamond legislation coupled with international trade laws as found in the various international instruments which are then comparatively analyzed against South African diamond trade practices. What this study has done is to relate such developments directly to the diamond industry in a qualitative manner while using the diamond industry as a sample market or guinea pig market for testing the international trade law developments that have occurred in South Africa. Further, there is a crucial reflection of the prodigious changes in South African diamond laws as a result of the constitutional dispensation.

This reflection was further enhanced with a review of legal regulatory frameworks of other major diamond producing or dealing countries in order to complete the global diamond trade picture while referring to some important constitutional values related to the diamond trade context. Some of the countries' diamond laws or international trade in diamond law that are considered in this study reflect and demonstrate that there have been major humanitarian, constitutional or fair

market competition themes which are important to inform global economic concerns for all industries and markets and in the case of this study, diamond markets.

For practical commercial legal aspects of this study, there has also been an important or core analysis of the intertwined relationships between the South African State and other commercial entities within South African international diamond trade. The methodology illustrated above includes an informal or unstructured interviewing process with members of the legal departments of one of the flagship South African diamond producers, the De Beers Group (De Beers). During the unstructured interview process, documents from the legal team of De Beers Marine (Pty) Ltd who are based in the offshore diamond mining area in the Western Cape, Cape Town volunteered much helpful diamond mining literature, all of which is available in the public domain.²

It can be stated that in this study legal literature and other academic reviews, various interviews and observations have been used to provide practical insight into the diamond trade industry in South Africa. These methods have been adopted to map out in this study the role of the more competitive or successful and world-famous South African and internationally acclaimed diamond trading company, the De Beers Group.

De Beers has had significant role in participating with South African law as well as international law. It is therefore prudent that De Beers and its notable participation in South African diamond trade and law is captured in this study particularly in view of the fact that most academic literature on De Beers and diamond trade in general is outdated and does not reflect the latest constitutionally based approach to South African diamond trade. This practical approach is also further highlighted in the investigation of core commercial

² www.debeersgroup.com 12 January 2008.

contracts of diamond trade and the role of various stakeholders who ensure the successful legal compliance of the South African diamond industry.

For a contextual analysis, resources from the United Nations Commission for International Trade Law (UNCITRAL), International Institute for the Unification of Private Law (UNIDROIT) as well as ratification documents have been extensively reviewed from the International Trade Law Journals and UNCITRAL updates. These instruments have also been used as part of an international diamond market international trade support structure test as developed during the course of this study because it became apparent during the course of this study that a global recession was taking place and affecting international trade relations in the most challenging way particularly trade in diamonds as industrial or luxury items.

The information given in this study is largely descriptive in nature containing extensive and relevant literature reviews. The unstructured interviews mentioned in this methodology with the employees of De Beers have also been used to inform this study in order to have a clear view of the legal perceptions from within the company which is also important to the understanding of how the legal reforms have affected the manner in which De Beers see themselves as a powerful diamond trading group within the South African commercial structures and economy.

At this stage it is also important to acknowledge in a special way the team of De Beers' legal personnel who were involved in the preparation of papers pertaining to their contribution and participation in general South Africa law. Further, the voluntary and helpful participation of De Beers in this study is acknowledged and various documents, licences, commercial and environmental reports created by De Beers in line with legislation have been incorporated to formulate views and observations for the purposes of this work.

The deeply descriptive and international or foreign law comparative nature of the study is aimed at extending the broad knowledge base of South African diamond regulation laws in light of the national and international trade context while enhancing the importance of the diamond industry and the efforts of the State to create a balanced view of positive participation of the citizens in the country's resources. The submissions given herein are intended to mark the dawn of constitutionalism and its contribution to the enhancement of the economy of South Africa based on equity and respect for the rule of law.

HYPOTHESIS

This study without being ignorant or insensitive about the atrocities that have previously been associated with diamond trade is written from a reconciliatory perspective. This is done in an attempt to establish an awareness of the positive aspects of South African diamond trade legal developments as part of an acknowledgment that trade in diamonds must be done in a just and fair manner having respect for human dignity.

The hypothesis underlying the inception and conception of this study is premised on the idea that South Africa is a diamond producing country whose diamond laws have been significantly altered by the dawning of the democratic constitutional dispensation. While the history of the diamond industry is captured greatly in academic literature, there are no legal works that have captured these significant changes in light of the diamond laws which form a significant portion of South Africa's economy. Therefore it became necessary that an analytical study be prepared and presented to uniquely contribute to the knowledge of law in these aspects. This is the critical focus of this study.

This study chronologically considers South African diamond laws which in the past were based on the protection of the dominating minority. Recent times however have seen the influence of the new constitutional democracy on the recently developed diamond laws. These progressive and current diamond laws have actively sought to promote the ideals of equal opportunities, the right to participate freely in economic activities and equitable access of all to natural resources and socio-economic justice to previously undermined groups in the diamond industry.

The development outlined above has directly led to the elimination of unjust economic relations and an inequitable economic system designed to enrich one group of people at the exclusion of another. A more equitable economic system

has been put in place and diamond trade regulation and this example of equitable economic activity must be well analyzed for the purposes of further development. On the other hand domestic regulation of diamond trade has been buttressed by the international regulatory systems based on international instruments. The two systems, national law and international law have been combined in diamond trade to combat illicit diamond trading that negatively impact on diamond trading both to national and the global economy at large. This is an ongoing challenge that this study is going to consider specifically.

As recently as 8 February 2009, a report in the Sierra Leonean Sunday 3 Star Ed contained a documentary on illicit diamond trading. The report refers to an orphan scouring the jungle for precious stones in order to survive. The concern in the report was that the orphaned child earned from the meager proceeds of precious stones scouring, barely enough to survive even though he is supplying a multi-billion dollar industry.

The report above was about illicit diamonds trade, the fact that remains is that the right to life of people such as the orphan above is endangered by unregulated or poorly regulated diamond trade in an effort to survive. This is a scenario that the international campaign for clean diamond trade needs to constantly deal with. This study acknowledges that international diamond trade when properly regulated internally through domestic legislation and externally through international law is able to encourage global development. This development includes the development of poor communities of developing States and this can lead to the achievement of international development objectives such as the United Nations 2015 Millennium Development Goals (MDG) under the initiatives of the Diamond Development Initiative International (DDII) in partnership with ONESKY.³

³ www.un.org; www.ddiglobal.org 29 October 2009.

The diamond industry has been earmarked for its relevance to the achievement of the MDG stated above. It has been identified by the international community through the 8 MDG, that diamond trade can be used as a vehicle of empowerment rather than total destruction which has been the sad state of certain diamond producing developing States. The MDG, are specifically listed as the eradication of extreme poverty and hunger, achievement of universal primary education, promotion of gender equality and empowerment of women, reduction of child mortality, improvement of maternal health, combating HIV/AIDS, malaria and other diseases, ensuring environmental sustainability and the development of global partnership for development.⁴ It is submitted that this study will create awareness of the positive role both nationally and internationally that equitable diamond trade can provide to the general upliftment of the human quality of life.

This study also seeks to highlight the South African and international legal endeavors to eradicate any other form of unjust or illicit diamond trade. It is submitted that this study will encourage more development of cogent national and international rules for the promotion of legitimate diamond trade as this is part of respecting the South African constitution⁵ which is the highest law of the land. Further, this study is intended to contribute to the knowledge and development of South African law for the purposes of achieving the practicality of benefiting all citizens of the South African Republic as desired in the national law and policies.

This study is strictly a legal analysis and to that extent, it will not delve into other related albeit painful issues of diamond trade for instance, the narration of historical injustices caused by multinational companies. These have been captured in other works for instance in the writings of authors such as Luvhengo in his *Multinational Corporations and Human Rights Violations in Africa Conflict*

⁴ *Ibid.*

⁵ The Constitution of the Republic of South Africa Act, 1996.

*Zones: The Case Study of Angola 1992 – 2005*⁶ and *United States v Diamond Centre, Inc. (S.D.N.Y. 1952)*⁷ and a rather racially biased case of *Queen v Keast*⁸ in South Africa, for example. These historical cases are important to South African development as they ensure that past mistakes of humanity are acknowledged and recorded in history so that such mistakes are not repeated.

This study will also not delve further deliberate on the pain of the ‘resource curse’ but it is intended to be a study that makes a contribution to diamond laws from a reconciliatory perspective in other words a perspective illustrating the more humanitarian developments of national and international diamond laws since the civilized global community have already by action acknowledged the wrongful methods of handling diamond resources and now as civilized nations the international community is working together to engage in diamond trade that respects human rights.

It is submitted with respect that often legal regulations are usually a response to an anomaly or anomalies in the relations among people or the State and its people. While it is submitted that diamond trade has in the past been associated with grievous human rights violations and probably continues to do so in the black markets, what this study intends to do is highlight the significant legal changes in diamond laws aimed at diminishing these anomalies without re-opening the wounds of the past. This is the study of the legal development contribution sought to be achieved in this instance albeit in the context of diamond trade.

Further, diamond trade regulation is an area of international concern and therefore leading nations are expected to take an explicit role in publicly condemning human rights violations that have tainted diamond trade in some

⁶Luvhengo Victor *Multinational Corporations and Human Rights Violations in Africa Conflict Zones: The Case Study of Angola 1992 – 2005*. A research report to the Department of International Relations, Master of Arts, University of Witwatersrand, Johannesburg.

⁷ This was a case dealing with the dehumanization of Jewish Diamond Merchants during the holocaust.

⁸ (1889-1890) 7 SC 355.

African countries. Most of these nations have acknowledged the human rights violations related to illicit diamond trading. This in itself is a positive contribution in international efforts to combat the illicit trade of diamonds and ensure the trade is done within legitimate limits and to the benefit of poor or perhaps developing States and the global economy at large.

In this study South African efforts are commended in that despite the country's unfortunate history of racial segregation and discrimination, it has managed to allow legislative changes which have created a new equity based diamond trade environment. This new diamond trade environment has allowed South Africa to conduct its current diamond trade within the newly established limits of equitable access to diamond resources while promoting international eradication of conflict diamonds.

Efforts to make equitable diamond trade possible in South Africa under the new diamond laws is shown in the fact that South Africa has participated in allowing affirmative action measures in the diamond sector and South Africa has also engaged with the international community in the formulation and setting up of the Kimberley Process Certification Scheme (KPCS) which is an endeavor designed to keep conflict diamonds out of legitimate trade. By virtue of the name of the process, as Kimberley is a famous diamond mining town in South Africa, it can be said that South Africa has taken ownership of the process.

Further, this study is essential to the understanding of an economic sector that has many commercial facets to it. If knowledge of such activities is kept hidden the economy will not develop because the citizens of the country will not know how to actively participate in various bodies and sectors of the industry that keep it a resilient market. It is submitted that through the contribution of studies of this nature to the South African diamond industry, such knowledge of diamond trading law will lead to further development as various conclusions and recommendations are drawn as part of the process of this study.

In light of the view that knowledge is power as reiterated throughout this study, it is submitted that further clarity of the diamond laws and the entities tasked with enforcing such laws is elucidated. There are various national bodies related to the industry, some are even affiliated with powerful international trading interests. Some of these bodies deal with various crucial aspects of the diamond industry, for example, associations for valuers, associations for beneficiators, jewellery associations, certification associations, industrial diamond associations, unions and State departments that regulate and implement the established diamond laws. This study will contribute in the enhancement of legal knowledge of those diamond related bodies as well.

It is proposed that without the knowledge of these institutions and their role in the diamond trading, there is virtually minimal contribution or benefit that ordinary persons will benefit from the industry. This would be an irony when considering that diamond industry related constitutional values require that the resources be regulated for the benefit of the people of the Republic. Therefore, in this contribution it is believed that through this study, those who manage to internalize the writings of this study whether as ordinary mine workers or top controllers of the industry, all will be able to take the developed principles of fair and humanitarian based diamond commerce and become participants (from an individual basis) in making the diamond industry in South Africa become even more successful even in economically turbulent times by adhering to the fair principles now contained in the rule of law.

It is further proposed that this study will be important in exposing important diamond institutions and their interests in the diamond industry so that it can be determined whether successful and productive constitutional equitable access has been created for all including those belonging to targeted groups in South Africa. This knowledge and understanding of the interaction between the regulations of national diamond resources, the commercial national and

international trade aspects will provide insight into the socio-economic development of the country and the economic emancipation of its poor population groups using the country's diamond resources.

Finally and most importantly this study will also highlight some of the critical challenges that have been or may be potentially created by attempting to use limited diamond resources as a vehicle for broad based economic empowerment. In light of principles established by the Constitution of the Republic of South Africa, 1996, the principles of fair capitalism and international anti-competitive laws, the changes in diamond laws that have occurred in the constitutional era will be carefully analyzed in order to enhance knowledge and provide a unique and original work of the national diamond laws and regulations.

ABBREVIATIONS

ADB - Antwerp Diamond Bank

AGS - American Gem Society

ANC - African National Congress

AU - African Union

BAPCPA - Bankruptcy Abuse Prevention and Consumer Protection Act 11 USC
1501

CEEC - Centre d'Evaluation, d'Expertise et de Certification des Substances
Minérales Précieuses et Semi-précieuses

CEO - Chief Executive Officer

CISG - United Nations Convention on Sale of Goods, 1980

COMESA - Common Market for East and Southern African States

COMI - Center of Main Interest

CPI - Consumer Price Index

CPIX - Consumer Price Index excluding interest rates on mortgage bonds

DBCM - De Beers Consolidated Mines Ltd

DBM - De Beers Marine (Pty) Ltd

DDA - Doha Development Agenda

DDC – (New York) Diamond Dealer's Club

DDII - Diamond Development Initiative International

DEEC - South African Diamond Exchange and Export Centre

DMA - Diamond Merchants Association of Southern Africa

DME - Department of Minerals and Energy

DRC – Democratic Republic of the Congo, capital city Kinshasa

DTC - De Beers Diamond Trading Company London

DTCB - De Beers Diamond Trading Company Botswana

DTCSA - De Beers Diamond Trading Company South Africa

DTI - The Department of Trade and Industry

ECOWAS - Economic Community for West African States

EEA Agreement - Agreement on the European Economic Area

EFTA - European Free Trade Area

EIA - Environmental Impact Assessment
EMS - Environmental Management System
EU - European Union
FOB - Free on Board ICC Incoterms 2000
GAO - US Government Accountability Office
GATT - General Agreement on Tariffs and Trade
GDP - Gross Domestic Product
GDV - Government Diamond Valuator
GFC - global financial crisis
GRI - Global Reporting Initiative G3 Sustainability Reporting Guidelines
IAPs - interested and affected parties
ICAO - International Civil Aviation Organization
ICC – International Chamber of Commerce
IDB – illegal (illicit) diamond buying
IDEX - International Diamond Exchange
IFAW - Fund for Animal Welfare
INSOL - International Association of Insolvency Practitioners
ITAC - International Trade Administration Commission
JASA - Jewellers Association of South Africa
JCSA – Jewellery Council of South Africa
JMASA - Jewellery Manufacturers Association of South Africa
KPCS - Kimberley Process Certification Scheme
LCs - letters of credit
LIEO - Liberal International Economic Order
MARPOL - International Convention for the Prevention of Pollution From Ships
(MARPOL) 1973/78 as amended
MDG - Millennium Development Goals
MLCBI - UNCITRAL Model Law on Cross-Border Insolvency
MPRDA - Mineral and Petroleum Resources Development Act 28 of 2002
NAFTA - North American Free Trade Area
NALEDI - National Labour and Economic Development Institute

NDTC - De Beers Diamond Trading Company Namibia
NEMA - National Environmental Management Act 107 of 1998
NGO – non-governmental organization
NIEO - New International Economic Order
ODA - Official Development Assistance
OFAC - Treasury Department's Office of Foreign Assets Control (US)
OHADA - Organization for the Harmonization of Business Law in Africa
ONESKY – A Canadian based environmental and human rights driven NGO
OPEC - Organization of Petroleum Exporting Countries
PC - Participation Committee
RBC - Royal Bank of Canada
SACU - Southern African Customs Union
SADC - Southern African Development Community
SADC - Southern African Development Community
SADPMR - South African Diamond and Precious Metals Regulator
SADPMR - South African Diamond and Precious Metals Regulator
SAPS – South African Police Service
SARS - South African Revenue Service
SASA - South African Sea Areas
SAWIMA - South African Women in Mining Association
SCOPA - Standing Committee on Public Accounts
SDT - State Diamond Trader
SGS - Société Générale de Surveillance
STCs - standard trading conditions
TAC - Total Allowable Catch
TDCA - Trade, Development and Co-operation Agreement
TURP - Trade Union Research Project
UAE - United Arab Emirates
UCC - Uniform Commercial Code
UN - United Nations
UNCITRAL - United Nations Commission on International Trade Law

UNCTAD - United Nations Conference on Trade and Development
UNGA - United Nations General Assembly
UNIDROIT - United Nations Organization for the Unification of Private Law
UNSC - United Nations Security Council
UNSC - United Nations Security Council
UCP - Uniform Customs and Practice for Documentary Credits
URS - United Registrar of Systems Ltd
US – United States
WGAAP - Working Group of Alluvial and Artisanal Producers
WGDE - Working Group of Diamond Experts
WGM - Working Group on Monitoring
WGS - Working Group on Statistics
WTO - World Trade Organization

DEFINITIONS

Beneficiation - Means the polishing of a diamond or the setting of a diamond in a tool, in an article or in jewellery.⁹

Industries - activities within major sectors e.g. metal industry, gold mining industry.¹⁰

Recession - In economic terms, a period of declining output for more than two successive quarters of a year.¹¹

Sector - major economic activities e.g. mining, manufacturing.¹²

⁹ Section 1 of Diamonds Act 56 of 1986.

¹⁰ *Ibid.*

¹¹ Union Research Project (TURP) *A User's Guide to the South African Economy* (1994) 22.

¹² Union Research Project (TURP) *A User's Guide to the South African Economy* (1994) 25.

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Figure 1: World Map and List of Kimberley Participants

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TABLE OF OTHER INTERNATIONAL INSTRUMENTS AND MODEL LAWS

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UNCITRAL Model Law on Cross-Border Insolvency

UNCITRAL Model Law on International Commercial Arbitration

United Nations Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997)

¹³ 30 October 1947, entered into force 1 January 1948.

Chapter 1: The Development of South African Diamond Laws

1.1 Introduction

In this study of South African diamond trade regulation¹, the period of 1994 to date,² is important as a first port of call to consider the inception³ of the development of these regulations. The development of law applicable to the diamond industry in South Africa owes its existence to a vast number of factors such as the developments of the legally regulated national and international markets,⁴ availability of transport⁵ and the advancement of financial systems.⁶

The list above is not exhaustive however it does provide clarity on the direction as to where to begin when tracing the roots and development of what the national community has accepted to be South African diamond trade regulations. This study aims to analytically emphasize and provide academic insight on the systems of law regulating diamond trade in South Africa from the early developments of diamond laws up to the present Constitutional dispensation.

¹ Such regulation took form in the development of the Diamonds Act 56 of 1986 and other diamond related statutes such as Diamonds Amendment Act 10 of 1991, Diamonds Amendment Act 22 of 1989, Diamonds Amendment Act 28 of 1988, Diamonds Amendment Act 29 of 2005, Diamonds Second Amendment Act 30 of 2005, Diamond Export Levy (Administration) Act 14 of 2007. These laws will form the foundation of this study.

² This is the period in which the Constitution of the Republic of South Africa Act, 1993 (the Interim Constitution), now repealed was applicable to the Republic of South Africa. The Interim Constitution was developed and promulgated as the final Constitution of the Republic of South Africa, 1996. The date of the commencement of the final Constitution was 4 February 1997 and is a milestone in South African democracy.

³ In other words, the study will briefly introduce and consider the economic impact of the discovery of diamonds which led to the development of laws that are applicable in the Constitutional dispensation.

⁴ The purchase of diamonds is going to be considered in light of the trade regulations under the Diamonds Act 56 of 1986 and other laws that are applicable in such transactions.

⁵ This includes for example the availability of air carriage, for example, which is often used in international diamond trade. Such air carriage is regulated under various aviation laws in the Republic of South Africa such as the Carriage by Air Act 17 of 1946, Civil Aviation Offences Act 10 of 1972, Civil Aviation Authority Act 40 of 1998, Civil Aviation Act 13 of 2009 (the commencement date of this Act has not been announced).

⁶ Financial systems within the Republic of South Africa together with those observed by the international community have an influence of diamond trade as will emerge from this study. These systems are also regulated in national law as well as international law in order to support international and national diamond trade with respect being given to harmonization and comity among nations. These practices will be considered under laws such as, for example, the Bills of Exchange Act 34 of 1964, The Cross-Border Insolvency Act 42 of 2000 and other international instruments such as the UNCITRAL Model Law on Cross-Border Insolvency.

This study forms a crucial work in light of the fact that diamond trade forms a vital cog in the economy of mineral rich States such as South Africa.⁷ It is submitted that while the focus of this study is primarily aimed at an in-depth consideration of diamond regulations in the Constitutional dispensation, it is important to have an understanding of the background of the influences that have resulted in the latest developments of South African diamond laws.

In order to place this study within the relevant trade context, it is important to consider the contribution of South African diamond trade to the GDP of the Republic of South Africa. 2007 was the year in which South Africa was celebrating its 140th anniversary since the discovery of Eureka diamond in 1867.⁸ To date South Africa is still a leading producer of diamonds.⁹ The contribution of the diamond industry to the South African GDP to date is one per cent which is relatively small. However South Africa remains a significant producer with diamonds being mined in forms such as kimberlite, alluvial diamonds and marine diamonds.¹⁰

By way of introduction, this chapter will consider the economic history of South Africa in light of diamond trade and the manner in which it has affected the development of laws regulating diamond trade. This chapter will make reference to certain Constitutional aspects of South African trade. Further, this chapter will

⁷ Diamond trade largely contributes to the South African GDP, although there has been a decline of this contribution in comparison with the early eighties. Linda Ensor *Business Day (South Africa)* October 13 2005.

⁸ www.dme.org.za 21 march 2010. Report R61/2007 section 2 'South African Diamond Heritage.'

⁹ <http://www.sadpmr.co.za/UploadedFiles/f503137dc3f34871b416f540062629b0.pdf> 25 March 2010, section 19 of report 'South Africa exported a total of 10 023 302 carats of unpolished diamonds valued at about \$1.42 billion in the twelve months of 2008. The bulk of South Africa's exports were to the European Community (includes United Kingdom and Belgium). The average \$/carat price of exports at about \$140/carat was marginally higher relative to 2007. It should be noted that exports include higher quality goods re-exported by diamond cutters and dealers and thus the average \$/carat value of exports are not a reflection of the average \$/carat value of South Africa's mine production.'

¹⁰ www.dme.org.za 21 march 2010. Report R61/2007.

<http://www.statssa.gov.za/publications/P0441/P04413rdQuarter2007.pdf> 25 March 2010.

discuss the legal framework¹¹ that forms positive law that has been established by the South African Legislature to support and create a balance in accessing economic involvement in national diamonds for the benefit of all the citizens of the Republic of South Africa.

It must be noted that the Constitutional references made in this work are not the only focus but the umbrella supreme law under which diamond trade laws have been developed in the 20th century South Africa. Therefore Constitutional debates have been restricted to aspects pertaining to trade and the development of diamond laws. Further, important attention to relevant aspects of the Constitution of the Republic of South Africa Act,¹² hereinafter referred to as the Constitution, will be discussed in this chapter insofar as the Constitution relates to the legal framework that has influenced the regulation of the currently overhauled laws governing the diamond industry in South Africa.

This chapter is not going to deliberate extensively on the political history of South Africa. Notwithstanding that political history in South Africa has affected international trade in diamonds previously, however, this study will be a tool that places emphasis on the commercial legal history and economic considerations of the diamond trade industry that have most influenced the development of the applicable law. Further, a consideration of the actual business of diamond trade, specifically looking at aspects of international commerce such as international sales and all ancillary aspects of such commercial activity within the diamond trade law will be included as part of the overall theme of the study and this chapter. The parameters of this study have been outlined at the outset in order to create clarity concerning the legal debates to be considered.

¹¹ The Diamonds Act 56 of 1986 and the MPRDA 28 of 2002 are some of the main examples of positive law created to provide for the practical achievement of the Constitutional goals in supporting more access to economic activity in the diamond mining and trade sector.

¹² 108 of 1996.

Presently South Africa's economy comprises of the following economic sectors,* mining and quarrying, manufacturing and agriculture, finance, retail/wholesale, government, transport, electricity/gas/water, construction, social services and other sectors that do not fit into the categories defined above.¹³ These sectors are responsible for the Gross Domestic Product of South Africa (GDP) an indicator of the size of an economy. It is the study of the laws regulating one of these sectors, i.e. diamond trade, that will show how South Africa has developed in order to participate more equitably in international markets. The Constitutionally based trading methods of South African law will be important in attracting international trading partners to South Africa, particularly in light of the 2008 and 2009 recession which has affected the global community.

Unfortunately the historical attributes of the South African economy show that it is an economy largely built on inequality as a result of the apartheid regime which left a large section of the population unable to participate positively in the economy. As a result, severe imbalances were and are still evident in the provision of social services and economic activity. However, this work will reveal the extent to which the South African economy and participation in international trade has been developed and ameliorated by current legislation based on equity, focusing particularly on the diamond industry.

With an understanding of the overview and themes of the aims of this chapter, it is important to note that this chapter will highlight some of the economic, environmental and socio-political factors that have influenced the development of diamond regulation laws. As a result there will be a demonstration of the manner in which South African diamond legal regulation has proved to be a model legislative framework for other diamond trading States across the continent, while illustrating South Africa's active role in the world-wide effort to curb illicit and

* See definitions at end of this work.

¹³ Trade Union Research Project (TURP) *A User's Guide to the South African Economy* (1994) 11, 25.

conflict diamond trading which have proved cancerous to the socio-political stability of many diamond producing African countries.

1.2 The Economy of South Africa

Presently South Africa has one of the most sophisticated economies in the continent of Africa. However, it is an economy with the highest levels of inequality.¹⁴ This means that there is a wide gap between the rich and the poor. While it is true that some of the South African trade systems and legal codes are sophisticated, it is unfortunately an economy marred by extreme poverty for millions. It has been said that there are parts of South Africa which represent the first world while it only takes a short drive to see a vast spread of a world that is in abject poverty.

In the last fifteen years, the democratically elected Government has attempted to correct the economic inequality in South Africa by investing large resources into improving the quality of life for all South Africans. The areas of focus in improving the quality of life include basic infrastructure, housing, electricity,¹⁵ water and sanitation, health, telecommunications and the improvement of other social services. The success of these government efforts lies in the creation and application of effective law. The diamond industry forms an important part of this economy both from the perspective of attracting national revenue as well as forming a fairly sustainable industry to benefit the country. It is important therefore that laws pertaining to this industry had to be amended to address the inequalities even in the access of the diamond resources of South Africa.

¹⁴ Trade Union Research Project (TURP) *A User's Guide to the South African Economy* (1994) 17.

¹⁵ In 2007 and 2008 South Africa experienced an energy crisis with the available power stations unable to keep up with the demands for electricity in the country. At that time the President assured the South African public that experts would be appointed to manage and investigate the situation. In 2009 the energy crisis seems to have been managed in a more efficient manner with less electricity blackouts, however, energy concerns will always be a concern that links directly with the ability of the economy to thrive.

1.3 The Mineral Roots of the South African Economy: Gold and Diamond Trade

1.3.1 Earlier Legal Developments in Diamond Regulations

In order to trace the economic history of South Africa, it is important to consider the history of a sector that has the most influence on the South African international trade involvement. That is the mining sector, in particular, the mining of gold and diamonds. The mining industry sustains South African economy and is the most influential in international trade patterns, laws and development.

In 1886, the Main Reef of the Witwatersrand was discovered triggering a great gold-rush that gave birth to mining.¹⁶ Not only did South Africa have large deposits of gold, it also had large deposits of diamonds which transformed the economic history of South Africa. The transformation resulted in sophisticated economic activity but this development came with challenges such as power struggles and racism. This is not uncommon in any society where a hunger for power and dominance exists.

The men who initially transformed the diamond mining industry in the 1870s were David Harris, Cecil John Rhodes, C.D. Rudd, F. Stow, J.B. Robinson, B.I. Barnato, Woolf Joel, Anton Dunkelsbuhler, J. Wernher, L. Breitmeyer, F. Baring-Gould, Max Michaelis and Sigmund Neumann.¹⁷ They achieved their goals by replacing the independent diggers which led to a significant transformation of the South African economy. This legacy was continued by Paul Kruger and the Oppenheimers.

The decision to replace the independent diggers was marked by the rising of the minority ruling class. This class was essentially a capitalist group assisted by the apartheid government to succeed at excluding other race groups from participating more meaningfully in gold and diamond mining. This history is

¹⁶ Wheatcroft Geoffrey *The Randlords: The Men Who Made South Africa* (1985) 2.

¹⁷ Wheatcroft Geoffrey *The Randlords: The Men Who Made South Africa* (1985) 41.

captured in the records of South Africa as follows 'the process begins in the 1870s. In 1872 the white 'diggers' democracy' on the diamond fields was able to force the colonial government to restrict prospecting and mining rights to whites only. These laws had the effect of declaring all indigenous blacks ineligible for any form of control or ownership over the nascent industrial economy. Any white fortune seeker, no matter what part of the world he came from, could aspire to own and share in the mineral wealth of South Africa; but not an indigenous black. The emergent capitalist class was thus defined as white, and this fact was underwritten by law.'¹⁸

With the reality of diamond trade patterns based on racism illustrated above, some of the consequences of its implementation resulted in the white miners obtaining vast training and development in prospecting and mining skills. This means that only the white miners had the required mining tools as well as the mining knowledge which they would have had years to develop. For the black miners, they could not grow into any position of influence as mining entities because of the exclusionary laws. The consequence of this unfairness in the past oppressive diamond laws is that it created a general legal perception that the indigenous black is an underclass miner and the only time he or she is in possession of unwrought minerals or rough diamonds is when criminal activity is involved.¹⁹

The endeavors of the mining giants although skewed by racism resulted in the rise of De Beers as a monopoly of diamonds.²⁰ At a later stage a marriage

¹⁸ www.anc.org.za/ancdocs/history/ruling.html 27 October 2009. See also references given by other authors on the same subject Lenin, V.I. *A Great Beginning*, Collected Works, Volume 29 (Moscow) 421; Marx and Engels, *The German Ideology*, (Moscow), 82. These writings are also a useful tool in illustrating the manner in which capitalist ideals were welcomed into South Africa from Britain, however, these ideals were particularly inhumane in South African history because at the core of them was the racist element. Therefore it became apparent that the effects of the South African economy would be that one racial group would inevitably be enriched at the expense of another.

¹⁹ *Ibid.*

²⁰ D. Innes *Anglo American and The Rise of Modern South Africa* (1984) 21. It must be noted, however, that in light of modern diamond law in South Africa and the international law on anti-competitive behavior, De Beers are not a monopoly in South Africa as previously perceived. This change in the perception of De

between gold and diamond mining was seen in South Africa when De Beers was absorbed by Anglo American.²¹ The Anglo American group of companies is best defined as 'a major force in the economic, political and social life of South Africa'.²² Since this contribution is mainly concerned with diamond laws, a further study of the De Beers group as a flagship of diamond trade in South Africa will be considered in light of further contributions to the developments in law in this study. The racist diamond laws of the past have also been eradicated from South African law and the dignity of the indigenous black diamond sector participant has also been restored in diamond laws and the Constitutional values, all these will be studied in greater detail in the subsequent chapters.

The contribution made by pioneer mining giants in the South African economy came about with the support of protective diamond mining and trading laws. The diamond legislative framework protected the interests of the pioneers from internal and external threats whilst simultaneously ensuring that the diamond industry remains competitive and profitable in the global arena. The success of diamond mining and trading in South Africa could not have achieved the objectives it boasts today without political stability and relative calm in the country. The notorious compliment to the painful case of 'blood diamonds' is political instability evidenced by armed civil strife as observed in countries rich with so-called blood diamonds.²³

It is important at this stage to provide insight on the nature of the South African diamond regulation framework while making comparisons with the diamond regulation systems of other diamond producing countries. This is in order to show that internal control mechanisms without international control systems are insufficient in the prevention of the proliferation of international 'blood

Beers is part of the Constitutional values that have influenced modern South African diamond laws.

²¹ D. Innes *Anglo American and The Rise of Modern South Africa* (1984) 97.

²² D. Innes *Anglo American and The Rise of Modern South Africa* (1984) 13.

²³ Countries such as Angola, Sierra Leone, Côte d'Ivoire and the DRC among others.

diamonds'.²⁴ This chapter will consider the strategies created nationally and internationally in order to deal effectively with the “conflict diamond” plague by enhancing the development of the diamond legislative framework. However, before these legal strategies are considered it is important to first look at the broad legal framework surrounding diamond trade by having regard to the legal issues raised in the history of such trade.

International trade in gold and diamonds in South Africa started with a common trend for most developing countries. This trend is marked by the exportation of products mostly as raw materials.²⁵ This meant that the revenue which could have been generated by selling a beneficiated final product is left to the country that has the skills to achieve such beneficiation and not the country with the raw material. In South Africa the exportation of raw materials resulted in the initial legal developments which would protect trade in these raw materials.

The early laws were thus concerned with the protection of the legal interests of those involved within the gold and diamond trade industry as producers of the raw material. Historically this meant that local industrial and technological conditions were suitable mainly for production of the raw material. The earliest diamond trading laws were therefore intended to regulate diamond production and sale. These came after the 1900s in the form of the Diamond Control Act²⁶ substantially amended by the Transvaal Precious and Base Metals Act, Amendment Act.²⁷ Thereafter the Diamond Act²⁸ was followed by the Diamond Export Duty Act,²⁹ the Diamond Export Duty Amendment Act³⁰ and the Precious

²⁴ Also commonly referred to as ‘conflict diamonds.’ In this study the term conflict diamonds will be used as formal reference to such diamonds.

²⁵ Trade Union Research Project (TURP) *A User’s Guide to the South African Economy* (1994) 34. This trend which may possibly lead to the producing country’s impoverishment and lack of skills has been dealt with in modern diamond regulations through State supported investment in local beneficiation of diamonds for example.

²⁶ 35 of 1908.

²⁷ 18 of 1913.

²⁸ 39 of 1925.

²⁹ 16 of 1957.

³⁰ 47 of 1961.

Stones Act.³¹ These laws are now obsolete in light of the latest developments in diamond laws but they did serve an important regulatory function in the early days and serve as a useful historic tool for the study of the nature of the South African diamond industry.

The main attribute of these pieces of legislation was the over-reliance on the criminal sanction to enforce compliance and deter unlawful conduct in the gold and diamond trade. This was a common trend in the laws of the nationalist government of the time. The criminal features of the legislation revolved around the licensing and permit mechanisms. The regulatory and administrative bodies and institutions in these statutes had formal authorizations and functions with a criminal tone attached to it which promoted discriminatory policies that continued to exclude certain groups from participating meaningfully in the industry.

The diamond laws of the earlier diamond trade era related to the power of granting permissions with a complementary power to withdraw the right or attach certain conditions to the right. The draconian element evident in earlier diamond laws was the presumption of guilt when a person is found in possession of an unpolished diamond. Even the Diamonds Act³² prior to the amendments was riddled with a criminal tone and presumption of guilt.

The command and control approach significantly contributed to controlling smuggling and proliferation of a parallel diamond trading market in South Africa. The legislative regulatory framework was stringent and laden with criminal penalties. This approach was not without deterrent benefits to the industry because it made it difficult for criminals to compromise the system by exploiting loopholes and fuelling illicit diamond trading.

³¹ 73 of 1964.

³² 56 of 1986.

It is clear when tracing earlier developments of South African diamond trade laws the Constitutional principles were not considered imperative as in the case of the post-apartheid South African diamond laws. The unfortunate disadvantage of the diamond legal framework at that time is that the law was designed to protect only pioneer minority established interests and did not encourage or promote access into the diamond mining and trading industry by other participants. Despite the fact that issues of environmental sustainability had already taken centre stage, for example, by 1986 the world had made huge strides in endeavors to protect the global environment, the South Africa Legislature was lagging behind with a consistent obsession to keep the country divided by unfair discrimination.

Various global conventions in the environmental sphere had been passed. These include the 1972 Stockholm Declaration and the 1982 World Charter on Nature and the Brundtland Commission which sold the concept of sustainable development. However in South Africa no attempt was made to incorporate relevant principles such as sustainable development, precautionary principle, intergenerational equity, social justice among others into the regulatory laws on environment and the mining industry. Notwithstanding, modern diamond trade legislation, as will be shown during the course of this study has dealt with all these issues to deal with the inequity of past laws.

The earlier unjust or inequitable laws gave rise to the application of diamond trade laws that were teeming with criminal suspicion with very little consideration of social justice. The application of criminally based diamond laws was evident in case law. Some of the earlier examples of laws protecting illegal trade in gold and diamonds were captured in an array of cases such as the case of *Rex v Lipshitz*.³³ This was a criminal case dealing with the now repealed Acts³⁴ which

³³ 1921 AD 282.

³⁴ Section 106 (1) Act 35 of 1908 as amended by a repealed Act 18 of 1913.

made it a criminal offence to be in possession of unlawfully and wrongfully obtained unwrought gold.

The fact that a person had to prove a right of possession (thereby his or her innocence) when found in possession implies that an accused was presumed guilty till he proved his or her innocence. This scenario violates the presumption of innocence that is cherished by modern democratic and Constitutional legal systems.³⁵ This should not be surprising considering that during the colonial and apartheid era the doctrine of parliamentary sovereignty and not Constitutional supremacy applied.³⁶

In *Rex v Broodryk*³⁷ the Appellate Division dealt with the now repealed Diamond Trade Act.³⁸ Section 2 of the Diamond Trade Act³⁹ proved to be one of the main statutory controls for illegal diamond trade in the developing South African mining industry. It provided that:

‘It shall be unlawful for any person except as in this Act excepted, to have in his possession any rough or uncut diamond; and any such person as aforesaid who shall be found in possession of any rough or uncut diamond and shall be unable to account satisfactorily for, or prove his right to, the possession of such rough or uncut diamond, or to produce his proper permit for the same in accordance with the provisions of this Act, shall on conviction be liable to certain penalties.’

³⁵ See *Rex v Broodryk* 1932 AD 131 where section 2 of the Diamond Trade Act 48 of 1882 was applied to convict a person. The accused was not asked to give an account of how he came to be in possession of the uncut diamonds.

³⁶ See De Waal J. et al *The Bill of Rights Handbook* (2000) 3 ed 369-378. The authors comment that apartheid legal order was based on the doctrine of parliamentary sovereignty as opposed to Constitutional supremacy. The apartheid legislature could therefore make laws it wished and no persons or institutions, including the courts could challenge the laws for want of substantive Constitutionality.

³⁷ 1932 AD 131.

³⁸ 48 of 1882.

³⁹ 48 of 1882.

The accused in this case was found in possession of certain carpenter's tools with diamonds concealed in them. At the time of the arrest no demand for an account was made and in any case at a later stage the accused was not able to give account.⁴⁰ It was common cause that the accused was employed as an assistant fitter in the machine shop on the State alluvial diggings at Alexander Bay. In terms of the contract of service, the accused was not permitted to leave camp without being searched and X-rayed.⁴¹

The accused was subsequently granted three months sick leave. Upon leaving the premises to commence his leave it was found that there were certain tools he had which had not been examined thoroughly. The accused was searched and escorted to the gate while the tools remained with the detectives for further investigation. The tools were eventually broken apart and inside them were found a total of 176 diamonds. The accused at that stage had left Alexander Bay but was arrested thereafter. The accused was charged and convicted of contravening section 2 of the Diamond Trade Act.⁴²

On appeal Counsel for the accused argued that possession of the diamonds in terms of the Diamond Trade Act⁴³ had not been proved by the crown. The court rejected that contention on the basis that it created an absurdity in law where it would mean that there is no offence for a person, who is not exempted under the section, to have in his possession a rough or uncut diamond, but that it only becomes an offence when he is found out.⁴⁴ The appeal was dismissed.

The cases above demonstrate the expeditious development of laws and technological advances developed to protect gold and diamond trade in its early stages in South Africa. This is a natural reaction to the discovery of a valuable

⁴⁰ 132.

⁴¹ 133.

⁴² 48 of 1882. 134 – 135.

⁴³ 48 of 1882.

⁴⁴ 136.

economic resource. One may not dwell too much on the jurisprudential aspects of theories revolving around law being there to protect those in power, as is evident in any capitalist society. The fact of the matter is that without an effective legal system an economy cannot function optimally.

These early stages of development in diamond trade laws of South Africa, though based on discrimination, gave the country its sophisticated legal nature where the advancements proved that as a country South Africa is able to interact with the rest of the civilized world particularly as South African diamonds and gold were in high demand by international trading partners and the colonial masters. In the case of *Rex v Fourie and Another*,⁴⁵ the two accused in this case were charged and convicted of stealing a box containing a quantity of gold bullion belonging to the Standard Bank of South Africa. At the time of theft the gold bullion was in the lawful custody of the Administration of the South African Railways and Harbours.⁴⁶

The stolen gold bullion was not recovered and was therefore not available as evidence at the trial because the two accused had agreed to dispose of it in order to gain personal advantage. In light of these illegal actions by the two accused, they were charged with wrongfully, unlawfully and corruptly defeating the ends of justice.⁴⁷ The matter revolved around section 105 of the Precious and Base Metals Act,⁴⁸ now repealed, which provided that 'no person shall buy, sell, deal in, receive or dispose of by way of barter, pledge or otherwise, either as principal or agent, any unwrought precious metal.'⁴⁹ Once again the court of appeal found that the accused were correctly charged and convicted of the crimes of illegal dealings in precious metals. These cases and past statutes are a reflection of diamond and precious metals regulations as existing prior to 1994 and the history of these laws is crucial to the understanding of modern diamond laws.

⁴⁵ 1937 AD 31.

⁴⁶ 36.

⁴⁷ *Ibid.*

⁴⁸ 35 of 1908.

⁴⁹ 38.

1.4 Diamond Trade and the Impact of Constitutional Values

1.4.1 Modern Legislative Controls of South African Diamond Trade

Having recognized the economic injustice of South Africa's discriminatory past, the democratically elected government of National Unity undertook to bring about a more equitable economic system based on Constitutional values.⁵⁰ There is no doubt that these Constitutional values are based on human rights and equity considerations supported by the international community.⁵¹ South Africa's past apartheid policies had to fail not only from a human rights perspective but from an economic perspective as well since the international community had called for economic sanctions against South Africa condemning its apartheid policies.⁵² It is only natural to perceive that South African diamond trading activities, like any other economic sector, would be compromised by such sanctions and therefore the removal of apartheid policies had to take place so that it would allow for economic empowerment for the whole country.

Cawood, in his paper acknowledging the paradigm shift in South Africa's mineral policy makes the point that it was the inauguration of the 1994 political dispensation in South Africa that initiated a shift in ownership, management and development of the country's affluent mineral heritage. It is further submitted in his paper that it was the spirit of reconciliation, negotiation, globalization and a holistic view of sustainable development in the mineral resources that immediately shaped the laws that would eventually regulate the country's mineral resources.⁵³

⁵⁰ The Constitution of the Republic of South Africa Act, 1996.

⁵¹ See colloquiums on apartheid held by the United Nations:<http://www.un.org/av/photo/subjects/apartheid.htm> 14 January 2008.

⁵² <http://en.wikipedia.org/wiki/Apartheid#Sanctions> 17 January 2006.

⁵³ Cawood F.T. *The Mineral and Petroleum Resources Development Act of 2002: A Paradigm Shift in the Mineral Policy in South Africa* The Journal of the South African Institute of Mining and Metallurgy Jan/Feb (2004) 53.

It is important to note that the writings of Cawood agree most closely with the theme of this study. Cawood acknowledges that South African mineral policies and precious resources management were altered by a paradigm shift. He states that in South Africa there was a clear shift from a governing system of inequity to equity. One wonders if there would have been an eventual evolvement of equitable or inclusive management of the country's resources had there been no move toward Constitutional values? This question must be answered realistically particularly in light of the fact that it is very difficult to ask those who benefit from inequity to give up their share of the benefit or power. On the other hand one is tempted to have faith in the human ability to care for fellow human beings particularly when oppression is at the core of another's wealth gain.

It is clear that there would not have been a natural evolvement of resource management norms in the country without a nationwide awakening to the realization that all forms of government that seeks to benefit only a few of its citizens while excluding others on the basis of unfair discrimination is evil. Constitutional values expressly established that unfair discrimination no longer has a place in a civilized South African society particularly where such a society is mineral rich and seeks to benefit itself in entirety through the management of those resources. It is clearly with disdain that South Africa looks at the past discriminatory anomalies and seeks to move positively forward in the Constitutional dispensation.

It has become evident from Cawood that apart from a national shift into a consciousness of Constitutional values, South African diamond laws would have remained in the state of perpetually benefiting a smaller controlling minority. Hence, without the Constitutional values there would have been lesser national effort being given to international efforts to make diamond trade more humane, as South African trade would have been excluded as a result of sanctions from other trading partners who were opposed to apartheid policies. Therefore one is

able to see from the developments in law the extent of the gravity of the impact of Constitutional values on the diamond industry in South Africa.

The Constitution of the Republic of South Africa Act,⁵⁴ as a whole is important to all areas of law relating to South Africa. However it is at this juncture important to highlight select Constitutional provisions that are of particular importance to the South African diamond industry. The study of the Constitutional impact on South African diamond laws must be limited to relevant Constitutional imperatives which have affected South African diamond trading and mineral policies in general as these will allow for clarity in the direction of providing an analysis of the proposed diamond industry. Further, the study of the Constitution itself is a vast area which cannot possibly be looked at as a whole and therefore it is prudent that the limits of its consideration in this study are mentioned at the outset.

Chapter 2 of the Constitution of the Republic of South Africa, 1996 contains what one can term the central provisions that ensure equity in diamond laws. This chapter contains the Bill of Rights which is the corner stone of South African democracy aimed at protecting values of human dignity, equality and freedom.⁵⁵ The protection of human dignity and freedom is essential to diamond trade in that there can no longer be a class of persons who are unfairly excluded from participating freely in the economy in various mineral sectors.

With these values in mind, economic rights are protected expressly in the Bill of Rights in sections 22 and 23 respectively.⁵⁶ These provisions encompass the new anti-apartheid economic strategies and have created a platform which

⁵⁴ 108 of 1996.

⁵⁵ Chapter 2 section 7(1).

⁵⁶ 22 Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

23 Labour relations

(1) Everyone has the right to fair labour practices.'

allows all the citizens of the Republic to have the freedoms necessary to participate freely in sectors such as the diamond industry.

Section 8 and 9 of Chapter 2 of the Bill of Rights captures an important aspect of Constitutional economic fairness by expressly providing for the horizontal and vertical application of the rights as well as expressly providing that all persons are equal before the law and are entitled to equal protection from the law. It is submitted that section 9 allows for the economic activity ground to be level by expressly providing that equality before the law includes the ‘full and equal enjoyment of all rights and freedoms’. This provision forms positive law that allows for the advancement of persons systematically excluded by virtue of a discriminatory past through the employment of affirmative action procedures. Affirmative action is intended to allow such previously disadvantaged persons an opportunity to participate meaningfully in the country’s economy in all sectors including the diamond trade sector.⁵⁷

With regard to the formulation of trade unions, which are bodies or associations that are often active in the diamond trading and mining in general, the Constitution provides expressly for the rights of forming such bodies.⁵⁸ It is submitted that it is through the Constitutional protection of this right to form trade unions that economic activity in diamond trade is further regulated by allowing for fair collective bargaining and if necessary allowing workers to have platforms from which they can participate with employer’s activities and voice grievances in their work places in a fair and open manner⁵⁹ without resorting to violence or unlawful activity.

⁵⁷ Section 9(2).

⁵⁸ Chapter 2, Bill of Rights Section 23(2), (3), (4), (5) and (6).

⁵⁹ Section 17, which provides for ‘Assembly, demonstration picket and petition.’ The section provides that ‘Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.’ It is submitted that this right protects the employer and the workers particularly when unions seek to exercise this right in order to actively participate in collective bargaining.

A further relevant diamond industry related provision in the Bill of Rights is captured in the form of section 24⁶⁰ of Chapter 2 of the Constitution. This is a provision related to the right to a safe environment. The Constitutional mandate to protect the environment while seeking to 'secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.' This provision clearly speaks volumes to the diamond mining and trade sectors as diamond mining or mining in general has the most impact on the environment. An example of environmental impact can be seen by all in the large hole in the diamond mining town of Kimberley in South Africa.

A mining activity involves a great deal of waste production and therefore environmental rehabilitation and ultimately conservation must guide every mining project in terms of the Constitution of the Republic of South Africa Act.⁶¹ This provision is important in guarding against environmental degradation during mining operations while ensuring that the environmental rights of persons involved within such industries are protected.

It is also an important provision in the regulation of economic participation in the country's natural resources by establishing a guiding principle that all such economic activity must be done in a justifiable economically sustainable manner for purposes of social development. This means that all mining operations must adhere to these Constitutional principles to make sure that the persons involved in such a sector are able to benefit from the country's natural resources. This sustainable use of the environment is in line with some of the international

⁶⁰ '24 Environment

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (i) prevent pollution and ecological degradation;
- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

⁶¹ 108 of 1996.

strategies for socio-economic empowerment such as the United Nations 2015 Millennium Development Goals (MDG).

If one considers specifically goal seven of the UN 2015 MDG which provides for the protection of environmental sustainability, mining is acknowledged to be a serious environmental threat as a general rule. It has been reported by the United Nations that Artisanal diamond mining has stripped thousands of square miles of African topsoil without rehabilitation or replacement. Therefore it is part of the UN goals to focus their attention on the promotion of sustainable mining practices and the rehabilitation of exhausted diamond fields so that the flora and fauna may be restored to such areas.⁶²

In terms of enabling mining law for the purposes of section 24 of the Constitution of the Republic of South Africa Act⁶³ the Mineral and Petroleum Resources Development Act⁶⁴ (MPRDA) is particularly helpful and will be discussed in more detail as the study progresses. It is however important at this stage to mention that the practice in seeking to conserve and rehabilitate the environment after a mining activity is made possible by section 38(1)(d) specifically where it is provided that a holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit must as far as practicable rehabilitate the environment affected by the mining activity.

To further support the practical environmental rehabilitation requirement in mining law, section 41 of the MPRDA provides for a financial provision for the remediation of the environment. The section provides as follows:

- (1) An applicant for a prospecting right, mining right or mining permit must, before the Minister approves the environmental management plan or environmental

⁶² www.ddiglobal.org 20 October 2009.

⁶³ 108 of 1996.

⁶⁴ 28 of 2002.

management programme in terms of section 39 (4), make the prescribed financial provision for the rehabilitation or management of negative environmental impacts.

(2) If the holder of a prospecting right, mining right or mining permit fails to rehabilitate or manage, or is unable to undertake such rehabilitation or to manage any negative impact on the environment, the Minister may, upon written notice to such holder, use all or part of the financial provision contemplated in subsection (1) to rehabilitate or manage the negative environmental impact in question.

(3) The holder of a prospecting right, mining right or mining permit must annually assess his or her environmental liability and increase his or her financial provision to the satisfaction of the Minister.

(4) If the Minister is not satisfied with the assessment and financial provision contemplated in this section, the Minister may appoint an independent assessor to conduct the assessment and determine the financial provision.

(5) The requirement to maintain and retain the financial provision remains in force until the Minister issues a certificate in terms of section 43 to such holder, but the Minister may retain such portion of the financial provision as may be required to rehabilitate the closed mining or prospecting operation in respect of latent or residual environmental impacts.

In practice the Department of Minerals and Energy (DME) Regional Office personnel⁶⁵ uses certain guidelines to calculate the quantum payable in terms of section 41 above. The calculation of quantum depends on many factors which are all influenced by the level of risk to the environment. What is interesting is that the amounts reflected in the guidelines have been actuarially determined and reflect a minimum of ZAR 10 000.00 and a maximum of ZAR 80 000.00. It has been reported that generally the department usually requires amounts in the region of ZAR 38 000.00. This financial guarantee illustrates the seriousness of the Legislature in ensuring that Constitutional provisions are carried out.

The only problem with implementation in practice of this very ideal environmentally considerate and Constitutionally sound Mineral and Petroleum Resources Development Act (MPRDA)⁶⁶ law is that while it does not cost great amounts of finance to rehabilitate the environment, companies or mining interests who do not have financial liquidity at the inception of the mining project do not have a chance to get a foot in the door to commence mining activities, that is a potential barrier to empowerment.

It is therefore important that the Department of Minerals and Energy (DME) considers each application according to individual merits of the proposed mining activity particularly where the ventures are financially feasible in the long run for purposes of using mining as a vehicle for empowerment. On the other hand there may be a dissenting view which realistically accepts that perhaps those who do not have access to required funds to undertake sustainable mining should leave it in the hands of those who do but what does that mean when looking at the

⁶⁵ The Minister of Justice has the authority
<http://www.bullion.org.za/Departments/Environment/Downloads/Guideline%20Document%20for%20the%20Evaluation%20of%20the%20Quantum.pdf> 20 February 2009. *Guidelines Document for the Evaluation of the Quantum of Closure Related Financial Provision Provided By a Mine* Report No: 5863-5900-2-P Rev 1.5 Department of Minerals and Energy, Department of Minerals and Energy, Private Bag X 59, Pretoria, 0001.

Section B of report provides for a manual to be used for calculating the quantum.

⁶⁶ 28 of 2002.

Constitutional goal of broad based socio-economic empowerment? It is interesting how the South African government attempts to handle this impasse. The short answer to that question is that even the Constitution of the Republic of South Africa Act,⁶⁷ acknowledges that all development must take place within available resources.⁶⁸ However it is submitted that funding initiatives from foreign investors may be beneficial in developmental mining projects.

With regard to safety of the mining environment, admittedly mining by its nature is a serious risk to those working down in the mines however it is equally expected that such environments are kept as safe as possible through the observation of various legislative safety codes in order to protect both the workers and the environment. South Africa has generally had impeccable foresight in that it has historically used sensible mining practices with a few serious exceptions in asbestos mining, for example. Good mining practices have been further enhanced by the Constitutional mandate to promote conservation and environmental safety in modern day South Africa therefore it is rare that its diamond mines have been hazardous and media reports have often reported mining deaths occurring through illegal mining rather than lawful mining generally speaking. However, on the whole it is quite clear that environmental safety is priority in South African diamond mining.

It is submitted further, that sections 32 and 33 of the Bill of Rights⁶⁹ respectively are crucial to the protection of an equitable diamond industry. It is evident in the country's diamond laws that information pertaining to diamond trade and beneficiation is held and controlled by the State for the purposes of regulating the industry must be made freely available to allow persons to exercise their rights in an appropriate manner. There must be a transparency with regard to information

⁶⁷ 108 of 1996.

⁶⁸ The Constitution of the Republic of South Africa Act 108 of 1996 section 25 (5). The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

⁶⁹ These are sections that provide for the right to access to information as provided for in terms of the Promotion of Access to Information Act 2 of 2000 as well as the right to just administrative action.

on administrative actions aimed at regulating the diamond industry. This includes information for example pertaining to the granting of mineral prospecting rights and other licenses necessary for the effective controlling of the Republic's mineral resources and precious resources.

The Constitutional provisions flagged above in terms of section 32 and 33⁷⁰ illustrate that actions of the State bodies in regulating the diamond industry must be fair and just otherwise such actions would be subject to a review process in law. This study will investigate some of the examples of such State activity in the regulation of South Africa's diamond trade. This exercise will be done in order to measure the effectiveness and impact of Constitutionally protected fair administrative action on diamond economic activity in the modern era.

One of the most important contributions on legal development of national law under Constitutional values relates to the encouragement of the consideration of foreign law and international law when interpreting the provisions of the Bill of Rights. This is provided for specifically in the form of the section 39 reflected below. This means that there is a Constitutional imperative on every court to have sensitivity to international efforts that uphold Constitutional values and ensure that such values are taken into account when applying national law. This provision is of particular relevance to diamond regulations as a general rule because of the Constitutional dispensation. This section is important to international trade aspects of diamond regulations as such regulations generally fall within the realm of international law. Throughout this study, the relationship between national law, international law and the Constitution of the Republic of South Africa Act⁷¹ is most clearly established.

39 Interpretation of Bill of Rights

⁷⁰ This must be done in line with statutes such as the Promotion of Administrative Justice Act 3 of 2000 and Promotion of Access to Information Act 2 of 2000.

⁷¹ 108 of 1996.

(1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The Constitutional mandate to enforce fair administrative action in essence means that Chapter 8 and 9 of the Constitution of the Republic of South Africa Act⁷² are relevant to upholding Constitutional values in a broad and general sense. Therefore the Constitution permits the desirable formulation of a protective and governing State umbrella in South Africa in all sectors of economic activity through courts which administer justice in every industry as well as the establishment of State institutions which are there to protect the South African people from any potential threats against their Constitutional democracy.

A further important Constitutional provision which has impacted the revised shape of South African diamond laws is encapsulated in section 35 of the Bill of Rights chapter. In a more particular manner section 35(3)(h) provides that 'every accused person has a right to be presumed innocent.' As previously noted in the earlier parts of this study under the heading discussing the earlier developments in diamond regulations⁷³ in South Africa it became evident that past diamond regulation laws being zealous of enforcing the criminalization to the extreme of all

⁷² 108 of 1996.

⁷³ Parts 1.3.1 of this study.

potential threats to the diamond trade industry, almost all past legislation had a much heavier criminal undertone to it.

This is shown in the presumption of guilt for the possession of unpolished diamond. In the Constitutional dispensation diamond laws have been structured in such a way that crimes related to diamond possession are treated with much respect to the provisions contained in section 35 of the Constitution therefore accused persons are able to defend their cases in diamond related matters in a more equitable manner. The Diamonds Act,⁷⁴ as amended, contains prohibited actions insofar as criminal activity is concerned so that all accused persons charged in terms of the act are presumed innocent until proven guilty in terms of the Diamonds Act.⁷⁵

When one contrasts the cases decided in the previous dispensation prior to the effects of section 35 of Bill of Rights, cases such as that of *Rex v Fourie and Another*⁷⁶ and *Rex v Broodryk*⁷⁷ as examples quoted earlier in this chapter. It becomes apparent that if the accused persons in these cases had been presumed innocent until proven guilty, the courts would have had to afford them the opportunity to prove that they were not to be branded as diamond criminals on possession alone. With the presumption of guilt being strongly based on possession alone, this also meant that the crown had a much simpler task in proving its case to secure convictions based on possession alone. This approach had a general inequity in the law in that proving one's innocence in possession cases was almost impossible. This is problematic in cases where persons are factually innocent and illicit diamonds have been planted on them without their knowledge.

⁷⁴ 56 of 1986.

⁷⁵ 56 of 1986.

⁷⁶ 1937 AD 31.

⁷⁷ 1932 AD 131.

It is the above Constitutional provisions that have prompted significant change in the regulation of the diamond industry in South Africa. This understanding of the present diamond trade laws shows the extent to which South Africa has been influenced in its diamond trade timeline. This periodical study of diamond regulations provides a mirror into which the South African society can look for the sake of understanding its own image on issues of fair diamond economic activity so that necessary changes can be made where it is apt.

Apart from the earlier decisions and laws demonstrating the court's response to illegal dealings in unwrought gold and other precious metals there are newly reported cases and new statutes which have been developed by Legislature to combat such crimes and the general regulation of laws pertaining to the Republic's diamond resources.

This study will at this point make a survey of these latest developments in diamond regulations in order to gain a full understanding of the current legal framework on diamond regulation laws. Although the legal framework has been updated or developed generally, modern precedent still illustrates that the same old threat of illicit diamond trade in diamond and precious metals continues to exist. This criminal element that threatens diamond trade will be considered in more detail in the latter parts of this study however at present it is important to look at the trends that have impacted on the development of the most current legal framework.

By way of introduction, it is important at this stage to consider very briefly a few court cases selected because of the time periods they represent in order to have an understanding of the natural progression of the changes in more modern diamond regulations. The source of modern developments of diamond trade regulations can be traced to earlier decisions such as that of *S v Seseane*.⁷⁸ In this case the court considered whether or not there was a contravention of

⁷⁸ 2000 (2) SACR 225 (O).

section 143(3) of the Mining Rights Act,⁷⁹ now repealed, which was one of the more modern pieces of legislation that regulate mineral rights in South Africa. This repealed Act made it an offence for certain persons to be in possession of unwrought gold.⁸⁰

The Mining Rights Act⁸¹ is a law that typically resembled some of the earlier diamond laws applicable to dealings in gold and diamond trade (or other precious metals) in South Africa. In this case the appellant had been charged and convicted of contravening section 143(3) of the Mining Rights Act⁸² in the *court a quo*.

On appeal however it was established by the court that there was no proof that the appellant had physical control over the gold, therefore the conviction had to be set aside. From this decision one can clearly determine that the theme held by

⁷⁹ 20 of 1967.

⁸⁰ The insert of the section of the law is added herein order to illustrate the earlier sources of modern legislation. There is in fact a fair amount of similarity in the earlier law when compared with the modern law. Section 143 of the Mining Rights Act 20 of 1967 *in casu* provided as follows ‘143 Prohibitions relating to dealing in or possession of unwrought precious metal.

(1) Save as is otherwise provided in this Act, no person shall buy, sell, deal in, receive or dispose of by way of barter, pledge or otherwise, either as principal or as agent, any unwrought precious metal, unless-

(a) he is the holder of a recovery works licence and concludes the transaction in accordance with the terms of his licence; or

(b) he is a banker within the Republic; or

(c) such unwrought precious metal has been won by him or his servants acting on his behalf from land on which he is lawfully entitled to prospect or mine for precious metals; or

(d) he has obtained a certificate from the mining commissioner authorizing him to be in possession or to dispose of such unwrought precious metal; or

[Para. (d) amended by s. 47 of Act 86 of 1981 and substituted by s. 1 (a) of Act 73 of 1988.]

(e) such unwrought precious metal is required for scientific purposes or in connection with any trade, industry or profession, and the person in possession thereof, not being a jeweller, has purchased such unwrought precious metal under the authority of and in accordance with a permit issued by the Commissioner of the South African Police or any person designated by him.

(2) No certificate contemplated in subsection (1) (d) shall be issued to any person except in consultation with the Commissioner of the South African Police or a person designated by him.

(3) No person shall have in his possession any unwrought precious metal unless-

(a) he is a person exempted under subsection (1); or

(b) he holds a jeweller's permit; or

(c) he is in possession of such metal in fulfillment of a contract of service with any such exempted person or holder of a jeweller's permit; or

(d) he has come into possession of such metal in a lawful manner.’

⁸¹ 20 of 1967.

⁸² 20 of 1967.

earlier decisions and this particular repealed Mining Rights Act⁸³ had not dramatically changed. If a person was proved to have been in possession of unwrought gold, it would be a crime if it not justified in terms of the law. This is essentially a theme evident in the earlier legal developments controlling the mining industry. It is therefore safe to argue that by the 1960s, diamond laws although developed to an extent some of the Constitutional values were still not laboriously prioritized in such laws in direct contrast to modern and currently active diamond law.⁸⁴ However, the Mining Rights Act⁸⁵ considered in light of the case very briefly above does provide a historical legislative study of the laws that originated to create the more Constitutionally sound modern diamond regulation laws.

On the question of police informers and traps set to catch illegal dealers in precious metals, *S v Desai*⁸⁶ is a useful decision in determining the attitude of the courts in such situations as well as an opportunity to study the legislative movements. Further, this matter is one decided in the Constitutional dispensation, therefore, it is a case that forms a fine example of the move from the repealed diamond law to the application of new diamond law under the Constitutional regime.

This case serves to mark the default reaction of the law to the common threat of theft⁸⁷ and illicit trading⁸⁸ of precious metals in the mining industry generally. This

⁸³ 20 of 1967.

⁸⁴ This is evident in that for example section 143 of the repealed Mineral Rights Act 20 of 1967, had a heavy leaning on the presumption of guilt for possession of unwrought gold and other precious metals, a position which has been dealt with to a great extent by section 35 of the Constitution which upholds to a great extent presumption of innocence until guilt is proven.

⁸⁵ 20 of 1967.

⁸⁶ 1997 (1) SACR 38 (W).

⁸⁷ *Queen v Klaas* (1893-1895) 7 HCG 245, 246. *S v Gauss v Mukete*; *S v Petrus*; *S v Teodor* 1980 (3) SA 770 (SWA) 771, 772. In this case the four appellants had, in separate cases, been convicted by a magistrate of theft of diamonds. *National Union of Mineworkers v De Beers Consolidated Mines Ltd* (1997) 18 ILJ 1442 (CCMA) 1455 F. It was stated in this case that diamond theft the mine threatens its profitability and ultimately its existence.

⁸⁸ *National Director of Public Prosecutions v Naidoo and Others* 2006 (2) SACR 403 (T) 415F, 416 G., *S v Mkonto* 2001 (1) SACR (C) 591 E, *S v Hove S v Shumba* 1979 (4) SA 648 (ZRA) 649 F where the court held that the law in question intended to deal with the mischief of illicit diamond trading. *Incorporated Law*

criminal threat is the common ground which unites industries and law makers as they seek to protect the integrity of the precious metal sought to be protected. In fact one may be so robust as to even suggest that all sources of modern diamond laws are based on the removal of this particular mischief. The case serves as an important chronological link illustrating a progression from the recently repealed more modern mining regulations and how these were applied in the earlier stages of the Constitutional dispensation.

The facts of the case show that the appellant had purchased unwrought gold in contravention of the now repealed Mining Rights Act.⁸⁹ In his defence the appellant admitted to purchasing unwrought gold but raised the defence of entrapment. The facts of the case show that an informer had given information to the police that the appellant wanted to buy unwrought gold.⁹⁰

Police inspector Kemp acting as the 'trap' afforded the appellant an opportunity to purchase the gold. The appellant had met the inspector and enquired about the quantity and quality of gold to be supplied. The appellant having satisfied himself that he was buying unwrought gold paid the agreed amount and took possession of the gold.⁹¹ The appellant was subsequently arrested and charged and convicted for contravention of the Mining Rights Act.⁹²

On appeal, counsel for the appellant argued that the appellant was not guilty because the defence of entrapment was available which resulted in the absence of 'illegality'. The court rejected this contention on the basis that by his own admission the appellant had knowledge that he was doing something illegal and

Society v Harris 1932 OPD 20 p 23, *Cape Law Society v Du Plessis* 1932 CPD 119 p 120, *S v Thomas and Another* [1988] 4 All SA 220 (NC) see judgment where the court held that a fine for illicit diamond buying was appropriate in the circumstances. *Nusca v Da Ponte and Others* [1994] 4 All SA 417 (BG), par. A factual background. Income Tax Case NO 1683 62 SATC 406 p 408, 409 where the amount of money to be taxed was a reward for information leading to the arrest of one involved in illicit diamond trading.

⁸⁹ 20 of 1967.

⁹⁰ 40 D.

⁹¹ 40 E – G.

⁹² 20 of 1967.

had made the choice not to resist temptation. Therefore any conscious deviation from the law is illegal and should be punished. Further this law had to apply successfully in this case because laws that are not seen to operate or whose operation depends on relative opinions of prosecutors or the idiosyncrasies of judicial officers would fall into disrepute. The court stated that in South African law there was no recognition of entrapment being a defence.⁹³

For a more precise precedent on the modern developments and the most current laws regulating diamond and other precious metals trade, the case of *National Director of Public Prosecutions v Naidoo and Others*⁹⁴ is most significant and deserves to be highlighted on the regulation of precious minerals. This case demonstrates the manner in which the modern statutory regulations regarding trading in unwrought precious metals in South Africa as then stated by the courts included the Mining Rights Act⁹⁵ which had some sections of it at that stage being repealed by the Minerals Act⁹⁶ (an Act subsequently repealed by section 110 of the Mineral and Petroleum Resources Development Act) or MPRDA.⁹⁷

These changes and developments in law demonstrate that dynamic legislative controls that have been adopted by Legislature in an effort to seek the achievement of the most internationally sound methods of trade in gold and diamonds. The classic scenario in the development of laws pertaining to trade in precious metals seems to be marked with a presence of new law against old problems that have always faced the industry and therefore it is common to find more judgments that relate to criminal activities that have long haunted the industry.

The main pieces of legislation constituting the diamond trading legal regulation framework highlighted above can be summed up and listed as being the

⁹³ 41 B – F.

⁹⁴ 2006 (2) SACR 403.

⁹⁵ 20 of 1967. Repealed.

⁹⁶ 50 of 1991.

⁹⁷ 28 of 2002.

Constitution of the Republic of South Africa Act,⁹⁸ the MPRDA,⁹⁹ the Diamonds Act¹⁰⁰ as amended and the Diamond Export Levy (Administration) Act.¹⁰¹ It is important to note that the Diamond Export Levy (Administration) Act¹⁰² contains a Schedule of amendment of laws table which summarily shows the significant amendments the main diamond laws.¹⁰³ These modern diamond related laws will be considered in greater depth throughout this study.

The Diamond Export Levy (Administration) Act¹⁰⁴ contains the following amendments, section 1 definition of unpolished diamond, section 60 relating to the export and import of unpolished diamonds, section 61A registration of unpolished diamonds for import, section 44 temporary exemption from Diamond Exchange and Export Centre (DEEC), section 65A examination and valuation of unpolished diamonds for import, section 67 deals with a fine in case of difference in values, section 69B deals with the release of unpolished diamonds for import.

The Diamonds Amendment Act¹⁰⁵ as amended by the Diamond Export Levy (Administration) Act¹⁰⁶ by virtue of the repeal of section 66 and 68 of the Diamonds Act.¹⁰⁷ The Diamonds Second Amendment Act 30 of 2005 is amended by the insertion of section 74 in the form of section 74A dealing with relief for certificated purchases. These latest amendments must be borne in mind when interpreting the modern South African diamond laws as they are designed to ensure equal economic participation for all citizens.

⁹⁸ 108 of 1996.

⁹⁹ 28 of 2002.

¹⁰⁰ 56 of 1986.

¹⁰¹ 14 of 2007.

¹⁰² 14 of 2007.

¹⁰³ See amended sections of the Diamonds Act as contained in the Diamond Export Levy (Administration) Act 14 of 2007, Schedule.

¹⁰⁴ 14 of 2007.

¹⁰⁵ 29 of 2005.

¹⁰⁶ 14 of 2007. It must be noted that the Taxation Laws Amendment Act 8 of 2007 is also significant to the existing diamond regulation framework.

¹⁰⁷ 56 of 1986.

This chapter will however be more focused on the Diamonds Act¹⁰⁸ and the MPRDA as an obvious legislative starting point on the modern laws regulating South African diamond trade. Other statutes will be discussed only to the extent they support these two pieces of legislation. It is submitted that it is these two significant pieces of legislation that have altered the face of diamond regulations in South African law to significantly bring about a more humane diamond trade in South Africa's modern Constitutional dispensation.

1.4.2 The Minerals and Petroleum Resources Development Act 28 of 2002

The MPRDA¹⁰⁹ as amended by the Minerals and Petroleum Resources Development Amendment Act¹¹⁰ assented to on 19 April 2009 but not yet promulgated as the date of commencement is yet to be proclaimed. The MPRDA can be seen as the framework legislation aimed at defining overarching and generic principles in terms of which sectoral-specific legislation should subsequently be made.

The common thread that runs through most of South Africa's framework legislation in its current active state is the delineation of principles and themes that should guide the enactment of other statutes passed in furtherance of its socio-economic empowerment objectives. Framework legislation such as the MPRDA reflects governmental policy in the area they regulate and in this case minerals and petroleum resources exploitation and utilization. It is therefore

¹⁰⁸ 56 of 1986.

¹⁰⁹ 28 of 2002.

¹¹⁰ 49 of 2008. Date of commencement of the Act to be proclaimed. The purpose of the Amendment is stated in the preamble as follows 'To amend the Mineral and Petroleum Resources Development Act, 2002, so as to make the Minister the responsible authority for implementing environmental matters in terms of the National Environmental Management Act 107 of 1998 and specific environmental legislation as it relates to prospecting, mining, exploration, production and related activities or activities incidental thereto on a prospecting, mining, exploration or production area; to align the Mineral and Petroleum Resources Development Act with the National Environmental Management Act 107 of 1998 in order to provide for one environmental management system; to remove ambiguities in certain definitions; to add functions to the Regional Mining Development and Environmental Committee; to amend the transitional arrangements so as to further afford statutory protection to certain existing old order rights; and to provide for matters connected therewith.'

important to highlight the principles and themes promoted by the MPRDA and its supporting regulations.

The wording of the preamble of the MPRDA illustrates that it is an instrument whose main purpose is to actively bring about legislative objective to ensure that the State as custodian of the country's mineral resources is empowered to deal with those resources in a sustainable manner for the benefit all people of South Africa. This includes those communities that are affected by mining and rural communities. There is a special commitment to eradicate discrimination in all forms in the mineral and petroleum industries. Due to the prodigious size of the MPRDA, it is important at this stage to discuss in further details certain excerpts of the Act in light of its contribution to the developments in diamond laws.

The MPRDA is deeply concerned with the transformation and equity theme which is captured expressly in section 100¹¹¹ of the MPRDA. It provides that the Charter must reflect government's objectives of redressing historical social and economic inequalities as stated in the Constitution and should set the framework, targets and time table for entry of historically disadvantaged South Africans¹¹² into the mining sector.¹¹³

The Diamonds Act¹¹⁴ itself, in line with the transformation goals which are central to minerals legislation in the MPRDA¹¹⁵ directs the Regulator (the South Africa Diamond and Precious Metals Regulator or SADPMR)¹¹⁶ to 'have regard to the

¹¹¹ Read together with section 12 of the MPRDA which places a duty on the Minister of Minerals and Energy to facilitate assistance to any historically disadvantaged persons to conduct prospecting or mining operations.

¹¹² The MPRDA goes so far as to define exactly what is meant by historically disadvantaged persons and explains that it is those persons who were disadvantaged by unfair discrimination before the Constitution took effect. This means that persons who were excluded from participating in the mineral sectors of the Republic by virtue of racial bias, as the most obvious unfair discrimination of South African past legislation as contained in apartheid law, such persons are now under the Constitution given the right to enter into such a sector with the State as overall overseer and guardian of the mineral resources, as custodian.

¹¹³ Section 100 of the MPRDA 28 of 2002.

¹¹⁴ 56 of 1986.

¹¹⁵ 28 of 2002. sections 2(d) and (e).

¹¹⁶ Established in terms of the Diamonds Act 56 of 1986, as amended.

promotion of equitable access to and local beneficiation¹¹⁷ of the Republic's diamonds' in application for licenses and permits in terms of the Diamonds Act.¹¹⁸ The SADPMR is obliged by the Diamonds Act¹¹⁹ to 'have regard to the broad based socio-economic empowerment Charter contemplated in section 100 of the MPRDA.'¹²⁰

The Constitutional principles like those established in section 9 of the Bill of Rights (which supports the equal treatment of all persons before the law), clearly forms the values and spirit of the MPRDA. For this reason the Act can be criticized or applauded as a vehicle for empowerment¹²¹ at the expense of the country's limited resources. This portion of the study will consider some of the diamond or mining industry reactions to the Act's application for further clarity.

Chapter Two of the MPRDA is headed 'Fundamental Principles'. It lists important principles that should apply in the minerals exploitation sector such as the South African State sovereignty over its own mineral resources. These include, the State's role as custodian¹²² of all minerals in South Africa as a country, the principle of equity in access to mineral resources, the need to correct historical imbalances and benefit previously undermined groups, sustainable development, socio-economic justice and the need to promote economic and growth. Therefore it can be safely stated that the MPRDA forms the backdrop of the mineral laws that have informed developmental changes in the current Constitutionally guided diamond regulations.

¹¹⁷ MPRDA 28 of 2002 section 26.

¹¹⁸ 56 of 1986.

¹¹⁹ 56 of 1986.

¹²⁰ Diamonds Act 56 of 1986 sections 5 and 15 as amended by the Diamonds Amendment Act 29 of 2005 read together with section 2 and 26 of the MPRDA.

¹²¹ Section 1, definitions section of the MPRDA makes reference to 'broad based economic empowerment' which forms a fundamental Constitutional principle adopted by the State in an effort to empower its people. This broad based economic empowerment is defined as a social or economic strategy, plan or principle which is aimed at eradicating unfairness in the use of the country's mineral and petroleum resources.

¹²² Section 50 of the MPRDA, for instance, allows the Minister on behalf of the State to investigate any occurrences of mineral resources, compensate the owner of the land upon which such resources occur as part of the duties to be undertaken by the State in the management of its environmental resources.

The MPRDA approaches the utilization of South Africa's mineral and petroleum resources on the basis of merit from the perspective of the participants and potential participants. This is drawn generally from the wording of the law contained in Chapter four of the MPRDA, a chapter that regulates the mineral and environmental regulation of mineral and petroleum resources. This insistence of merit engagement in the minerals industry is clarified below.

The MPRDA Section,¹²³ in particular read together with the precise applicable regulations under the Act, deals with the granting and duration of prospecting rights on a standard of merit. This merit standard is adhered to in the MPRDA by inserting within the provision that those granted mineral rights by the Minister must illustrate that they have access to financial resources and technical ability to carry out the proposed projects in an optimal manner in accordance with the prospecting work programme.

From the provisions of the MPRDA above it is clear that environmental safety and conservation is priority to Constitutional principles. Therefore applicants wishing to acquire mineral and petroleum rights must show that their operations will not result in unacceptable pollution, ecological degradation or damage to the environment. This means that applicants must provide a feasibility study together with an environmental impact assessment.¹²⁴ Clearly this provision is interpreted in this study to suggest that only proposed activities with sufficient financial backing, skills efficiency, environmental consideration and appropriate tools will be permitted to undertake activities taking place in the minerals sector and that is the standard of merit required by the MPRDA.

¹²³ Section 17(1)(a)(b)(c) read together with sections 37 – 46 of the MPRDA which provides for environmental management principles, including principles pertaining to environmental rehabilitation and management of residue stockpiles and residue deposits.

¹²⁴ Section 28 of the National Environmental Management Act 107 of 1998. Section 22 of the Environment Conservation Act 73 of 1989.

The MPRDA¹²⁵ balances the provisions of section 17(1) by expressly providing that the Minister must refuse to grant a prospecting right if the application does not meet the requirements of section 7(1) or if the granting of such a right will result in an exclusionary act, an act that prevents fair competition or result in the concentration of the mineral resources in question being under the exclusive control of the said applicant.¹²⁶ It is important for the South African State at all times even in the process of granting mineral rights, to continue to exercise custodianship over such mineral resources.¹²⁷ This will ensure that the Constitutional goals of equitable access to the South African Republic's minerals are monitored by the State.

The above provisions illustrate that while transformation goals are at the core of the MPRDA, this does not mean that environmental safety and high standards of mining ought to be compromised by such transformation goals. To further achieve the South African State and societal goals in the most optimal manner the State in the MPRDA undertakes that it will through its agencies assist those from historically disadvantaged communities who may lack skill and resources to participate by virtue of merit within such sectors. Therefore, it is stated that State policies are applauded as they do not suggest any stultification of performance standards in utilization of the country's mineral resources. Therefore, transformation is a Constitutional mandate that should not be feared but desired and supported.

With regard to developing national skills in the minerals sector, particularly mineral beneficiation, the MPRDA provides in section 26 for State incentives from the South African government to mining interests in an effort to promote the beneficiation of minerals within the Republic. Such local beneficiation is placed

¹²⁵ Section 17(2).

¹²⁶ Section 17(2).

¹²⁷ MPRDA 28 of 2002. In line with the provisions of section 2(a) of the same Act which provides for the State's custodianship over its own mineral and petroleum resources.

as priority within the MPRDA¹²⁸ such that any person who wishes to beneficiate South African minerals outside of the Republic, such a person may only do so after written notice in consultation with the Minister has been completed.¹²⁹ It is submitted that this is a very important development tool for South Africa to improve local skills and technology to enable the country to not always be at the economic mercy of nations that have these skills. Further, trade that only involves removal of raw materials from the country is curtailed for the long term development of South Africa.

It has been proposed by a particular author that while local beneficiation is the South African State priority in current mineral's legislation, more enabling legislation must be created to remove any structural impediments that may exist in the system that will cause local mineral beneficiation to be competitive in all markets. In other words even more resources must be channeled into ensuring the survival of local beneficiation.¹³⁰

One of the most important contributions of the MPRDA is the establishment of a Minerals and Mining Development Board¹³¹ whose responsibilities is to advise the Minister on a broad range of issues. The issues include advice to the Minister on sustainable development in the use of national mineral resources, transformation and downscaling of minerals and mining and to provide a report on the application of the Act. The Board clearly acts as a provider of measurable deliverables under the MPRDA and through its reports South Africa is able to determine the success of its minerals policy and implementation.

With regard to fair administrative action, this is a Constitutional imperative in matters pertaining to the granting of rights and access to the Republic's mineral resources. The MPRDA makes a provision for this in section 96, a section which

¹²⁸ 28 of 2002 section 2(e) and specifically section 26.

¹²⁹ MPRDA 28 of 2002 section 26(3).

¹³⁰ Baartjies N.L. *Diamonds – Source to Use* The Southern African Institute of Mining and Metallurgy (2007) 2.

¹³¹ Section 58.

provides for an internal appeals process and later if necessary access to courts to those who feel aggrieved by the administrative actions taken by the State organs. The Act sets out an appeals process to the Director-General from an administrative decision by the Regional Manager¹³² or an officer or to the Minister if it is an administrative action by the Director-General or the designated agency. In terms of section 96(3) only when internal appeals processes have been exhausted will parties be permitted to approach the court¹³³ for a review of administrative action.

The MPRDA contains Schedule II which provides for transitional arrangements to deal with matters pertaining to rights held prior to the commencement of the MPRDA. The aims of these transitional arrangements as provided for in Schedule II it to allow for equitable access to mineral resources while allowing holders of old order rights an opportunity to comply with the provisions and aims of the MPRDA. Obviously a transitional period by its very nature suggests a specific time period to ensure that compliance with this legislation is achieved in South Africa. These provisions will affect the licences, land tenure and mining rights of pioneer mining interests under the order licences. However this will not be onerous or unfair in light of the Constitutional values of securing land tenure.

It is prudent at this stage to examine one particular decision of the court pertaining to some of the practical aspects of the application of this seemingly Constitutionally progressive piece of legislation. This practical consideration of the MRPD Act will be considered in light of the case of *Mofschaap Diamonds (Pty) Ltd v The Minister for Minerals and Energy and Others*¹³⁴ which provides a true test of some of the provisions and policies contained in the MPRDA in light of the diamond mining sector.

¹³² Section 1, definitions, an officer designated by the Director-General in terms of section 8 as a regional manager for a specified region.

¹³³ Such a court would be required in law to apply the requisite provisions of the Promotion of Administrative Justice Act 3 of 2000.

¹³⁴ (3117/2006) [2007] ZAFSHC 51 (14 June 2007).

This matter was heard before the Free State High Court in Bloemfontein. The court in this case was concerned with the nature of the correctness of an application for a mining or mineral right. This is an important judgment as it forms a neutral decision around the mining industry and concerns itself with the proper observance of correct procedures that ought to be observed by parties when applying for a mineral right in terms of the current law.

The facts are that Mofschaap (Pty) Ltd as applicant had lodged an application to the court seeking a *rule nisi*. The rule was calling upon the Minister for Minerals and Energy and his officers (respondents) to show cause as to why they should not be interdicted from granting a prospecting, mining permit or mining right in term of the MPRDA to any third party in respect of the mineral rich property named as the Mofschaap and Adullam farms while a review process was underway in respect of the respondents' decision to refuse the applicant's application for a prospecting right in respect of the property in question. After an agreement pertaining to the rule was reached the parties were granted an opportunity to bring the matter before the court.

One of the points note pertaining to procedure in this case as argued by the respondents was that the applicant had not fully exhausted internal remedies in terms of section 96 and 103 of the MPRDA and had therefore failed to make an appeal to the Minister before approaching the court for relief. On this point the court held that the internal remedy of appeal to the Minister was not available to the applicant.¹³⁵

The court based its finding on this point by stating that the administrative decision taken by the respondents in this case was done under a scheme of the deconcentration of public power¹³⁶ in terms of section 103 of the MPRDA. This meant that with respect to the decision pertaining to the granting or refusal of a

¹³⁵ Para. 10.

¹³⁶ Para. 11. As opposed to the scheme of decentralization of public power which allows the State agencies to act independently in the exercise of public power.

prospecting right to the applicant, the first respondent (Minister) had acted through the third respondent and therefore the decision to refuse the right by the third respondent must be regarded as the decision of the Minister and therefore there could be no cogent basis for an appeal being available to the applicant in this case in terms of section 96 of the MPRDA.¹³⁷

With regard to the arguments raised by the applicant pertaining to grounds for review of the Minister's decision to refuse the applicant a prospecting right, the court found that such arguments¹³⁸ were tenuous with the result that the application was dismissed with costs.¹³⁹ The court found that the regulations pertaining to the application for prospecting rights under the MPRDA had not been complied with by the applicant. Therefore, it was held by the court that it was essentially the applicant who had made an error in law pertaining to the application and that the respondents were correct to refuse such an application.¹⁴⁰

This case is an important case for determining the test of the application of the MPRDA particularly in the area of establishing a guideline for interpreting the meaning of just administrative action. The case clearly pronounces on the interpretation of section 103 of the MPRDA and illustrates that the deconcentration model for the exercise of power excludes the appeal process that is recorded in terms of section 96 of the MPRDA. This means that parties may in certain instances proceed directly to court to protect their rights to just administrative action. This interpretive method in the protection of rights to just administrative action allows the public to exercise its administrative rights in this area of mineral rights with more flexibility. Further the true meaning of section 103 as shown in the case allows for State agencies to be more open to public

¹³⁷ Para. 13; 15.

¹³⁸ Para. 18. The applicant argued three points for the review by stating that the delegation of power was not properly exercised, that there was an error in law and there was procedural unfairness.

¹³⁹ Para. 18; 19.

¹⁴⁰ Para. 18.

scrutiny¹⁴¹ when administrative decisions are taken, thus allowing for the appropriate checks and balances to exist within the system.

According to Cawood¹⁴² the MPRDA is a newer product of the responses given to the State after the movements in Constitutional developments in mineral law. These developments were brought about by the following historical facts and proposed law. Firstly it was the 1995 African National Congress (ANC) Freedom Charter, the 1994 Reconstruction and Development Programme (RDP), the 1994 election of the ANC, the 1995 view of the Chamber of Mines of South Africa, the 1995 Mineral Policy Process Steering Committee, the 1996 Constitution of the Republic of South Africa, the 1997 Green Paper on a Minerals and Mining Policy for South Africa, the White Paper on a Minerals and Mining Policy of South Africa and finally the 2002 Mineral and Petroleum Resources Development Act 28 of 2002 read together with the 2002 Broad-Based Socio-Economic Empowerment Charter and the regulations applicable to the MPRDA.¹⁴³

Author Peter Leon, argues a cautionary point concerning the MPRDA. In his writings Leon states that the newly elected government of 1994 was quick to set its sights on the Republic's mining industry. Leon, further points out in his writings that the South African State custodianship is largely supported by section 2(a) of the MPRDA and states that the development of the MPRDA stems from the internationally accepted right of the State to exercise sovereignty over all its mineral and petroleum resources. State sovereignty in turn reflects the sentiments of the new international economic order, however Leon argues that in

¹⁴¹ In other words there is a greater amount of transparency in the manner in which administrative action is taken particularly when a party wishes to approach the courts concerning the administrative decisions taken by State organs in the regulation of access to mineral rights in South Africa.

¹⁴² Cawood F.T. *The Mineral and Petroleum Resources Development Act of 2002: A Paradigm Shift in the Mineral Policy in South Africa* The Journal of the South African Institute of Mining and Metallurgy Jan/Feb (2004) 56.

¹⁴³ Cawood F.T. *The Mineral and Petroleum Resources Development Act of 2002: A Paradigm Shift in the Mineral Policy in South Africa* The Journal of the South African Institute of Mining and Metallurgy Jan/Feb (2004) 58.

South Africa this has resulted in a law that is uncertain in application and thus has created an unattractive venue for foreign investment.¹⁴⁴

It is submitted that the author's arguments above serve as a caution to the plausible but wide reaching values of the MPRDA concerning even wider principles such as broad-based economic empowerment. The reality is that it is difficult to ensure that these values are upheld particularly when they show broad idealism without providing measurable deliverables concerning their application. Unfortunately there are times when South African State policy does not balance well with foreign investment. On the other hand it is argued that any State worth its salt must put the interests of its own country's development ahead of only seeking unsustainable revenue from outside.

Indeed a country ought to be able to manage its own resources without unfair interference from outside sources particularly in cases where such a State adheres to principles that reflect the protection of human rights and broad-based socio-economic empowerment for its people. However, it is proposed in light of the argument above that the MPRDA must not seek to isolate the Republic from foreign investment particularly if such investment is in the best interests of broad-based socio-economic empowerment. This means that the MPRDA must continue to evolve until it is able to fully appreciate the uniqueness of South Africa's needs without over emphasizing a particular developmental need above another. This may lead to serious imbalances later on and thus make a mockery of the goal of achieving sustainable development.

Cawood¹⁴⁵ correctly articulates the historical and legal developments leading to the creation of the MPRDA. He makes some observations that further support the Constitutionally progressive branding of these new minerals laws in South

¹⁴⁴ Leon Peter *A Fork in the Investor-State Road: South Africa's New Mineral Regulatory Regime Four Years On* Journal of World Trade 42(4) Kluwer Law International (Netherlands) (2008) 671 – 690.

¹⁴⁵ Cawood F.T. *The Mineral and Petroleum Resources Development Act of 2002: A Paradigm Shift in the Mineral Policy in South Africa* The Journal of the South African Institute of Mining and Metallurgy Jan/Feb (2004) 56.

Africa's development. He states that the MPRDA is concerned with the important role played by the South African State in using its resources to incorporate social aspects of an economy and makes it thoroughly inclusive by making an important and special mention of the role played by mining in local and rural development. This is a leap forward for the law when one compares the MPRDA with its predecessor in the form of the Minerals Act.¹⁴⁶

Cawood points out clearly in his writings that previous legislation did not make provision for the reconnaissance permissions in terms of section 13 to 15 and retention permits as provided for in section 31 to 36 of the MPRDA. Section 1 of the MPRDA defines the meaning of these terms. The MPRDA does allow for such permits and permissions respectively subject to certain conditions such as following established procedure to obtain the granting of such rights. These rights are obtained by merit and therefore the process has the effect of rooting out unfair competition and the hoarding of rights.¹⁴⁷ Once again the developmental legal trends showing an intention to ensure that equitable access to South Africa's mineral resources is made possible.

Schedule II of the MPRDA, deals with transitional arrangements from the old order to the new order of holding rights. Cawood argues that the MPRDA does not provide much security of tenure for unused old-order rights. However, he suggests that conversion of such rights to new-order rights is cogent in these circumstances. In other words to secure old order mineral rights, all the holders of such rights need to do to protect themselves is to convert these rights. Further, active holders of old-order rights who wish to continue conducting business conversion is a sensible option since failure to do so will result in an automatic cession of rights. When dealing with these rights the spirit of the Constitution of

¹⁴⁶ 50 of 1991. *Ibid.*

¹⁴⁷ Cawood F.T. *The Mineral and Petroleum Resources Development Act of 2002: A Paradigm Shift in the Mineral Policy in South Africa* The Journal of the South African Institute of Mining and Metallurgy Jan/Feb (2004) 60.

the Republic of South Africa Act¹⁴⁸ is expected to be upheld by the State when dealing with the rights of holders.¹⁴⁹

This effectively means that if the cession of rights to mineral property amounts to an expropriation in accordance with section 55 of the MPRDA, for instance, compensation will be payable according to established Constitutional principles. Further, no person is to be arbitrarily and unfairly deprived of property. These are important core Constitutional values as contained in the Bill of Rights provisions on property stated below.

‘Property

25. (1) No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application

- a. for a public purpose or in the public interest; and
- b. Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including

- a. the current use of the property;
- b. the history of the acquisition and use of the property;
- c. the market value of the property;

¹⁴⁸ 108 of 1996.

¹⁴⁹ Cawood F.T. *The Mineral and Petroleum Resources Development Act of 2002: A Paradigm Shift in the Mineral Policy in South Africa* The Journal of the South African Institute of Mining and Metallurgy Jan/Feb (2004) 62.

- d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - e. the purpose of the expropriation.
- (4) For the purposes of this section
- a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - b. property is not limited to land.'

Having considered legal sources and other academic legal contributions pertaining to the MPRDA, it is clear that Constitutional values are at the forefront of interpreting the MPRDA's provisions. However, this understanding of the Act to date has not been without challenges on the ground or to the average person involved in the mining industry or diamond industry. This is because when one looks at current legislation it is clear that the South African State is requesting mining giants to open mineral resource markets to new entrants and thus creating undesired market competition in an effort by the State to enforce broad-based socio-economic empowerment for its people.

Examples of these challenges that have tested the provisions of the MPRDA have been recorded in media. For example, as recently as 25 January 2008 the media reported a legal battle between the mining giant De Beers and the Minerals and Energy Ministry over the control of diamond mine dumps said to contain deposits worth billions of rands. This media report made a statement that perhaps the MPRDA is not entirely clear on this issue as it does not seem to apply to the granting of licenses to prospect of tailing dumps which in fact have already been mined. The media report had correctly made a statement that the Bloemfontein High Court had found in favour of De Beers.¹⁵⁰

¹⁵⁰ Charlotte Matthews *South Africa: State to Fight De Beers' Diamond Dump Victory* Business Day 25 January 2008.

Of course the legal battle being referred to in this case represents the milestone judgment of *De Beers Consolidated Mines Ltd v Ataquá Mining (Pty) Ltd and Others*.¹⁵¹ This matter involved an application lodged by De Beers for an order prohibiting Ataquá Mining Pty (Ltd) ('Ataquá') mining from conducting any prospecting operations on or removing material from the tailings dumps situated on subdivision 16 of the Jagersfontein farm in the Fauresmith Magisterial district as De Beers sought stated that it was the owner of such tailings dumps. Further, the order sought to confirm that Ataquá's prospecting rights granted under 7/2006 did not entitle it to conduct any prospecting operations in the tailings dumps aforementioned. Finally the order sought a review and setting aside of Ataquá's prospecting right in these circumstances.¹⁵²

The arguments put forward by Ataquá in this case contained a series of moving statements pertaining to State control over mineral deposits of any kind. They argued that this view was supported by the empowerment policy established under the MPRDA with the object of using them to meet Constitutional goals of equitable access to the nation's resources.¹⁵³ However, the court accepted De Beer's arguments which while it did not dispute remedial legislation also required that the application of the MPRDA be interpreted as a whole using the purposive approach to achieving Constitutional aims.¹⁵⁴

With regard to the interpretation and application of the MPRDA De Beers argued many points however three of these points will be highlighted in this study. Firstly it was argued by De Beers that while the Minister has power to expropriate property under section 55 of the MPRDA, Schedule II containing provisions for transitional arrangements is very important because it provides a form of security

¹⁵¹ Case Number: 3215/06 in the High Court of South Africa (Orange Free State Provincial Division), judgment delivered on 13 December 2007.

¹⁵² Para. 1.

¹⁵³ Paras. 26 – 35.

¹⁵⁴ Para. 42.

of tenure in terms of Schedule II item 2. It terms of the said item 2 compensation is payable for such expropriation.¹⁵⁵

The second point argued by De Beers was that one could not just simply go and mine tailing dumps at will just because the National Environmental Management Act¹⁵⁶ does not provide sufficient control over tailing dumps.¹⁵⁷ De Beers argued that a distinction must be drawn between NEMA and the MPRDA. The distinction to be made is because in terms of the MPRDA, an Environmental Impact Assessment (EIA) is required in terms of section 39(1) for whoever wants to engage in a mining activity or remove diamonds from dumps. Further section 41(1) of the MPRDA imposes a duty on the applicant to make a financial provision in advance for the rehabilitation of the environment following the impact of the mining activity and therefore these provisions of the MPRDA are paramount to the circumstances raised in this case therefore it cannot be said that only NEMA could be relied on.¹⁵⁸ In other word De Beers was stating that this was a fresh mining activity that had to comply with all the statutory requirements of the MPRDA.

Thirdly De Beers on the point of the meaning of 'mineral' under the MPRDA argued that while diamonds are still in the ore ownership does not vest in the miner. Transfer of ownership in such a case is hindered by the fact that such diamonds still form part of the land. Once the ore is severed from the land, a movable *res* is created which is the object of separate ownership. Therefore when you extract kimberlite (which is diamondiferous) ore you become the owner of the ore. A diamond by nature is a simpler mineral unlike gold which takes many forms.¹⁵⁹ It is clear from this argument that by analogy De Beers extracted

¹⁵⁵ Para. 46. An alternative remedy as argued was to launch an application with the Department of Minerals and Energy.

¹⁵⁶ 107 of 1998.

¹⁵⁷ Paras. 50 – 51.

¹⁵⁸ *Ibid.*

¹⁵⁹ Para. 53.

the kimberlite ore and became owner thereof as a separate *re* capable of ownership and lying in the dumps.

The gap in the MPRDA was identified in paragraph 57 of the judgment where it was argued that the MPRDA is silent on the actual meaning of 'tailings or tailings dumps.' It was further argued that mentioned in the Act was the word residue stockpiles such as including tailings stockpiled for potential use. However, it was argued further that the MPRDA use of residue stockpiles and residue deposits do not include tailings dumps. Even so the tailings dumps in question, as argued by De Beers, were not residue stockpiles as they were produced before the application of the MPRDA. It was stated by De Beers that a mineral is expressly defined as a substance occurring naturally and it must have been formed by or subjected to a geological process. Minerals in a stockpile have been severed from the land therefore in this case a tailings dump is not a residue stockpile.

The court after determining the arguments before it found in favour of De Beers by stating that the MPRDA leaves no doubt that mining rights in respect of minerals which have not been mined are not within private hands and the State exercises custodianship over such minerals in terms of section 2 of the MPRDA. The court held that the tailings dumps in this case were not a subject matter of the MPRDA because they do not occur naturally and they are privately owned by De Beers who have owned them since 1973 (making it an old order right) having spent financial resources, labour and time maintaining these dumps.¹⁶⁰

According to the MPRDA and the inferences that may be drawn from the case above it is clear that the Act provides fully for dealing with residue stockpiles and residue deposits in terms of section 42 of the Act.¹⁶¹ The definitions section of the Act includes tailing deposits and states that they ought to be managed

¹⁶⁰ Para. 68.

¹⁶¹ Para. 44. In fact the argument by De Beers in this case did agree with the custodianship of the State over South African minerals in essence. This argument was also made by Ataquia in seeking to uphold their prospecting right on the tailing dumps in question.

according to an acceptable environmental management plan (a NEMA inspired concept which Ataquia attempted to rely on as part of their reasons for seeking to carry on mining activity on De Beers tailings dumps). It is noted that although the MPRDA does not specifically provide that such residue or dump necessarily belongs to the State in section 42 the application of the law in the case above certainly clarified this issue to an extent by stating that it was not a naturally occurring mineral under the South African State's custodianship. Therefore no provision was applicable in the MPRDA for the tailings dump in this instance.

It is submitted that to counteract such an impasse in law with regard to licenses for mining the tailing dumps, amending legislation will deal with this issue more specifically. This will be important since mining an already mined dump is effectively cheaper and may be very useful for empowerment mining interests. This empowerment however may not be done without proper respect being given to the property rights of the tailings dumps owners.

It is submitted herein with respect therefore that licenses for mining tailing dumps should be State administered and State controlled in order to create social order while ensuring that legislative goals are achieved. However, with great respect to land tenure rights of tailings dumps owners. Having considered the provisions of the MPRDA it is clear that it is a statute that has played a seminal role in informing the latest structural developments of diamond specific laws. The decision of the court above certainly had the effect of forcing the South African State to take cognizance of the limits of its custodianship over mineral deposits in the country.¹⁶² The decision illustrated a firm commitment to protecting property rights of old order mining interests in spite of the pursuit of broad based socio-economic empowerment.

In response to this case on 30 May 2008, the South African Chamber of Mines released a public document containing 'comments to the portfolio committee on

¹⁶² MPRDA 28 of 2002. Section 2 (a).

minerals and energy on certain of the amendments proposed in the MPRD Amendment Bill.¹⁶³ The MPRD Amendment Bill is instrumental to responding to the gap in law as raised in the case of *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others*.¹⁶⁴ The Bill and the commentary on it is a direct response to the case. It is interesting to note that the State immediately used its prerogative of turning to the Legislature for dealing with this question rather than incurring costs in an appeals process requesting the courts to deal with the gap in the interpretation of the MPRDA. This means that the court in deciding this matter had applied the MPRDA as correctly although the outcome was not entirely intended by the Legislature. The State *in casu* acknowledged the soundness of the decision with the result that the gap identified in the application of the MPRDA had to be dealt with by the law makers.

What is proposed in the amending bill dealing with this issue is that as the MPRDA stands it reflects the position that old order residues (tailings dumps not covered under the MPRDA) were not intended to be expropriated therefore what needs to be done with the new amendment is that the words 'or old order right' in the definition of 'residue deposit' be included. Further it is proposed in the bill that 'residue stockpile' will be deleted and thus allow the State to expropriate such residues to continue with the State policy of using the expropriated land for the achievement of its broad-based socio economic empowerment goals.¹⁶⁵ In terms of the proposed amending legislation the South African State will still take ownership and custodianship over the tailings dumps not covered in the MPRDA however compensation will be payable to the holders of the old order rights.

1.4.3 The Diamonds Act 56 of 1986

¹⁶³ [B10D-2007]

¹⁶⁴ Case Number: 3215/06 in the High Court of South Africa (Orange Free State Provincial Division), judgment delivered on 13 December 2007.

¹⁶⁵ [B10D-2007]. See report to the portfolio committee.

The Diamonds Act¹⁶⁶ was assented to on 11 June 1986 and entered into as force of law on 1 October 1986. The Act has been amended by the statutes listed herein. The list includes the Diamonds Amendment Act,¹⁶⁷ the Diamonds Amendment Act,¹⁶⁸ the Diamonds Amendment Act,¹⁶⁹ the Abolition of Restrictions on the Jurisdiction of Courts Act,¹⁷⁰ the Diamonds Amendment Act,¹⁷¹ the Diamonds Second Amendment Act¹⁷² and the Diamond Export Levy (Administration) Act¹⁷³ whose commencement date is 1 November 2007.

The Diamond Export Levy (Administration) Act¹⁷⁴ has significantly altered the face of the Diamonds Act and therefore it is important to take cognizance of these changes when interpreting the provisions of the Diamonds Act.¹⁷⁵ The provisions of the Diamonds Act¹⁷⁶ and other diamond legislation mentioned above will be considered throughout this study from various angles that illustrate the industry regulation of the diamond industry. At this point the Diamonds Act¹⁷⁷ is simply being looked at from the perspective of understanding the structure of the legislative framework of diamond law. This part of the study will focus particularly on the main pillars of Constitutionally sound diamond legislative provisions together with milestone provisions contained in South African law against trade in conflict diamonds. As the study progresses more provisions of the Diamonds Act¹⁷⁸ will be explicated.

¹⁶⁶ 56 of 1986.

¹⁶⁷ 28 of 1998.

¹⁶⁸ 22 of 1989.

¹⁶⁹ 10 of 1991.

¹⁷⁰ 88 of 1996.

¹⁷¹ Act 29 of 2005 preamble. 'To amend the Diamonds Act, 1986....' See Chapter 2 of this work for a more in depth consideration of the 2005 Act.

¹⁷² 30 of 2005.

¹⁷³ 14 of 2007.

¹⁷⁴ 14 of 2007.

¹⁷⁵ 56 of 1986.

¹⁷⁶ 56 of 1986.

¹⁷⁷ 56 of 1986.

¹⁷⁸ 56 of 1986.

The Diamonds Act¹⁷⁹ forms the leading statute with regard to regulating dealing and trade in diamonds in South Africa. The Diamonds Act¹⁸⁰ has a fairly technical industry based set of regulations that came into force on 1 April 1987. There have been further regulations in 2007 made applicable to this Act. The main purpose of the Diamonds Act¹⁸¹ is to provide for the South African Diamonds and Precious Metals Regulator (SADPMR) and for the establishment of the State Diamond Trader (SDT).¹⁸² These State organs are established in order to control the purchase and sale, the processing, the local beneficiation¹⁸³ and the export of diamonds and incidental matters.¹⁸⁴

Most importantly the provisions of the Diamonds Act¹⁸⁵ are also applicable in terms of other minerals as determined by the Minister by notice in the *Government Gazette* as stated in terms of section 2 of the Diamonds Act¹⁸⁶ read together with section 1 of the MPRDA which defines the word mineral. Off course it would be a Legislative nightmare to have a special Act for each mineral that is mined and subject to controls listed under the Diamonds Act.¹⁸⁷

The current state of the Diamonds Act¹⁸⁸ and its regulations is one that evidences constant activity in terms of amendments, changes and developments in the body of the Act. This illustrates Legislature's desire to eradicate any potential problems in the statute whether it relates to the interpretation of the Act or application. Legislature is expected to constantly update controls of the diamond industry as it is an industry that forms one of the core economic activities of the South African economy.

¹⁷⁹ 56 of 1986.

¹⁸⁰ 56 of 1986.

¹⁸¹ 56 of 1986.

¹⁸² Diamonds Act 56 of 1986. State Diamond Trader established in terms of section 14 and definition of State Diamond Trader inserted by section 1 of the Diamonds Amendment Act 29 of 2005.

¹⁸³ Means the polishing of a diamond or the setting of a diamond in a tool, in an article or in jewellery. Section 1. See MPRDA 28 of 2002 section 26.

¹⁸⁴ Preamble.

¹⁸⁵ 56 of 1986.

¹⁸⁶ 56 of 1986.

¹⁸⁷ 56 of 1986.

¹⁸⁸ 56 of 1986.

Legislature has therefore essentially ensured that the laws regulating diamond trade are sound, effective and keep abreast with the latest developments in terms of technology, international concerns, national concerns and other advances including the vice of criminal activity. The Diamonds Act¹⁸⁹ expressly provides for authorized bodies that will exercise legitimate control over the diamond trade while expressly providing for the criminalization of unauthorized activities. The stakeholders have clear parameters in which to operate when carrying out activities involving trade in diamonds. Some of the provisions of the Diamonds Act¹⁹⁰ will be studied in some detail without attempting to unnecessarily re-write it.

As far as diamond trade is concerned the definition section of the Diamonds Act¹⁹¹ is very useful in providing explanations of terms related to participants within the diamond industry. Further this section the Act clearly sets out the ambit of the application of the Act. First and foremost the diamond industry is defined as including ‘any person involved in the buying of, selling of, dealing in, importation of, export of or production of diamonds, or beneficiation involving diamonds.’¹⁹² By definition this Act¹⁹³ is applicable to national as well as international trade transactions related to the diamond industry and therefore provides a link between South Africa and the international community at trade level. This understanding of the scope of the Act¹⁹⁴ forms the basis of the study as it contains industry specific enabling legislation for the purposes of bringing about Constitutionally sound trade practices and economic activity in the diamond sector.

¹⁸⁹ 56 of 1986.

¹⁹⁰ 56 of 1986.

¹⁹¹ 56 of 1986.

¹⁹² Chapter 1: Application of Act, Section 1.

¹⁹³ 56 of 1986.

¹⁹⁴ 56 of 1986.

A dealer in diamonds in terms of the Act is defined as 'a holder of a diamond dealer's licence contemplated in section 26 (a)'.¹⁹⁵ In terms of section 26(a) of the Diamonds Act,¹⁹⁶ a lawful dealer must be in possession of a diamond dealer's licence which will be issued by the Regulator or SADPMR (the South African Diamond and Precious Metals Regulator established by section 3(1) of the Act) authorizing the holder to carry on business as a buyer, seller, importer or exporter of unpolished diamonds.

The Diamonds Act¹⁹⁷ applies in conjunction with the MPRDA¹⁹⁸ as previously elucidated in order to define the meaning of a diamond producer.¹⁹⁹ A producer of diamonds is a person entitled to win or recover diamonds in terms of section 19 of the MPRDA.²⁰⁰ In terms of this section, a producer is a holder of prospecting who has rights and obligations expressly defined within the section. In terms of section 25 of the MPRDA, a producer is also a holder of mining rights. Further according to section 27 of the MPRDA a producer is a holder of a duly issued mining permit.

The main purpose of the Diamonds Act²⁰¹ is to establish explicit State control. Through the establishment of the SDT, a juristic person established in terms of the Diamonds Act.²⁰² The main objects of this juristic person are to ensure the promotion of equitable access to and local beneficiation of the Republic's diamonds.²⁰³ The SDT is to achieve its objects by complying with the internationally recognised procedures of handling unpolished diamonds.²⁰⁴

¹⁹⁵ Diamonds Act 56 of 1986.

¹⁹⁶ 56 of 1986.

¹⁹⁷ 56 of 1986.

¹⁹⁸ 28 of 2002.

¹⁹⁹ 28 of 2002.

²⁰⁰ 28 of 2002.

²⁰¹ 56 of 1986.

²⁰² 56 of 1986. State Diamond Trader established in terms of section 14.

²⁰³ Diamonds Act 56 of 1986 section 5, 15 and MPRDA 28 of 2002 section 26.

²⁰⁴ Diamonds Act 56 of 1986. Section 1, as amendment by the Diamond Export Levy (Administration) Act 14 of 2007.

'unpolished diamonds' means-

(a) diamonds in their natural state, as they occur in deposits or extracts from the parent rock;

The Diamonds Act²⁰⁵ prior to the amendment by the Diamond Export Levy (Administration) Act²⁰⁶ had a definition of an unpolished diamond which included synthetic diamonds as part of that definition. It is submitted that this is a strange definition that took away the integrity of true diamond to an extent as it had the effect of giving laboratory diamonds equal recognition in law. While due recognition is given to laboratory diamonds as a cheaper alternative to real diamonds, it is proposed that the high value integrity of the true mined diamond should always be given its separate value categorization as such. This is important for economic development purposes.

It can therefore be seen from the above notes that the Diamond Export Levy (Administration) Act Levy Act²⁰⁷ a crucial Act in changing the face of the Diamonds Act²⁰⁸ and its amending legislation. Therefore when reading the Diamonds Act it is important to have regard to the amendments brought in by the Diamonds Export Levy (Administration) Act.²⁰⁹

One of the common themes in the last fifteen years of South African diamond related legislation regulating economic activities involving South African resources is the theme of equitable access to such resources. Equitable access here is recognized as the abandonment of unfair and racially discriminatory practices that have excluded certain persons from participating and accessing the country's resources and exercising certain rights.

(b) diamonds simply sawn, cleaved, bruted, tumbled or which have only a small number of polished facets (windows which allow expert examination of the internal characteristics), and includes diamonds that are provisionally shaped but clearly require further working;

(c) tumbled diamonds of which the surface has been rendered glossy or shiny by chemical treatment or chemical polishing;

(d) broken or crushed diamonds;

(e) diamond dust; or

(f) diamond powder,

and applies regardless of whether such diamonds are won or recovered within the Republic.'

²⁰⁵ 56 of 1986.

²⁰⁶ 14 of 2007.

²⁰⁷ 14 of 2007.

²⁰⁸ 56 of 1986.

²⁰⁹ 14 of 2007.

It can therefore be safely stated that legislation such as the Diamonds Act,²¹⁰ National Water Act²¹¹ and the Marine Living Resources Act²¹² are examples of legislation that support the theme of equitable access to South African economic resources. In making equitable access to South African economic resources a reality the Constitutional court in *(Phambili II) Bato Star Fishing (Pty) Ltd v Minister of Environmental affairs and Others*²¹³ stated that most of the South African economy is dominated by historically advantaged companies owned by white people therefore it should be accepted that legislation such as the Marine Living Resources Act²¹⁴ (which in this case dealt with the hake industry) was created to address historical imbalances and achieve equity in all branches of the fishing industry.²¹⁵

Judge Ngcobo emphasized in the same judgment that South Africa is a country in transition from a system of inequality to a system of equality therefore it is impossible to root out systematic racial discrimination without taking positive action.²¹⁶ Therefore equitable legislation was introduced in order to remove competitive access which had its roots in forms of discrimination.²¹⁷ Clearly the MPRDA is one of those positive laws that are established to assist in creating equity and balance in accessing economic involvement in national diamonds. Further, the Diamonds Act,²¹⁸ as amended while it pre-dates the Constitution when interpreted in light of the ethos of the MPDRA it also serves as an important diamond law that works together with the MPRDA to achieve a diamond industry that upholds Constitutional principles.

²¹⁰ 56 of 1986.

²¹¹ 36 of 1998.

²¹² 18 of 1998.

²¹³ 2004 (4) SA 490 (CC).

²¹⁴ 18 of 1998.

²¹⁵ 498 G-H.

²¹⁶ 522 F-H.

²¹⁷ 525 E - F.

²¹⁸ 56 of 1986.

In the Diamonds Act²¹⁹ itself provisions that form examples of positive law to eradicate unfair discrimination in mineral resources can be found in section 4(a)(b)(c) of the Diamonds Act²²⁰ which provides for a regulating body which will 'ensure that diamond resources of the Republic are exploited and developed in the best interests of the people of South Africa, to promote equitable access to and local beneficiation of the Republic's diamonds and to ensure compliance with the Kimberley Process Certification Scheme (KPCS).' Section 5(a) provides that the SADPMR must have regard to the promotion of equitable access to and local beneficiation of the Republic's diamonds when considering applications for licenses and permits provided for in the Diamonds Act.²²¹ It is evident that equitable access to the diamond industry is statutorily protected in the Diamonds Act²²² not only from a national perspective but from the international perspective as it is clear that dealing in conflict diamonds would be rampant but for the use of the KPCS.

A further provision relating to fairness and equity in the diamond industry is section 5(2) of the Diamonds Act.²²³ This section provides specifically that when the Regulator is considering an application for a licence or permit, due regard must be had to considerations of the 'broad-based socio-economic empowerment Charter contemplated in section 100 of the MPRDA.' The provisions of the Diamonds Act²²⁴ above clearly seek to reverse the effects of apartheid laws in the diamond industry. It is appropriate in this instance to consider a few examples of such broad-based economic empowerment efforts by the South African State in partnership with private business, most of these efforts will be considered in a more in depth manner as this study progresses.

²¹⁹ 56 of 1986.

²²⁰ 56 of 1986.

²²¹ 56 of 1986.

²²² 56 of 1986.

²²³ 56 of 1986.

²²⁴ 56 of 1986.

To further allow for equitable access to diamond resources, Chapter IX of the Diamonds Act²²⁵ is crucial. Section 95(jA) provides that the Minister in consultation with the Regulator may make such regulations as he or she deems necessary to create 'guidelines for and implementation of broad-based socio economic empowerment in terms of section 100 of the MPRDA. This means that after careful consideration of industry specific requirements, to further support equity in the industry, the Minister has power to issue whatever regulations are necessary to achieve that objective.

Other equity supporting diamond legislation comes in the form of the Diamond Amendment Act²²⁶ and the Diamonds Second Amendment Act.²²⁷ Both these pieces of legislation alter the actual manner in which diamond trade is to be conducted. This is achieved by allowing the South African State greater say in the diamond product produced by the South Africa's diamond producers.

The State's control over diamond sales will be investigated more thoroughly as this study progresses, however it is clear that there is certainly more enabling law that seeks to protect equitable access to South Africa's diamond resources. This is particularly evident in the wording of the preamble of the Diamond Amendment Act²²⁸ as it provides that the Act is there to 'empower the Minister to make regulations regarding guidelines for, and the implementation of, broad-based socio-economic empowerment.' It is submitted that regulations are the practical steps that link the ideal objectives of diamond legislation with the practical achievement of those objectives.

The balancing act of maintaining equity in the industry is evident in what is known as BEE (Black Economic Empowerment) partnerships and agreements which have been established in an effort to have positive action to root out systematic

²²⁵ 56 of 1986.

²²⁶ 29 of 2005.

²²⁷ 30 of 2005.

²²⁸ 29 of 2005.

racial discrimination in all national sectors. These so called BEE deals are not unique to the diamond industry as they form part of the section 100 broad-based economic empowerment goals of the MPRDA as well the Diamonds Act,²²⁹ all of which are projects initiated by the South African State. On February 9, 2007 De Beers for instance gave a press conference announcing their plan to partner with the South African government in order to foster a sustainable diamond industry.²³⁰

In this announcement De Beers set out the details of an agreement where it would be working together with the Department of Minerals and Energy to amalgamate the West Coast operations of Alexkor and De Beers Consolidated Mines' Namaqualand Mines into a new, stand alone diamond mining company. 'The new independent and empowered company would capitalize on synergies that exist across both operations and will realize the full economic potential of the West Coast diamond mining industry. As a first step in this process, De Beers will be issuing, through a special purpose vehicle, a 20 per cent stake in its Namaqualand Mines to the Department of Minerals and Energy.'²³¹

De Beers announced that it would, as part of the agreement 'make its management, technical expertise and assets available to the Department of Minerals and Energy for the next three years to facilitate the start up of the State Diamond Trader. This further cements De Beers' commitment to play a constructive leadership role in the diamond industry by encouraging industry growth and facilitating broad BEE ownership and competition within the diamond sector in South Africa.'²³² Clearly through corporate and government partnerships of this nature the equity objectives of the Diamonds Act²³³ are made a reality. This is an example of effective law. It is submitted that although the

²²⁹ 56 of 1986 section 5.

²³⁰ <http://www.csrwire.com/News/7479.html> 20 September 2009. This is in line with the constitution of the Republic of South Africa Act, 1996.

²³¹ <http://www.csrwire.com/News/7479.html> 20 September 2009.

²³² *Ibid.*

²³³ 56 of 1986.

application of these laws will have challenges associated with them, South Africa has been able to apply these laws in a relatively smooth manner with the rule of law being given priority in every government strategy.

The positive sounding press releases are important in the diamond industry in order to give public accountability of the empowerment initiatives that are taking place. They highlight important challenges or successes that are usually faced by new entrants in the industry. These challenges vary from entity to entity however the most prevalent one is that while the South African State is pleased to grant licenses to new entrants, proper mining tools are not available for proper execution of mining activities. Therefore unless the State in partnership with private business assists these initiatives with mining tools and skills, the granting of licenses to new entrants will simply not be enough. Ignoring the groundwork needs of new entrants will cause failure of these empowerment initiatives. This will lead to more anger and frustration on the part of the new entrants as they continue to feel even more helpless. This is an outcome that is not desirable in South African diamond mining.

In the Diamonds Act,²³⁴ illegal acts are dealt with in chapter 3 of the Diamonds Act.²³⁵ Its is expressly stated in the act to regulate matters pertaining to possession, sale, purchase, assistance by a non-licensed person, dealing, processing, erection and operation of machinery, export of unpolished diamonds is prohibited unless such activities are conducted within the lawful manner established within the Act. Although the Diamonds Act²³⁶ is clear concerning criminal offences contained in the statute, the overt presumption of guilt in the

²³⁴ 56 of 1986 sections 18, 19, 20, 21, 22, 23, 24 and 25.

²³⁵ 56 of 1986 sections 18, 19, 20, 21, 22, 23, 24 and 25. Chapter three provides sections specifically dealing with the following topics: Section 18 Possession of unpolished diamonds prohibited, section 19 Sale of unpolished diamonds prohibited, section 20 Purchase of unpolished diamonds prohibited, section 20A Assistance by non-licensed persons prohibited, section 21 Dealing in unpolished diamonds restricted, section 22 Processing of diamonds prohibited , section 23 Erection and operation of machinery prohibited, section 24 Export of unpolished diamonds prohibited and section 25 provides for Unpolished diamonds found or picked up by chance.

²³⁶ 56 of 1986 sections 18, 19, 20, 21, 22, 23, 24 and 25.

wording of the statute has been significantly reduced by using in the wording of the Diamonds Act²³⁷ various specific prohibitions.

The Diamonds Act,²³⁸ is crucial as it deals with the unique situation of what ought to happen should an unpolished diamond be picked up or found by chance. This section addresses an unusual but realistic scenario

‘Any person who by chance finds or picks up any unpolished diamond at any place where he or she or his or her employer is not permitted to prospect, dig or mine for diamonds in terms of the MPRDA shall forthwith take that unpolished diamond to the nearest police station and deliver it to a member of the South African Police Service on duty who holds a rank of at least sergeant.’²³⁹

The point of taking the found unpolished diamond is to give the police a chance to establish true ownership of the diamond.²⁴⁰ If proof of ownership of the found or picked up unpolished diamond is not established that diamond can be sold and the proceeds thereof paid into the State Revenue Fund.²⁴¹ Where it is established that the person found or picked up diamond in terms of section 25(1), that person shall be entitled to an amount calculated at one-third of the amount realized at the sale of the diamond. This is a statutory incentive for ensuring that diamonds that are found and picked up without being accounted for shall benefit the finders within the legal perimeters. The State is willing to pay individuals for conducting themselves lawfully in such circumstances.

²³⁷ 56 of 1986 sections 18, 19, 20, 21, 22, 23, 24 and 25.

²³⁸ 56 of 1986 section 25.

²³⁹ Diamonds Act 56 of 1986 section 25(1) Hopefully such a diamond does not end up in the black market through corrupt activities.

²⁴⁰ Section 25(2)(a), (b).

²⁴¹ Section 3.

One of the main controls on the trade of diamonds is that it must be conducted on premises registered as a diamond trading house.²⁴² An application in writing must be made to the Regulator for the registration of premises as a diamond trading house.²⁴³ Further, all unpolished diamonds intended for export purposes must be offered at a Diamond Exchange and Export Centre (DEEC).²⁴⁴ This is a measure to curb clandestine dealings with foreign nationals in exporting unpolished diamonds which may remove legitimate revenue from South African legitimate diamond trade.

Essential to trade is section 56A which requires that disclosure be made regarding synthetic or enhanced diamonds. A register in terms of section 57 must be kept in respect of unpolished diamonds. All these regulations must be implemented by the Regulator as it has the responsibility of controlling all matters related to the diamond trade industry.²⁴⁵

In express terms provided in the Diamonds Act²⁴⁶ that the functions of the Regulator are to implement, administer and control all matters relating to the purchase, sale, beneficiation, import and export of diamonds; and to establish diamond exchange and export centres, which shall facilitate the buying, selling, export and import of diamonds and matters connected therewith.²⁴⁷

The aims of the Diamonds Act²⁴⁸ are achieved through the cooperation between the State Diamond Trader and the Regulator. The State Diamond Trader is further empowered by the Diamonds Act²⁴⁹ to obtain diamonds from other

²⁴² Section 44. It must be noted that the amendments relating to the export and import of unpolished diamonds are captured in the Schedule of the Diamond Export Levy (Administration) Act 14 of 2007, therefore the correct definitions, fines and regulation of these activities of the diamond industry must be correctly interpreted according to those provisions.

²⁴³ Section 45.

²⁴⁴ Section 48A.

²⁴⁵ Section 59.

²⁴⁶ 56 of 1986.

²⁴⁷ Section 59(a), (b).

²⁴⁸ 56 of 1986.

²⁴⁹ 56 of 1986.

countries²⁵⁰ while ensuring compliance with the KPCS which is the relevant international agreement, in respect of any unpolished diamonds it handles.²⁵¹ The SDT and the Regulator function as a checks and balances system for the diamond industry which enables in a practical manner lawful diamond trade.

Chapter VI of the Diamonds Act²⁵² deals with the export of polished and unpolished diamonds. This chapter must be read together with the Diamond Export Levy (Administration) Act²⁵³ which is an Act providing for administrative matters in connection with the imposition of an export levy on unpolished diamonds (but not including synthetic diamonds).²⁵⁴ Polished diamonds must be registered for export in terms of section 71.

The Diamonds Act²⁵⁵ expressly provides for statutory controls relating to offences relating to illegal acts, offences relating to diamond trade, offences relating to the export of diamonds, offences relating to the functions of the Regulator, inspectors and police officials and offences relating to fraudulent conduct.²⁵⁶ Penalties in respect of these offences are provided for in section 87 of the Act. Further, the magistrate's court has jurisdiction to impose such penalties in respect of the Diamonds Act.²⁵⁷ The Act provides a guide for magistrates to impose appropriate sanctions where offences have been committed under the Act. Having considered the basic structure of South African diamond law, it is important to consider how the same law has impacted international diamond trade in an effort to end trade in illicit diamonds, particularly conflict diamonds.

²⁵⁰ Section 16(2)(a).

²⁵¹ Section 16(1)(a).

²⁵² 56 of 1986.

²⁵³ 14 of 2007.

²⁵⁴ Preamble.

²⁵⁵ 56 of 1986.

²⁵⁶ Sections 82 – 86.

²⁵⁷ 56 of 1986.

1.5 Conflict Diamonds

The diamond industry throughout the world has been plagued by the presence of what has come to be known as conflict diamonds or 'blood diamonds.' Often rebel groups in such conflict areas exchange diamonds to fund conflicts. It is not desirable that these diamonds should enter the legitimate diamond chain hence a monitoring process known as the KPCS and System of Warranties was created as a United Nations system where over 99per cent of the diamonds²⁵⁸ are certified.²⁵⁹

There is no doubt that conflict situations offend the very spirit and purport of the Bill of Rights in South Africa. The human rights abuses that have existed in the diamond industry nationally and internationally previously have been condemned throughout the world as awareness of these abuses was made known to the international communities through film making and efforts by various NGOs. It can therefore be said that the KPCS is one of the efforts supported by governments to curb abuses of human rights that have been evident in conflict diamond trade. In South Africa the Bill of Rights contains specific provisions that affect the diamond industry and human rights upliftment as captured in the Constitution of the Republic of South Africa Act²⁶⁰ as follows:

'Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

11. Everyone has the right to life.

Freedom and security of the person

12. (1) Everyone has the right to freedom and security of the person, which includes the right

²⁵⁸ See Appendix A and B.

²⁵⁹ diamondfacts.org/conflict/eliminating_conflict_diamonds.html 16 march 2009.

²⁶⁰ 108 of 1996.

- a. not to be deprived of freedom arbitrarily or without just cause;
- b. not to be detained without trial;
- c. to be free from all forms of violence from either public or private sources;
- d. not to be tortured in any way; and
- e. not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right

- a. to make decisions concerning reproduction;
- b. to security in and control over their body; and
- c. not to be subjected to medical or scientific experiments without their informed consent.

Section 13 is also relevant to the diamond industry as no person may be subject to slavery, servitude and forced labour to mine diamonds for the benefit of another.’

In South African law, regulations under the Diamonds Act²⁶¹ define conflict diamonds as ‘unpolished diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments. This definition is as described in relevant United Nations Security Council (UNSC) regulations insofar as they remain, in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognized in United Nations General Assembly (UNGA) Resolution 55/56,²⁶² and 56/263²⁶³ or in other similar UNGA resolutions which may be adopted in future.’²⁶⁴

²⁶¹ 56 of 1986.

²⁶² Appendix C.

²⁶³ Appendix D.

²⁶⁴ GN R680 in GG 10684 of 1 April 1987.

The UNGA Resolutions stated in the *Government Gazette* above are examples of the many resolutions adopted by the international community to deal with the problem of conflict diamonds. The common purpose of these resolutions is to 'break the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts.'²⁶⁵ The resolutions are clear about the fact that rebel groups use diamonds to finance their military activities with the objective of undermining legitimate Governments.²⁶⁶ It is no secret that these rebel groups murder, rape and torture civilians and attempt to destroy the dignity of other human beings.

It is therefore evident within the UN resolutions that legitimate trade in diamonds must be performed according to the KPCS as part of the 'effective and pragmatic, consistent with international law' strategies of international trade in diamonds. Parties to the KPCS are required to report on the progress of this system in their countries. This allows for accountability insofar as ensuring that the written resolutions are effective in eliminating illicit diamonds.

1.5.1 The History of the Adoption of the Kimberley Process Certification Scheme

Conflict diamonds were first noted by the world media during a brutal conflict in Sierra Leone in the 1990s. The United Nations, governments, the diamond industry and non-governmental organizations recognized a need for a global system to prevent conflict diamonds from entering the legitimate diamond supply chain. This international effort gave rise to the KPCS which requires that 'participating governments must ensure that each shipment of rough diamonds is imported/exported in a secure container, accompanied by a uniquely numbered government validated certificate stating that the diamonds are from sources free from conflict'.²⁶⁷

²⁶⁵ Preamble UNGA Resolution 55/56.

²⁶⁶ Appendix C and D.

²⁶⁷ diamondfacts.org/conflict/eliminating_conflict_diamonds.html 27 July 2008.

The timeline of the KPCS can be traced from 1998 where in June 24 the United Nations Security Council (UNSC) adopted a resolution which prohibited direct or indirect export of unofficial Angolan diamonds. These would include all diamonds not accompanied by a Certificate of Origin issued by the government of Angola. The Angolans showed no co-operation with the result that sanctions came into force against Angola on 1 July 1998.

In the year 2000 awareness over conflict diamonds was raised by various Non-Governmental Organizations (NGOs) and journalists which resulted in a forum which was held in the South African mining town of Kimberley. This process gave rise to the Kimberley Process Certification Scheme. The World Federation of Diamond Bourses and International Diamond Manufacturers Association also met in Antwerp to pass a resolution creating a body known as the World Diamond Council (WDC). The duties of the council included *inter alia* the development and implementation of a tracking system for the export and import of rough diamonds to ensure that such diamonds are not used for illegal purposes. Present at the meeting were delegates from all the main diamond producing and importing countries except Sierra Leone, Democratic Republic of the Congo (DRC) and India.²⁶⁸

For the first time in 2001 the term 'Kimberley Process Certification Scheme' was officially used. The Israeli banks issued a notice to their clients warning them of the conflict diamond issue and strongly advising their clients not to deal in such diamonds. Further sessions were held in different countries from the period of 2001-2003 to set out the requirements of the Kimberley Process Certification Scheme. In 2003 one of the highlights of the KPCS included President Bush's signing of the US law known as the Clean Diamonds Trade Act²⁶⁹ implementing regulations that make the US KPCS compliant.²⁷⁰

²⁶⁸ diamondfacts.org/conflict/eliminating_conflict_diamonds.html 16 March 2009.

²⁶⁹ HR 1584.

²⁷⁰ diamondfacts.org/conflict/eliminating_conflict_diamonds.html 16 March 2009.

In July 2004 the DRC was removed from the KPCS for the purposes of review because it was found that it could not account for the origin of the large quantities of diamonds it was officially exporting. The Chairman of the KPCS stressed at that stage that the removal of the DRC was necessary as a safeguard to the credibility and integrity of the Kimberley Process Certificate System.²⁷¹ The DRC has since been re-admitted to the KPCS as a participant. However the removal and review of the DRC in 2004 proves the legitimacy of the process. Therefore those who trade in certified diamonds are able to trade with confidence knowing that the diamonds they are dealing with are from areas free of conflict.

In 2005 the Republic of Côte d'Ivoire, previously known as the Ivory Coast, made a representation to the KPCS Plenary meeting held in Moscow that it would no longer issue KPCS certificates. This meant that the Côte d'Ivoire would suspend the official export of its rough diamonds. The UNSC responded to this representation by imposing sanctions on the import of diamonds from the Republic of Côte d'Ivoire.²⁷² By 2008 Côte d'Ivoire was back on the member list of the participants of the KPCS,²⁷³ however the issues surrounding full observation of the KPCS were not entirely settled though the Republic of Côte d'Ivoire remained is listed as an official member of the KPCS. It has been established that presently Côte d'Ivoire has at least met the minimum requirements of the KPCS as participant.²⁷⁴

It is clear that the KPCS has been met with opposition or certain political barriers in certain countries which is not the ideal situation. It is offensive to human rights that a State would not take urgent steps to act in the best interests of its citizens when dealing with matters related to trading in conflict stones. It is submitted that

²⁷¹ diamondfacts.org/conflict/eliminating_conflict_diamonds.html. See Timeline of Kimberley Process.

²⁷² diamondfacts.org/conflict/eliminating_conflict_diamonds.html

²⁷³ http://www.kimberleyprocess.com/structure/participants_world_map_en.html 20 Nov 2007. See *Kimberley Process Plenary November 15 – 17, Moscow Russian Federation (2005)* available www.kimberleyprocess.com/download/getfile/16 24 February 2010.

²⁷⁴ http://en.wikipedia.org/wiki/Kimberley_Process_Certification_Scheme. 21 January 2009.
<http://www.amnestyusa.org/document.php?lang=e&id=ENGPOL300572006>. 25 January 2009.
<http://www.globalpolicy.org/component/content/article/182/33837.html> 24 February 2010.

excluding defaulting diamond traders from the legitimate diamond trade stream is an important step in ensuring compliance with the KPCS. It is submitted that the economic impact of being excluded from legitimate global diamond trade might persuade deviating countries to reconsider their participation in KPCS. On the other hand one cannot ignore the real existence of black market diamond trade.

In 2006, a report was released on Brazil bringing to the attention of the KPCS authorities that in Brazil roughly half of their diamond exports were not accounted for. The report proposed that Brazil must be suspended from the process. Interestingly the response of the Brazilian Ministry of Mines and Energy was that it took upon itself to suspend official exports of Brazilian rough diamonds in order to make them KPCS compliant.²⁷⁵

In 2007 Turkey and Liberia became members of the Kimberley Process Certification Scheme. In the same year the DRC was re-admitted into the KPCS.²⁷⁶ By 2008 members of the KPCS appeared as shown below as in Figure1. It must be noted that certain countries in this list are noted as having at least fulfilled the minimum requirements of the KPCS.

Figure 1: World Map and List of Kimberley Participants

²⁷⁵ diamondfacts.org/conflict/eliminating_conflict_diamonds.html

²⁷⁶ diamondfacts.org/conflict/eliminating_conflict_diamonds.html



Angola	Guyana	Singapore
Armenia	India	South Africa
Australia	Indonesia	Sri Lanka
Bangladesh	Israel	Switzerland
Belarus	Japan	Tanzania
Botswana	Korea	Thailand
Brazil	Lao, Democratic Republic of	Togo
Canada	Lebanon	Turkey
Central African Republic	Lesotho	Ukraine
China, People's Republic of	Liberia	United Arab
Congo, Democratic Republic of	Malaysia	Emirates
Côte d'Ivoire	Mauritius	United States of America
Croatia	Namibia	Venezuela
European Community	New Zealand	Vietnam
Ghana	Norway	Zimbabwe
Guinea	Russian Federation	
	Sierra Leone	

It is apt to mention at this stage that in 2009 there was a rising concern about the status of Zimbabwe as a participant in the KPCS. It has been highlighted in media reports that the World Diamond Council has called for the removal of

Zimbabwe from the Kimberley Process Certification Scheme. It has been reported that the decision whether or not to remove Zimbabwe from the KPCS will be taken in November 2009. Speaking for Zimbabwe it has been reported that the Zimbabwean ministry of mining has given strong undertakings that the KPCS requirements are strictly adhered to in Zimbabwe.²⁷⁷ Therefore it appears that there will be a need to address Zimbabwe's participant status through a more formal process of enquiry in light of these conflicting statements.

The concern over the legitimacy of Zimbabwean diamonds was raised in respect of the supply of diamonds from Zimbabwe's Marange field. The Marange field was taken from African Consolidated Resources Plc and given to the State owned Zimbabwe Mining Development Corporation in 2006. At the time as many as 20 000 illegal miners were swarming onto the property and engaging in diamond smuggling activities which were costing the nation significant weekly losses. Human Rights Watch accused Zimbabwe, through its security forces, of ordering the killing of more than 200 people as a method of driving illegal workers from the Marange field in 2007 while the KPCS statistics showed that Zimbabwe had produced 695, 000 carats of diamonds worth \$ 31 million USD in the same year.²⁷⁸

It is submitted as shown in this study that the KPCS is mostly concerned with the curbing of fueling of conflict that arises when illegitimate government opposition, usually in the form of rebel forces who have no regard for human rights use illegal diamond trade to fund their activities. In the case of the Zimbabwe and the Marange diamond field concern, which is still to be investigated, it will be important to see how the KPCS will deal with a situation when the potential or actual violation of human rights in diamond trade is done seemingly for the

²⁷⁷ Katerere Fred *Kimberley Process to Decide on Zimbabwe Membership in November* 8 September 2009. www.bloomberg.com 15 September 2009.; contact details of writer abolleurs@bloomberg.net (available in public domain).

²⁷⁸ *Ibid.*

protection of the industry and State interests by a legitimate or recognized government agency.

On the other hand it is accepted and correctly so that at the core of the KPCS humane diamond trade is the goal. Therefore it is submitted that it does not matter what interests are being protected whenever diamond trade is coupled with human rights abuses, turning a blind eye to such violations will allow the atrocities to spread like contagion. It is submitted that if anything the abuse of human rights in diamond trade must be dealt with in a manner that ultimately condemns human rights violations in all circumstances. This will prevent a double standard from being adopted where State interests are being protected. This means that in cases similar to the alleged circumstances around the Zimbabwe Marange diamond field, it is proposed that ideally the State should not seek to deal with illegal mining in a militant manner but rather to use policing methods that will preserve human dignity.

1.5.2 The Specific Legal Requirements under the Kimberley Process Certification Scheme

This part of the study will explore the South African Diamonds Act²⁷⁹ as part of the South African Republic's statutory effort and contribution to the fight against trade in conflict diamonds. This will be done by considering some of the specific legal requirements and regulations established under the KPCS.

Joelle Burbank argues that natural resources have great potential to generate conflict and the proceeds from these resources can be used to fund the generated internal conflict.²⁸⁰ The objective of legal regulation of natural resources in any Constitutional State is to harness the proceeds and revenue generated for economic growth and ensure that natural resources do not assume

²⁷⁹ 56 of 1986.

²⁸⁰ Burbank J. *The Effect of the Kimberly Process on Governance, Corruption and Internal Conflict* paper presented under the auspices of The Fund for Peace under Globalization and Human Rights Series (2006) 1.

the role of generating and funding internal conflict.²⁸¹ South Africa is a Constitutional State that has achieved some success in keeping its natural resources from being used to fund internal conflict.

Another objective is to ensure that core values of accountability, good corporate governance, sufficient policing and reporting and transparency are upheld in order that no opportunities for corruption exist. Corruption of governmental and other agencies, bodies and institutions involved in one way or the other in diamond trading can compromise a legitimate regulatory system. In the case of diamond trading, opportunities are created for the entrance of conflict diamonds into the system as well as their exit.²⁸² This means that in terms of international good codes of practice a business entity ought to take it as part of their social responsibility to actively exclude conflict diamonds. Unfortunately Africa and many other regions in the world still need State driven moral regeneration that will cause corruption to be destroyed from its governing structures.

It is therefore submitted that the practical implementation of the principles in South Africa's diamond legal regulation system can prevent incidences of conflict diamonds getting into the legitimate trade system. According to Global Witness, an independent advocacy body that is active in reporting on international efforts pertaining to clean diamond trade, the main methodology of ensuring that conflict diamonds are excluded from an effectual diamond trading system is to tighten the internal control mechanism.²⁸³ This internal commodity control mechanism would plug holes that could be used to divert legitimately extracted diamonds out of the legal channel and into the unregulated zone ultimately ending up funding internal conflict.

²⁸¹ *Ibid.* 3.

²⁸² *Ibid.*

²⁸³ Global Witness Report '*Kimberly Process at Risk*', November (2006) 2.

The Diamonds Act²⁸⁴ obliges the SADPMR to ensure compliance with the KPCS.²⁸⁵ The KPCS requires member States or participants as referred to in the language of the process to establish proper export and import control regimes. Members or participants are encouraged to issue licenses to mines and to ensure the operation of licensed mines only. Small-scale diamond mining, usually called artisan miners should be licensed. Member States are required to submit statistics on rough diamond trade and production in order to identify any possible trade in illicit diamond production and trading.²⁸⁶

It is important to mention at this stage that concerning small-scale diamond mining or artisanal mining as is commonly known, the Diamonds Act²⁸⁷ of South Africa does not specifically mention the term small-scale mining in relation to diamonds. However, the fact that the Diamonds Act²⁸⁸ prioritizes equitable access to diamonds means that methods are in-built in the Act to ensure that mining licences are distributed in a manner that will assist all South Africans who qualify to participate meaningfully in diamond production and trade.²⁸⁹

With regard to small-scale mining generally, South African law is not silent on the issue as it is dealt with under the National Environmental Management Act.²⁹⁰ The regulations²⁹¹ under this Act provide that ‘Government encourages and facilitates the sustainable development of small-scale mining in order to ensure the optimal exploitation of small mineral deposits and to enable this sector to make positive contributions to the national, provincial and local economy. In this regard, a National Small-Scale Mining Development Framework has been

²⁸⁴ 56 of 1986.

²⁸⁵ Section 4(c) of the Diamonds Act 56 of 1986.

²⁸⁶ Burbank J. ‘*The Effect of the Kimberly Process on Governance, Corruption and Internal Conflict*’ paper presented under the auspices of The Fund for Peace under Globalization and Human Rights Series (2006) 5.

²⁸⁷ 56 of 1986.

²⁸⁸ 56 of 1986.

²⁸⁹ This is in line with what author is stating in his submission, see Burbank J. ‘*The Effect of the Kimberly Process on Governance, Corruption and Internal Conflict*’ paper presented under the auspices of The Fund for Peace under Globalization and Human Rights Series (2006) 5.

²⁹⁰ 107 of 1998.

²⁹¹ GN 435 of 23 February 2001.

developed to assist first-time small-scale mining entrepreneurs to overcome constraints facing initial development.²⁹² This process will be driven by a national steering committee appointed to facilitate the possibilities of assisting small-scale mining in South Africa.

The usual process for national governments, especially developing states such as South Africa, is to domesticate international law and practices into its legal system. This domestication of international law will take the form of governments passing legislation giving effect to their international obligations under a certain convention or international instrument. South Africa should be applauded for initiating the internationalization of its best practice diamond trading regulations.

It can be said as expressed in the name of the KPCS that South Africa has taken ownership of the KPCS and made a contribution to global scheme clean diamond trade. It is no wonder that the KPCS is hinged on two essential forms of regulation namely internal and external diamond commodity control mechanisms. The internal control mechanism is the domestic regulation of diamond trading mainly by national law such as the Diamonds Act²⁹³ as will be considered below.

For purposes of clarity on the actual trade practice concerning the provisions of the Diamonds Act²⁹⁴ KPCS, the legal requirements for application, certification, non-compliance, shipment and packaging will now be investigated together with the applicable regulations. This analysis of the above legal requirements will ensure that the practicalities of the KPCS are made easier to understand. The first point established by the Diamonds Act²⁹⁵ is that it defines the process as 'the international certification scheme for the international trade in unpolished diamonds negotiated in the KPCS.' That scheme relate of course to the

²⁹² 2.1 Minerals and Mining.

²⁹³ 56 of 1986.

²⁹⁴ 56 of 1986.

²⁹⁵ 56 of 1986.

international understanding among participating States as recorded by Resolution 55/56 as adopted by the General Assembly of the United Nations.²⁹⁶

In terms of section 4 and section 16 of the Diamonds Act,²⁹⁷ the KPCS is mandatory in diamond trade and must be applied by both the Regulator and the State Diamond Trader. Section 16(a) provides that the State Diamond Trader shall comply with the KPCS in respect of all the unpolished diamonds it handles. Further, with regard to unpolished diamonds registered for export, section 60(3) provides that such a diamond must be handled in compliance with the KPCS.

Failure to attain such compliance empowers the SADPMR to confiscate such an unpolished diamonds. The forfeiture of an unpolished diamond for lack of compliance with the KPCS ensures that conflict diamonds, illicit diamonds and diamonds potentially linked with any other corrupt activity are excluded from legitimate trade. This stringent dealing with failing rough diamonds illustrates South Africa's commitment to legitimizing the process while ensuring that South Africa has no part in the fuelling of conflict through illicit diamonds.

In terms of section 69(f) and section 69B(e) of the Diamonds Act²⁹⁸ which deals with the release of unpolished diamonds for export and import respectively, such diamonds must be accompanied by a prescribed KPCS certificate.²⁹⁹ This certificate certifies that such a diamond has satisfied the minimum standards of the KPCS in respect of diamonds for export and satisfies the requirements of the KPCS in respect of diamonds for import. The use of the word 'minimum' requirements of the KPCS in respect of diamonds to be exported as opposed to requirements of the KPCS in respect of diamonds due for import creates an impression that there is a varying standard of compliance, with a lesser standard of compliance for diamonds to be exported. Perhaps this is because South

²⁹⁶ See Appendix C.

²⁹⁷ 56 of 1986.

²⁹⁸ 56 of 1986.

²⁹⁹ See Appendix A and B.

Africa's diamonds are by implication not linked to conflict sources as a general rule.

The regulations that prescribe the exact manner in which the KPCS must be found in the Regulations³⁰⁰ as amended and corrected by various subsequent government notices. The regulations provide that a KPCS Certificate is a forgery resistant document issued by the appropriate authority of a particular participant.³⁰¹ The KPCS certificate can be said to be a document of dignity in diamond trade as it must accompany all legitimately obtained rough diamonds for all purposes, including scientific research as contained in section 2K(1)(a) of the regulations.

Kimberley Process Certificate' means a forgery resistant document in a particular format which identifies a consignment of unpolished diamonds as being in compliance with the requirements of the Kimberley Process Certification Scheme, and which in relation to export, is issued and validated by the Board and in relation to import is issued and validated by the exporting authority of a Participant.³⁰²

³⁰⁰ GN R680 in *Government Gazette* 10684 of 1 April 1987.

³⁰¹ See Appendix A, sample document. It is also important at this stage to take note of some of the useful definitions under the regulations as these are important for understanding the relevant diamond trade jargon. These definitions also relate to understanding the practical meaning of compliant packaging and shipment required in terms of the KPCS and Diamonds Act provisions. These definitions include the following regulatory terms, "Participant' means any state or a regional economic integration enforcing the Kimberley Process Certification Scheme;

'Regional Economic Integration Organization' means an organization comprised of sovereign states that have transferred competence to that organization in respect of matters governed by the Kimberley Process Certification Scheme;

'Transit' means the physical passage across the territory of a Participant or a non-Participant, with or without transshipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a consignment passes."

³⁰² *Ibid.*

Section 6 of the regulations provides for documents that are to accompany a consignment (or shipment) of rough diamonds in a situation where those diamonds are presented to the Board³⁰³ for export and registration. These documents are listed as a return in the form of Form N (i) or N (ii) in duplicate, a custom's bill for the export of South African goods, an attested declaration of foreign currency proceeds, an export declaration in the form of KPC (ii)³⁰⁴ and any additional information that may be required by the Board from time to time.

Section 6A and 6B also contains regulations in bold pertaining to the KPCS for export and import of unpolished diamonds. It will not be necessary to rewrite the regulations here suffice to say that all rough diamonds (excluding synthetic diamonds, diamond powder or a partly processed diamond having at least 14 facets) must be accompanied by a KPCS certificate when presented for export.³⁰⁵

Regulation 6A and 6B clearly lists specific requirements for the Kimberley Process Certification Scheme. The requirements can be summarized by showing that what is required is the relevant prescribed KPC Form (ii) which must be used in such circumstances together with other relevant import and export documents depending on the nature of the transaction. Export must be made to a participating State and the diamonds in question must have been examined and bear the seal of the Board as having complied with the Kimberley Process Certification Scheme. Further, the consignment must be carried in a prescribed tamper resistant container. After all the requirements have been met a registering officer must issue a KPCS certificate as prescribed in KPC (i)³⁰⁶ and the original certificate must be permanently attached to the diamond container.³⁰⁷

³⁰³ The Board as defined in the preamble of the Diamond Amendment Act 29 of 2005. Reads as follows 'to establish the South African Diamond and Precious Metals Regulator; to provide for its objectives and functions; to provide for the Constitution of its Board and the management of the Regulator by the Board.'

³⁰⁴ See Appendix A.

³⁰⁵ Regulation 6A(1).

³⁰⁶ See Appendix A.

³⁰⁷ Regulations 6A (3);(4).

A record of compliant consignments must be kept by the Board on computer records and such records must be kept for a period of three years. In terms of the regulations failure to comply with the regulations for KPCS in the exportation or importation of diamonds is a criminal offence.³⁰⁸ The regulations although technical in nature are clear particularly for those industry participants whose business is based on legitimate business practices free from diamonds that potentially fund conflict as desired in South African law. Further, the regulations encourage international trade by increasing communications³⁰⁹ and friendly trade relations with other participating States.

From the understanding of the basic requirements of the KPCS and the regulations above, it is clear that national governments have a role to play in international diamond regulation, and this role begins at home as South Africa has done, in an exemplary manner one must add, by passing appropriate legislation. Global Witness sets certain standards for national governments to play in order to ensure the triumph of legitimate diamond trading. Governments should *inter alia*:

- (a) Effectively enforce and implement national legislation that provides for strong internal controls.
- (b) Develop stronger monitoring mechanisms for the artisanal mining sector. Small effective and well equipped teams must be trained and motivated to monitor internal controls.
- (c) Develop better cross border coordination of Kimberly Process authorities and law enforcement officials including police, customs officials and the military to curb smuggling. These policing agencies can and should also target

³⁰⁸ Regulations 6A (6); (8).

³⁰⁹ Regulation 6A(7).

members of the diamond industry that are likely to trade in conflict diamonds.

- (d) Take appropriate action to arrest/penalize traders that are found to be involved in the smuggling of conflict and illicit diamonds.
- (e) Carry out rigorous audits and inspections of diamond companies' implementation of the KPCS and the self-regulation. This should include periodic random checks of imports and exports and random audits of company books to verify compliance with the Kimberley Process Certification Scheme.
- (f) Require that diamond companies have their financial auditors audit the system of warranties.³¹⁰

As much as South Africa is to be applauded for its efforts in the participation and creation of the scheme and the application thereof in the form of the Diamonds Act³¹¹ of South Africa, its ongoing maintenance processes should be tested against these standards or global benchmarks. This test must be done in order to determine a conclusion to be reached in answering the question as to whether South Africa sufficiently meets the intended objectives of the international diamond legal regulation system.

At this point South Africa seems to have ensured through the laws and regulations considered above that the international standards set by the participating State membership have been met. Therefore, South African diamond trade laws certainly appear to practically deter the proliferation of conflict diamonds by insisting on strict compliance with the regulations of the Kimberley Process Certification Scheme.

³¹⁰ Global Witness Report '*Making it Work: Why the Kimberly Process Should Do More to Stop Conflict Diamonds*' November (2005) 5 – 6.

³¹¹ 56 of 1986.

Although the concern over conflict diamonds is one that has soiled diamond trade in the international community and in many ways is still a threat because of corruption that permits the smuggling of illicit diamonds into the clean stream, it must be noted that this is not due to a lack of solid international law and practical processes. This view has been supported by author Mayer D. who proposes that corporations must clearly acknowledge that they together with their trade associations reject bribery, corruption, tax evasion to counter the rise of illegitimate business and this can be achieved by a strict adherence to the rule of law. The author in this case argues that what is required in international trade is the enforcement of what he terms, trustworthy capitalism.³¹² Clearly it offends the principles of trustworthy capitalism to trade in blood diamonds.

In the application of the KPCS there has been no trace of reported commercial case law where trade for example the illicit³¹³ source of the diamonds being traded was challenged. In South Africa the courts have not heard a case where the subject for determination involves conflict diamonds. In fact one can safely state that conflict diamonds have not been an internal South African problem on the surface of the legitimate KPCS compliant sales.

It is submitted that the African States who have had a history of conflict diamonds will consequently manage to deal with these matters if they are brought to justice in their courts although this may be difficult for various limitless reasons such as the arrest of rebels, subjecting them to criminal prosecution for crimes against humanity, tracing the buyers of conflict diamonds to bring them to book as well. These tasks of cleaning up African diamond trade will not be carried out in countries where the State is inefficient or fallen. Hence it has become the broad proposal of this study that the focus of eradicating conflict diamonds should be to correct the mistakes of the past in the most sensitive manner without overly dwelling or being trapped by the painful past mistakes made by humanity in

³¹² Mayer D. *Corporate Citizenship and Trustworthy Capitalism: Cocreating a More Peaceful Planet* The American Business Law Association, Inc. American Business Law Journal 44 Am. Bus. L.J. 237; 271; 272.

³¹³ In relation to the diamonds originating from conflict areas.

diamond trade. Perhaps the focus of the international community now should be the rehabilitation of the affected communities as clearly aimed in the UN 2015 Millennium Goals. This is exactly the initiative taken on by the Diamond Development Initiative International (DDII) in partnership with ONESKY or One Sky.³¹⁴

ONESKY³¹⁵ is a non-profit non-governmental (NGO) which has its focus in the sustainable use of the global environment. One Sky is registered in the province of British Columbia. This NGO focuses on pursuing solutions including appropriate technology green building and renewable energy in order to aid, sustain and develop personal human growth in harmony with the environment. In aiming to achieve this sustainable use of the global environment this NGO has been described in many ways however they have chosen to describe their endeavours as follows.³¹⁶

‘We think of ourselves as social change agents in a world of shared challenges doing our best to “promote sustainable living globally”. We work in some difficult and challenging places and we take on some of the world’s most pressing issues. Our hope is that we can serve to inspire others and to inspire ourselves to live under One Sky. The following pages explain some of the ways we approach this.’³¹⁷

The projects of DDII intend in the initiatives for the rebuilding of communities affected by human rights abuses brought about by rebels through unlawful diamond trade. In the United Nations Millennium Development Goals Report 2007 it was reported that over a million African and South American artisanal diamond diggers live in absolute poverty. This is because most of their countries

³¹⁴ www.ddiglobal.org/pages/projects-tclp.php 20 October 2009.

http://www.onesky.ca/projects/detail/leading_from_within 16 February 2010.

³¹⁵ www.onesky.ca/one_sky/ 16 February 2010.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

are recovering from the ravages of war and are disadvantaged by working outside of the formal economy. One of the projects engaged in by the DDII among many other projects is to ensure that fair returns are promoted for artisanal diamond diggers in order to eradicate extreme poverty and hunger in those nations.³¹⁸

The DDII is concerned with projects around the development of diamond standards that are in line with the KPCS. It is concerned with investigation the fair pay for diamond trade from those areas of the informal diamond sector. It is concerned with the using of artisanal diamond digging to empower women and to encourage environmental conservation and other initiatives that will support sustainable life after diamond mining. It is concerned with displaced children in areas of Sierra Leon and the DRC. Above all the DDII initiative is said to be aiming to achieve the global success of the KPCS when fully implemented.³¹⁹

In the western world the KPCS is contained in the American Clean Diamonds Act³²⁰ which provides for penalties and statutory regimes for prosecuting those charged with smuggling conflict diamonds. This Act has been however criticized as having failed to date of prosecuting anyone. This is mainly because it is difficult for the prosecutors to discharge the burden of proving that the diamonds in question come from a conflict area. This is because often diamonds are small and it becomes difficult to prove in their raw state the true origin of those diamonds in question.³²¹

³¹⁸ www.ddiglobal.org/pages/projects-tclp.php 20 October 2009.

³¹⁹ *Ibid.* For example, the DDII initiative is running a project known as the 'DDII's Tukudimuna Project'. This project 'seeks to prevent and remove children from working in the diamond mines in the Mbuji-Mayi region of DRC; to understand the dynamics and the political economy of child labour in artisanal diamond mining; and to find sustainable and replicable methodologies to end this practice.'

³²⁰ HR 1584.

³²¹ Tina Muscarella Gooch *Conflict Diamonds or Illicit Diamonds: Should the Difference Matter to the Kimberley Process Certification Scheme?* *Natural Resources Journal* (2008) 48 *Nat. Resources J.* 189; 202.

Perhaps this obvious gap or impasse in the law for enforcing penalties for violating the KPCS is the reason why such matters concerning conflict diamonds have not entered the realms of legal persecution. On the other hand one may choose to be an optimist and adopt the view that the KPCS is working efficiently, however, this is dangerous naivety. Another safety guideline often adopted by the western world is to refuse to accept diamonds from conflict prone or suspected conflict diamonds altogether. This is of course the prerogative of any sovereign State in protecting its diamond trade interests.

Much of this study leans towards a heavier reliance on the academic writing and international law against trading in conflict diamonds. These writings serve an important compass in the determination of the direction that the international community needs to take in eradicating conflict diamonds. Unfortunately these reviews are considered as the main sources of guidance and regulation for the eradication of conflict diamonds. It is submitted that this body of law and legal commentary will continue to advise the international community on the law and practical steps that have to be taken in order to keep diamond trade as clean as possible. However more of the voice of affected communities and their ideas on how to solve these conflict stones issues need to be captured as well. This is very important so that solutions are not only one sided elitist views on the problems faced by affected countries.

It is important to truly understand the true picture of the sad realities and dangers of trading in conflict diamonds. To fuel conflict by illegal trade constitutes serious crimes³²² against humanity. Therefore the combined international efforts to eradicate trade in the conflict diamond have metaphorically cleaned up diamond trade from the blood of war victims. Much has been written about blood diamonds in the international community and the common stance in the

³²² It must not be ignored that often war is accompanied by rapes and other kinds of sexual violence and in some cases genocide. See Article edited by Crook John R. *Contemporary Practice of the United States Relating to International Law: Brief Notes* The American Society of International Law (2008) 102 A.J.I.L. 894.

submissions is clear, such illicit trade in diamonds is condemned. Obviously trading in illicit diamonds can cause even the most innocent of dealers to partake in such trade if such conduct is not regulated in law.

At the same time law alone does not solve the entire situation of illicit diamond trade because there will always be criminal elements surrounding diamond trade. On the other hand at least at present there exists a process which forms a fresh start for clean diamond trade as resolved by various United Nations efforts. This basic understanding of the true effects of conflict diamonds is important for other areas of study, for instance, politics. It is important to note further that there are other criminal and political aspects that influence international trade in diamonds but this study is not mainly concerned with those aspects as much as it is with diamond trade. It is useful however to set out the broad relationship between socio-political aspects and the global economy.

The US as a leading nation has had to set an example in the condemnation of trading in conflict diamonds. This was done when in addition to existing law in May 2008 the US tightened controls on blood diamonds. The US Department of the Treasury's Office of Foreign Assets Control issued new regulations to strictly regulate trade in rough diamonds in support of the Kimberley Process Certification Scheme. The new regulations³²³ provide *inter alia* that the US government is committed to strengthening the international Kimberley Process Certification Scheme.³²⁴ The truth is some of the weapons used by rebels came from illicit sources from developed nations.

The US regulations³²⁵ set out the following standards; firstly it is required that all rough diamond imports should be entered under a formal entry using US

³²³ www.gpoaccess.gov/fr/ 26 November 2008, www.state.gov/e/eeb/diamonds 26 November 2008.

³²⁴ Crook John R. *Contemporary Practice of the United States Relating to International Law: Brief Notes* The American Society of International Law (2008) 102 A.J.I.L. 894; 900.

³²⁵ As required by the US's commitment to clean diamond trade as per executive order 13312 Implementing The Clean Diamond Trade Act. See <http://www.state.gov/e/eeb/diamonds/> 25 March 2010. The US Rough Diamond regulations 21 May 2008 require strict account for all rough diamonds handled in

Customs and Border Protection Entry Summary, under government form CBP Form 7501. Informal entries valued less than \$ 2,500 USD will not be allowed any longer under these regulations.³²⁶ It is clear in this case that the law maker's intention is to discourage potential seepage of blood diamonds through informal channels. This will affect the honest small scale diamond dealer by indirectly benefiting him or her to formalize his or her rough diamond exports into the US in a KPCS compliant manner.

Further, it is required in terms of the regulations that rough diamond importers and exporters be required to file an annual report that includes the total amount of imported diamonds and export activity and stockpile activity from the period dating back to September 2008. The government of the US has strengthened the observation of the KPCS through the US Census Bureau which in terms of the regulations will oversee the authenticity of the KPCS Certificate. The US

the US. Rough Diamond Control Regulations promulgated under 56936 Federal Register / Vol. 69, No. 184 / Thursday, September 23, 2004 / Rules and Regulations available at <http://www.state.gov/documents/organization/77549.pdf> 25 March 2010. The Regulations provides follows: 'On July 29, 2003, the President issued Executive Order 13312, to implement the Clean Diamond Trade Act (Pub. L. 108-19) and the multilateral Kimberley Process Certification Scheme for rough diamonds (KPCS). The Clean Diamond Trade Act requires the President, subject to certain waiver authorities, to prohibit the importation into, and exportation from, the United States of any rough diamond not controlled through the KPCS. This means shipments of rough diamonds between the United States and non-Participants in the KPCS generally are prohibited, and shipments between the United States and Participants are permitted only if they are handled in accordance with the standards, practices, and procedures of the KPCS set out in these regulations. The Treasury Department's Office of Foreign Assets Control (OFAC), acting pursuant to Executive Order 13312 and delegated authority, published the Rough Diamonds Control Regulations, 31 CFR part 592 (the Regulations), as an interim final rule on August 4, 2003 (68 FR 45777). The Regulations, which are described in detail in the preamble to the interim final rule, implement the Clean Diamond Trade Act and the KPCS. OFAC requested public comments on the Regulations. No public comments were received. However, based on its experience and that of other agencies that also participate in the implementation and administration of the Clean Diamond Trade Act and the KPCS, OFAC is revising the Regulations in four respects: (1) To specify that the ultimate consignee is responsible for retaining the original Kimberley Process Certificate accompanying an importation into the United States; (2) to require the ultimate consignee to report the receipt of a shipment of rough diamonds to the relevant foreign exporting authority within 15 calendar days of the date that the shipment arrived at a U.S. port of entry; (3) to advise persons engaged in the diamond trade of a pending requirement of U.S. Customs and Border Protection (Customs) that customs brokers, importers, and filers making entry of a shipment of rough diamonds either submit through Custom's Automated Broker Interface (ABI) system the unique identifying number of the Kimberley Process Certificate accompanying the shipment or, for non-ABI entries, indicate the certificate number on the Customs Form 7501 Entry Summary at each entry line; and (4) to clarify the country-of-origin reporting requirements for shipments...'

³²⁶ Crook John R. *Contemporary Practice of the United States Relating to International Law: Brief Notes* The American Society of International Law (2008) 102 A.J.I.L. 894; 900.

Government Accountability Office (GAO) is also another US government agency that has oversight of the trade in rough diamonds.³²⁷ The US diamond laws pertaining to diamond trade bear a striking resemblance to South African diamond law thus illustrating international uniformity in the battle against the removal of conflict diamonds from clean diamond trade.

It has been submitted that the lessons from Sierra Leone and blood diamonds are important to the international community when negotiating for positive change in the protection of human rights. While public awareness concerning blood diamonds was being created by various NGO groups it became quite apparent that the diamond industry itself wanted to see the end of trading in conflict diamonds. Through successful negotiations supported by a multi-stakeholder forum, the banning of conflict diamonds became an international reality. It is submitted that one of the obstacles that had to be overcome included getting the WTO³²⁸ to develop policing mechanisms, criminal penalties and enforcement mechanisms against trading in blood diamonds.³²⁹

One of the concerns about diamond trade and conflict diamonds includes the debate of the impact of diamond mining on the environment itself. In her submissions, writer Kelley Kori argues that laboratory diamonds are a viable alternative to natural diamonds for environmental conservation purposes but warns that in the case of conflict diamonds, laboratory diamond producers may attempt to manipulate the market by creating doubt as to the cleanliness of the source of the natural diamond that has been purchased.³³⁰

³²⁷ Crook John R. *Contemporary Practice of the United States Relating to International Law: Brief Notes* The American Society of International Law (2008) 102 A.J.I.L. 894; 901.

³²⁸ Bhagirath Law Das *The World Trade Organization A Guide to the Framework for International Trade*, Zed Books Ltd. (1999) 47.

³²⁹ Amadon C.D. *Human Rights Committee Examines Ongoing Crisis in Darfur: Anguish and Alienation* 21 CBA Record 20; 70.

³³⁰ Kelley K. *Are Mined Diamonds Forever? The Emergence of Lab Diamonds and the Suppression of Conflict Diamonds* Georgetown International Environmental Law Review (2008) 20 Geo. Int'l Envtl. L. Rev. 451; 459.

While this market manipulation may be a reality since illicit diamonds continue to be a threat in diamond trade, writer argues that this problem can be solved by internal legal mechanisms of each country through the application of the KPCS methods.³³¹ The submissions made by the writer in this case are cogent as the abandonment of natural diamonds all together for the sake of avoiding all uncertain or potential conflict diamond trade may lead to a devastation of economies that are supported by legal and environmentally sound natural diamond production.

Since it has been established that the KPCS methods are the appropriate international regulatory response to conflict diamonds, it is important to test whether the scheme has been effective or not otherwise the doctrine of effectiveness of this law will be mocked. Having noted that the regulations and processes under the KPCS are strictly and practically government enforced perhaps it is advisable to take the view that because of the monitoring the scheme is effective. However, when it comes to prosecuting or challenging in court the breach the KPCS rules implementation seems generally difficult for many countries particularly for the reason that the origin of the diamonds may be difficult to link to a conflict area in a particular arrest or charge.

It has been submitted that there are countries who are struggling with the implementation of the Kimberley Process Certification Scheme. In Côte d'Ivoire (Ivory Coast), for example, it was found in 2006 that there were still large volumes of diamonds originating from a rebel-held area therefore the UNSC imposed a diamond embargo but this only resulted in diverted trade of conflict diamonds through neighboring countries.³³² Countries such as Brazil and Venezuela have also had struggles with the implementation of the KPCS and as a result illicit or conflict diamonds were entering legitimate diamond trade. Ultimately the fact that is if countries are unwilling to clean up their own trading

³³¹ *Ibid.*

³³² Gooch T.M. *Conflict Diamonds or Illicit Diamonds: Should the Difference Matter to the Kimberley Process Certification Scheme?* Natural resources Journal (2008) 48 Nat. Resources J. 189; 208.

systems such problems will continue to exist. Therefore it is proposed that there should be more Government accountability³³³ though methods that will prove that their diamond trade is KPCS compliant.

1.5.2 The American Clean Diamonds Trade Act HR 1584

The American law on conflict diamonds is listed clearly in the findings section of the American Clean Diamond Trade Act.³³⁴ It has been found that these findings are in agreement with the South African Diamonds Act³³⁵ regulations which aim to eradicate trade in conflict diamonds. It is stated in the findings section of the American Clean Diamond Trade Act³³⁶ that conflict diamonds have led to devastating conditions for innocent victims caught in the middle of diamond conflicts. It is important in cases of human rights violations to see that the leading nations are participating in the condemnation of such violations.

The American Clean Diamond Trade Act³³⁷ provides that 'Funds derived from the sale of rough diamonds are being used by rebels and State actors to finance military activities, overthrow legitimate governments, subvert international efforts to promote peace and stability, and commit horrifying atrocities against unarmed civilians. During the past decade, more than 6,500,000 people from Sierra Leone, Angola, and the DRC have been driven from their homes by wars waged in large part for control of diamond mining areas. A million of these are refugees eking out a miserable existence in neighboring countries, and tens of thousands have fled to the United States. Approximately 3,700,000 people have died during these wars.'

³³³ For suggestions on codes and methods of government accountability see also, Marisa B. Van Saanen *Paul Collier, Law and Codes for the 'Resource Curse'* Symposium, Corporate Social Responsibility in the Extractive Industries: Yale Law School (2008). The writer here suggests that codes such as the Kimberley Process are important accountability tools for both the government and traders in the management of diamond resources in developing worlds.

³³⁴ HR 1584.

³³⁵ 56 of 1986.

³³⁶ HR 1584.

³³⁷ HR 1584.

The American Clean Diamond Trade Act³³⁸ condemns trade in conflict diamonds. It calls for compliance with the KPCS and acknowledges the negative impact that trading in illicit diamonds has over legitimate diamond sources in Sub-Saharan Africa for countries such as South Africa, Namibia, Botswana and Tanzania.³³⁹ This Act came into force in 2003 making it an important step for the international community to see an influential country such as the US make an effort to criminalize trade in conflict diamonds.

1.6 Diamond Laws of Some African Countries

The study of international trade in light of the diamond mining sector must include a consideration of diamond laws of other African countries. A few of these countries' diamond laws will be highlighted. This allows for a comparative study of South African diamond laws to determine where it is in legal development in comparison to other African States. Further, this consideration allows for a contribution to the Pan-African ideal while pointing out the effectiveness of the South African diamond regulation framework against trade in conflict diamonds. The countries considered here have in the past been the subject of conflict diamonds (with the exception of Nigeria) so it will be interesting to see how they have recovered in law to curb trade in conflict diamonds particularly in light of the development of the Kimberley Process Certification Scheme.

Having studied the South African Diamonds Act³⁴⁰ it becomes more evident that the States of different countries in whichever part of the world should seek to develop their diamond regulation laws to improve their diamond industries. If you take for instance chapter seven of the South African Diamonds Act,³⁴¹ it lists control measures that the government can exercise in controlling diamond trading. In line with international diamond trading standards, the government should strictly monitor, inspect and police the production, processing and trading

³³⁸ HR 1584.

³³⁹ Section 2(7), (8) and (9).

³⁴⁰ 56 of 1986.

³⁴¹ 56 of 1986.

of diamonds. This chapter supports in South African law the Kimberly Process standards that governments exercise greater control over diamond activities in general to ensure that 'conflict diamonds' are excluded from the system.³⁴²

Chapter Seven of the South African Diamonds Act³⁴³ provides for offences related to illegal acts and provides that any person who contravenes various provisions of the Act, particularly sections that are created to discourage rough diamond smuggling under the Act will be guilty of an offence. Naturally such conduct will attract criminal sanction and thus strengthen government internal control mechanisms of keeping diamond trade clean. With regard to the regulation and encouragement of clean diamond trade section 83 is directly relevant. Section 83(a) which criminalizes the delivery of an unpolished diamond in pursuance of an invalid agreement and (c) in particular, which criminalizes the contravention or failure to comply with conditions for a certificate under the Act are important statutory offences that will ensure that KPCS requirements are adhered to in South Africa.

South African diamond regulatory system is water tight and therefore it is highly unlikely that the system can be compromised to allow conflict diamonds to enter it, or divert legitimate diamonds out and into illicit diamond trading markets. South Africa has efficient policing strategies and the State is reasonable and politically, stable political peace and respects human dignity. It is important however the KPCS is always respected.

This contrasts sharply with the situation that obtained in Côte D'Ivoire during the civil strife. Huge diamond rich fields were in areas under rebel control. The diamonds were used to fund and fuel the internal strife since the proceeds were used by rebels to purchase armaments. The fact that Côte D'Ivoire proceeded to ban exports of diamonds had no effect. Diamonds found their way out to ready

³⁴² Global Witness Report '*Kimberly Process at Risk*', November (2006) 2.

³⁴³ 56 of 1986 section 82.

markets such as those in Liberia, Mali and other countries that certified diamonds in terms of the KPCS.³⁴⁴

According to Global Witness, the Ministerial Order banning export of diamonds was necessitated by the fact that the country's diamond mines are outside government control.³⁴⁵ During the civil strife in Sierra Leone in the 1990s, the government structures had broken down to such an extent that no government control of diamond mining could be exercised. An intelligent act taken by Belgium was to designate neighboring countries such as Mali as possible buyers of 'conflict diamonds' from that country.³⁴⁶

In South Africa, there is neither diamond mining that can be done outside of the licensing and permit procedures nor diamond trading that can be done outside the registration procedures laid down in the Diamonds Act.³⁴⁷ Further, although it is possible, South Africa is not notorious as a destination for diamonds from conflict torn States. A huge possibility for conflict diamonds to have entered the South African system was during the civil war in Angola with the rebel movement led by Jonas Savimbi.³⁴⁸

1.6.1 Angola

The first country to consider in this section of the study is Angola. Angola is a participant of the KPCS. This means that the diamonds traded officially by it are free from conflict as required by the warranty of the KPCS.³⁴⁹ The existing Diamond Law of Angola, in the form of the Mining Law 1992,³⁵⁰ gives exclusive mineral rights to ENDIAMA,³⁵¹ the State National Diamond Company to go into

³⁴⁴ Global Witness Report 'Kimberly Process at Risk', November (2006) 11.

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ 56 of 1998.

³⁴⁸ Luvhengo Victor *Multinational Corporations and Human Rights Violations in Africa Conflict Zones: The Case Study of Angola 1992 – 2005*. A research report to the Department of International Relations, Master of Arts, University of Witwatersrand, Johannesburg.

³⁴⁹ See figure 1.

³⁵⁰ (1/92).

³⁵¹ The Angolan Mining Law provides that, '1. The mining rights, exploration, reconnaissance,

joint venture with private foreign and local investors. Further this law makes provision for small-scale mining. The legislation was drafted by the Angolan Government with the assistance of the World Bank and the British Geological Survey.³⁵² This control by the State is evident in South African diamond trade laws in a similar fashion.

The Angolan laws provide that all minerals belong to the State and this is enshrined in their Constitution. The Ministry of Geology and Mines regulates the manner in which exploration, development and activities of prospecting and mining ought to run. The Ministry grants prospecting licences which are issued for a maximum period of 5 years. Prospective licence or mining title holders must submit work plans and feasibility studies prior to licenses or mining titles being granted. They must also demonstrate that they have a programme which will allow for the training and employment of Angolans.³⁵³

The Angolan Mining Law 1992,³⁵⁴ not only makes reference to the important of marketing their diamonds,³⁵⁵ it also uniquely provides for a protection zones section in the law which will ensure the future existence of the diamond by preventing extinction of the diamond.³⁵⁶

exploitation, processing and marketing of diamonds throughout the national, including the continental shelf and exclusive economic zone,

will be exclusively granted to ENDIAMA - UEE, or companies mixed in that it participates, in accordance with Law No. 1 / 92.

2. The rights referred to in the preceding paragraph may be exercised directly by ENDIAMA-UUT, or joint ventures in which she participates in accordance with Law No. 1 / 92, and will be assigned a case, through a concession contract to be approved by decree of the Council of Ministers, under the same law.'

³⁵² <http://www.mbendi.co.za/indy/ming/af/an/p0005.htm> 14 October 2009.

³⁵³ *Ibid.*

³⁵⁴ (1/92).

³⁵⁵ Article 8 read together with a recurring theme of marketing the diamond. It is submitted that this is the ideal manner in which the State is protecting its mineral resources by upholding the integrity of the diamond.

³⁵⁶ Article 15 which provides as follows: ' 1. Are *protection zones*:

- a) the areas corresponding to the tracks of land surrounding areas restricted to establish a distance up to 5 km, from the limits external demarcation of mining;
- b) the areas corresponding to the occurrences of diamonds found in

The Angolan diamond mining laws have a similar spirit to the South African diamond laws. Not only does State control diminish conflict but it allows for the use of the country's resources to empower its people through training and providing employment for the Angolans. This is in line with the BEE efforts and equitable access to diamonds captured in the South African diamond laws.

1.6.2 The Democratic Republic of Congo (DRC)

The DRC is currently a participant of the Kimberley Process Certification Scheme. This is a major step in eradicating conflict diamonds in a country which has seen much tragedy as a result of conflict diamonds. The conflict diamonds in the DRC revolve around poorly paid diggers who are taken advantage of by rebels.³⁵⁷ It was reported that³⁵⁸ that since the KPCS became operative in the DRC officially traded diamonds are accounted for and come from reliable sources, although this process is constantly being monitored in the case of the DRC. Legitimate diamond trade in the DRC can do much to improve the country's infrastructure and economy. The summary report provided the following information on the KPCS and the DRC in 2004.³⁵⁹

under a prospecting license, plus a full surround
establish a distance up to 5 km, from the outer limits of
deposits or deposits protected in the period elapsing between the
discovery of occurrences grants from royalties "

2. The *buffer zones* shall be marked on the ground through
marks and signs, clearly visible and legible, facing outwards
and located at the vertices of geometric figures that define, so
as the point of intersection with the roads and public
containing the word 'protection zone diamonds - Stay
prohibited "and an indication of the operating company.

3. *Protection Areas* referred to in *b)* of paragraph 1 shall
remain with the same or other limits, where, in
occurrences of diamonds protected areas are demarcated exploration
craft.

4. *AREAS; PROTECTION* is established by the Ministry of
Geology and Mining, at the request of the utilities and are intended to prevent
a subtracção, extinção e tráfico ilícito de diamantes, subtraction, extinction and illicit diamonds.'

³⁵⁷ <http://news.bbc.co.uk/2/hi/business/7060420.stm>

³⁵⁸ www.kimberleyprocess.com/download/getfile/61 24 February 2010. *Summary of Review Visit Report on the DRC* conducted by the KPCS fraternity.

³⁵⁹ *Ibid.*

‘Diamond production in the Democratic Republic of Congo (DRC) today is largely artisanal, with the active participation of at least 700,000 Congolese Creuseurs. The lead authority with responsibility for the implementation of the Kimberley Process Certification Scheme (KPCS) in the DRC is the Centre d’Evaluation, d’Expertise et de Certification des Substances Minérales Précieuses et Semi-précieuses (CEECC). The main elements required to implement the KPCS in the DRC are in place. However, further efforts are needed to tighten controls over artisanal mining and improve coordination between the various authorities involved in the implementation of the KPCS. Other improvements should also be made on import procedures and production statistics.’³⁶⁰

In 2008, four years after the initial report summarized above, a report by the Chair of the KPCS fraternity addressed the plenary on the DRC’s KPCS compliance strategies and stated that a Working Monitoring Group would continue to investigate that the DRC is adhering to the requirements of the KPCS.³⁶¹ It is submitted that the efforts of the KPCS fraternity have been significant in at least conscientising the DRC about the unlawfulness of trading in conflict diamonds through the international bodies KPCS Working Monitoring Group. However, the DRC mining legislation³⁶² does not make any reference to the KPCS.

The DRC mining legislation is contained in the Mining Code.³⁶³ The objective of this law was to secure interests of mining operators as well as protect the Congolese State. This law applies together with a regulation text referred to as

³⁶⁰ www.kimberleyprocess.com/download/getfile/61 24 February 2010.

³⁶¹ www.kimberleyprocess.com/download/getfile/820 24 February 2010.

³⁶² Law No. 007/2002 of July 11 Relating to the Mining Code.

³⁶³ Law No. 007/2002 of July 11 Relating to the Mining Code.

the Mining Rules.³⁶⁴ The law allows for the granting of mining rights for exploration and exploitation to eligible individuals as well as legal entities.

In terms of the DRC Mining Code the Exploration Licence is real property and exclusive right. The right may be ceded and it is also transferable. This position is distinguishable in South African law. In terms of the Diamonds Act³⁶⁵ certain conditions have to be met before a licence can be transferred and this is only limited to natural persons. The section provides that,

‘ transfer of licences by juristic persons is prohibited, unless a licensee is a natural person who has acquired the approval of the Regulator to transfer his licence in terms of s 34, he shall not in any manner dispose of his licence or allow any other person to acquire any interest therein.’³⁶⁶

In terms of the Congolese Mining Code, the Mining Registrar is responsible for making decisions regarding applications made for obtaining exploitation licenses. One of the conditions for granting of the license is the demonstration by the applicant that there exists an economically profitable deposit. This must be done through a presentation of a feasibility study with a technical framework plan for the development, construction and exploitation work for the mine.³⁶⁷ This method of granting relevant mining licenses is in line with South African and Angolan mining law with a slight difference in the naming of the registering authority.

One of the interesting attributes of the Congolese Mining Code is that it addresses the issue of small-scale mining. A licence known as the ‘Exploitation Certificate of Small Scale Mining’, issued by the Congolese Mining Registrar

³⁶⁴ www.miningcongo.cd/pdf_divers/guide_of_mining_investor.pdf 20 March 2008.

³⁶⁵ 56 of 1986 section 33.

³⁶⁶ Diamonds act 56 Of 1986 section 33.

³⁶⁷ www.miningcongo.cd/pdf_divers/guide_of_mining_investor.pdf 20 March 2008.

confers the rights to its holder to exploit the mineral substances for which it is especially issued. This type of licence has a variable term of validity. However, such term may not exceed ten years including renewals.³⁶⁸

The Congolese Mining Code³⁶⁹ makes provision for artisanal exploitation of diamondous zones for which technical and economical factors do not allow an industrial or semi-industrial exploitation.³⁷⁰ The regulation of small-scale mining in Congolese law is a plausible method of dealing with accounting for the production of diamonds which may come from sources other than those created by larger industry conglomerates. This is a positive step in ensuring some kind of equity in diamond production. The obvious danger is to have unregistered small-scale miners as it would be difficult to account for the sources of such diamonds. However with the KPCS participation in place Congolese diamond mining law is greatly developing.

The Congolese Mining Code³⁷¹ provides for authorized trading houses³⁷² access to which is regulated in law. Further in these trading houses are unlimited in number³⁷³this means that there is easier access to the industry however the number of purchasers per trading house is limited in law. It is submitted that this is to set up boundaries so that the industry is accessible but not flooded with limitless buyers. The authorised trading houses are subject to inspection or supervision by the DRC Mines Authority and are expected to pay due taxes in terms of the law.³⁷⁴

³⁶⁸ www.miningcongo.cd/pdf_divers/guide_of_mining_investor.pdf 20 March 2008.

³⁶⁹ Law No. 007/2002 of July 11 Relating to the Mining Code.

³⁷⁰ www.miningcongo.cd/pdf_divers/guide_of_mining_investor.pdf 20 March 2008.

³⁷¹ Law No. 007/2002 of July 11 Relating to the Mining Code.

³⁷² Article 120.

³⁷³ Article 121

³⁷⁴ Article 126(a), (b), (c) and (d). It is submitted that the regulation of a trading house under the DRC law, although it does not distinguish diamonds per se, the regulation of a mineral trading house is in line with that of the South African Diamonds Act 56 of 1986 section 44 which provides that only registered premises may be used as diamond trading houses.

The implications of tax that arise of mining activities under the Congolese Mining Code³⁷⁵ are provided for in the same law as the mining code. This is unlike the South African Diamonds Act³⁷⁶ which must be read together with separate diamond taxation statute in the form of the Diamond Export Levy (Administration) Act.³⁷⁷ Further the Congolese Mining Code³⁷⁸ provides for the contingencies of mining such as fortuitous³⁷⁹ events, corruption of State civil servants³⁸⁰ and other offences such as illegal mining³⁸¹ and complaints related to administrative action.³⁸²

As a result of the areas that the Congolese Mining Code³⁸³ regulates, it forms an elaborate document with many articles. However the most important aspect of the Congolese Mining Code³⁸⁴ related to the issue of dispute resolution. The Code provides for the following avenues of dispute resolution: administrative appeals,³⁸⁵ the judicial system³⁸⁶ and domestic³⁸⁷ or international arbitration.³⁸⁸ Most importantly the Congolese Mining Code³⁸⁹ provides for the encouragement and support of a partnership with the DRC State when exercising rights in terms of the Congolese Mining Code³⁹⁰

1.6.3 Sierra Leone

Sierra Leone is a participant to the Kimberley Process Certification Scheme. This is a very important legal development to a country that was ravaged by war funded through conflict diamonds. Conflict diamonds were used by the brutal

³⁷⁵ Law No. 007/2002 of July 11 Relating to the Mining Code. Article 219, 220 -235.

³⁷⁶ 56 of 1986.

³⁷⁷ 14 of 2007.

³⁷⁸ Law No. 007/2002 of July 11 Relating to the Mining Code. Article 219, 220 -235.

³⁷⁹ Article 297.

³⁸⁰ Article 307.

³⁸¹ Article 299.

³⁸² Article 313.

³⁸³ Law No. 007/2002 of July 11 Relating to the Mining Code. Article 219, 220 -235.

³⁸⁴ Law No. 007/2002 of July 11 Relating to the Mining Code.

³⁸⁵ Article 312.

³⁸⁶ Article 315.

³⁸⁷ Article 318.

³⁸⁸ Article 319.

³⁸⁹ Law No. 007/2002 of July 11 Relating to the Mining Code.

³⁹⁰ Law No. 007/2002 of July 11 Relating to the Mining Code. Article 332.

rebels to finance their military activities leaving thousands of civilians dead and many more maimed.

The adoption of the KPCS by the Sierra Leonean government served to change the trajectory of the diamond industry. The objective of the KPCS is to eradicate trade in diamonds from rebel controlled regions. However, there are some challenges facing the efficacy of the Kimberley Process Certification Scheme. These challenges include the existence of corruption in the ranks of Sierra Leone officials who allow diamond smuggling to continue. Further challenges include illegal mining, environmental damage,³⁹¹ poor working conditions, including child labour and corrupt practices that still persist in the country.³⁹²

The law applicable in Sierra Leone in relation to mining is the Mines and Minerals Act.³⁹³ With regard to the environment, the Mines and Minerals Act³⁹⁴ provides as follows:

‘in deciding whether or not to grant a mineral right, the Minister of Mines shall take into account the need to conserve the natural resources.... The Minister shall require environmental impact assessments as prescribed as a condition for granting a mining lease.’

This law is important to Sierra Leone to address the negative environmental effects created by illegal mining. Often illegally mined areas are left bare without any environmental rehabilitation.³⁹⁵

³⁹¹ See Kelley K. *Are Mined Diamonds Forever? The Emergence of Lab Diamonds and the Suppression of Conflict Diamonds* Georgetown International Environmental Law Review 20 Geo. Int'l Envtl. L. Rev. 451; 464 - 465. Mining natural diamonds has been linked to grave environmental and social consequences particularly for developing countries.

³⁹² <http://archives.cnn.com/2000/WORLD/africa/10/12/sierraleone.ap/> 26 June 2008.

³⁹³ 5 of 1994.

³⁹⁴ 5 of 1994.

³⁹⁵ See Kelley K. *Are Mined Diamonds Forever? The Emergence of Lab Diamonds and the Suppression of Conflict Diamonds* Georgetown International Environmental Law Review 20 Geo. Int'l Envtl. L. Rev. 451;

The Mines and Minerals (Amendment) Act³⁹⁶ of Sierra Leone was introduced to provide for matters related to sale of precious minerals by licence holders and unlawful possession of precious minerals. According to the Mines and Minerals (Amendment) Act³⁹⁷ which is in line with the South African law on the unlawful possession³⁹⁸ the Mines and Minerals (Amendment) Act³⁹⁹ of Sierra Leone provides that,

‘any person who is in possession of any precious mineral and who fails to prove that he is in lawful possession of such minerals commits an offence.’⁴⁰⁰

The Diamond Cutting and Polishing Act⁴⁰¹ is the most recent law relating to the diamond industry in Sierra Leone. This law came into force at the time when the KPCS is active in the diamond industry of Sierra Leone. It is therefore a statute that reflects the developments in law in light of the international aims of eradicating illicit diamonds. This Diamond Cutting and Polishing Act⁴⁰² came into force on 5 April 2007 and provides for the control of diamond cutting and polishing, licensing of diamond cutters and polishers and defining the rights and duties of a licensee and other matters connected therewith.⁴⁰³

464 - 465. Mining natural diamonds has been linked to grave environmental and social consequences particularly for developing countries.

³⁹⁶ 1 of 1999.

³⁹⁷ 1 of 1999.

³⁹⁸ Diamonds Act 56 of 1986. Sections 18, 19, 20, 21, 22, 23, 24 and 25 that possession, sale, purchase, assistance by a non-licensed person, dealing, processing, erection and operation of machinery, export of unpolished diamonds is prohibited unless such activities are conducted within the lawful manner established within the Act.

³⁹⁹ 1 of 1999.

⁴⁰⁰ Section 118 B(1).

⁴⁰¹ 2 of 2007.

⁴⁰² 2 of 2007.

⁴⁰³ See short title.

The most important aspect of the Diamond Cutting and Polishing Act⁴⁰⁴ of Sierra Leone is that it makes the KPCS applicable in local legislation. In terms of section 7(1) of the Diamond Cutting and Polishing Act⁴⁰⁵ a licensee has a right to buy, deal in, export, import as well as cut, polish, crush, or set diamonds in tools, implements or other articles or otherwise alter diamonds for purposes of trade. Section 7(d) further states that ‘...carry on operations authorized by his licence only, emphasis, in accordance with the Kimberley Process Certification Scheme’. The statute’s use of the word only makes it imperative that the KPCS is observed in Sierra Leone. It is clear through the Diamond Cutting and Polishing Act⁴⁰⁶ of Sierra Leone that there is a great effort to improve the local beneficiation industry, a consideration which is important to South African diamond law.

1.6.4 Nigeria

Nigeria is a country that is not a large producer of diamonds, however diamond trade regulation does form part of Nigerian law. Nigeria will be used here as an example of an African country that is not part of the Kimberley Process Certification Scheme. Nigeria is considered here to demonstrate the effectiveness of laws in an African country without the Kimberley Process Certification Scheme. This study will demonstrate how Nigeria has opted to deal with the problem of illicit diamond trade which has plagued the African diamond producing countries.

Nigerian law regulating diamond trade is contained in the Minerals and Mining Decree⁴⁰⁷ In terms of the Minerals and Mining Decree⁴⁰⁸ control of property in minerals vests in the State. Chapter II of the Decree regulates diamond trade. In

⁴⁰⁴ 2 of 2007.

⁴⁰⁵ 2 of 2007.

⁴⁰⁶ 2 of 2007.

⁴⁰⁷ No. 34 of 1999.

⁴⁰⁸ No. 34 of 1999.

terms of section 147 of the Minerals and Mining Decree⁴⁰⁹ only an authorized diamond miner or a licensed dealer may sell or buy an uncut diamond provided that such an uncut diamond has been lawfully obtained. Section 148 provides that uncut diamonds may not be exported from Nigeria or imported into Nigeria without clearance from the Minister.

Similar to South African law, the Nigerian Decree provides in terms of section 150 that every uncut diamond be registered by the licensed diamond dealer. Every transaction relating to that registered uncut diamond must be recorded. Further, section 151 provides that a person who has possession, control or power over an uncut diamond is guilty of an offence under the Decree unless he can prove that he lawfully obtained such a diamond. Section 154 makes it a statutory offence to contravene the licensing, registration and possession provisions stated in the Decree.

It is clear that the Nigerian Minerals and Mining Decree operates in essence in the same manner as the South African Diamonds Act⁴¹⁰ and the MPRDA with the exception that the Decree does not make references to the Kimberley Process Certification Scheme. One may argue however that the Nigerian diamond trade legislation complies with basics of the KPCS as it strictly monitors its diamond trade and ensures the lawfulness of the method of obtaining diamonds dealt with in the Federation of Nigeria.

1.6.5 Tanzania

The discussion of Tanzanian diamond trade in this instance will be a brief commentary and acknowledgment of the structural form of the legislation that governs the diamond industry of this African State. Famous for the precious

⁴⁰⁹ No. 34 of 1999.

⁴¹⁰ 56 of 1986. Sections 18, 19, 20, 21, 22, 23, 24 and 25 that possession, sale, purchase, assistance by a non-licensed person, dealing, processing, erection and operation of machinery, export of unpolished diamonds is prohibited unless such activities are conducted within the lawful manner established within the Act. The MPRDA, section 2, is also similar to the above Nigerian diamond law in that establishes the State's custodianship over its own mineral resources.

stone 'tanzanite' named after the country; Tanzania is a State that is largely endowed with mineral deposits. It is therefore only natural that a large industry player such as De Beers would formulate a partnership with the Tanzanian government to exploit the country's diamond resources.⁴¹¹ It is important to mention at the outset that Tanzania is a participant of the KPCS although like South Africa and Botswana conflict diamonds have historically not been a serious problem in Tanzania.

It appears from the reported Tanzanian case in *Commissioner General of Income Tax v Diamond Corporation Tanzania Limited*⁴¹² that historically Tanzanian diamond trade has reflected above board trade practices. This case shows the foreign diamond companies' trade methods that were generally observed in Tanzanian diamond laws. From this case one is able to see the foreign diamond company's relationship with the State agencies that stood to collect tax from them. It is submitted that this case represents a historical perspective of Tanzanian diamond trade law. Further, it appears that Tanzania has had practices that were subject to careful government control with mining tax liabilities and proceeds being monitored by laws that were enforceable at that stage.⁴¹³

The case above cogently discussed and dealt with taxation for profits earned in Tanzanian diamond trading and illustrates that Tanzanian diamond trade has a historical background showing legally sound corporate practices that were enforced by legitimate court systems. This is very true for the history of South African diamond trade with the exception that South African diamond laws were historically unfair because of racial discrimination.

⁴¹¹ www.idexonline.com 29 October 2009 www.diamondnews.com/tanzania_diamond.htm 29 October 2009.

⁴¹² (Civil Appeal No. 12 of 1970) [1970] EACA 2 (9 June 1970).

⁴¹³ See judgments of Mustafa J.A. and Law J.A.

In 2006, some of the controversies raised in national media pertaining to the Tanzania diamond industry involved issues surrounding a committee report probe of the Tanzanian Diamond Sorting Office (Transort) and its London Trading Centre which was to be tabled before the Tanzanian parliament. The investigating committee was tasked with a mandate of investigating Transort's activities and methods of payment of royalties emanating from diamond sales. There was an apparent concern at the inception of the committee project that there needed to be a probe into the dubious nature of the contracts entered into with foreign companies who did not have the interests of Tanzania at heart.⁴¹⁴

The Tanzanian government in an effort to protect its national mining interests formulated a minerals policy in 1997 however it has been reported in 2007 that the country still lacked a comprehensive approach to monitoring Tanzanian diamond trade.⁴¹⁵ The law that is currently applicable to diamond trade in Tanzania is contained in the Mining Act.⁴¹⁶ The law currently deals with national mining interests by seeking to benefit its citizens by encouraging mining firms to buy goods and services locally when they are available.⁴¹⁷ The theme of the Tanzanian Mining Act⁴¹⁸ reflects the sentiments of the South African Diamonds Act⁴¹⁹ which encourages the use of local beneficiation or use of local mineral related goods and services this in turn has a socio-economic effect of ensuring a form of broad-based economic empowerment.

It is not necessary to expound on all the provisions of the Tanzanian Mining Act⁴²⁰ it is important to consider a few of the main provisions of the Act as a comparator to the South African diamond regulations. The Tanzanian Mining

⁴¹⁴ www.nationmedia.com/estafrican 29 October 2009.

⁴¹⁵ *Ibid.*

⁴¹⁶ 1998.

⁴¹⁷ www.miningmx.com 29 October 2009.

⁴¹⁸ 1998.

⁴¹⁹ Diamonds Act 56 of 1986, see section 5 and 15, as amended, by the Diamonds Amendment Act 29 of 2005 read together with section 26 of the MPRDA.

⁴²⁰ 1998.

Act⁴²¹ regulates mined minerals and not petroleum which contrasts with the South African diamond legislation which tends to allow for the mineral and petroleum resources laws to be read together.⁴²²

The Tanzanian Mining Act⁴²³ is similar to the South African Diamonds Act⁴²⁴ in that it has inherent Constitutionally sound principles such as concern for the environment and sustainable development⁴²⁵ as illustrated in the Tanzanian Mining Act⁴²⁶ and in particular and more expressly section 38(5) of the Act which provides that

‘every applicant for a special mining licence shall commission and produce to the Minister an environmental impact assessment on the proposed mining operations from independent consultants of the international standing shortlisted by the applicant and approved, by the Government of the United Republic.’⁴²⁷

The Tanzanian Mining Act⁴²⁸ further provides substantially for the regulation of licences for mineral rights,⁴²⁹ the mining licence⁴³⁰ and rights pertaining to provisions for additional requirements in respect of certain licences and primary

⁴²¹ 1998.

⁴²² Part I Preliminary Provisions point 3. In South African law, the Diamonds Act 56 of 1986 is read together with the MPRDA 28 of 2002 and both statutes regulate access to the use of the South African Republic’s mineral resources and petroleum.

⁴²³ 1998.

⁴²⁴ 56 of 1986 section 5(1) for example which regulates the support of the local beneficiation industry read together with the MPRDA sections 26 and 100.

⁴²⁵ Diamonds Act 56 of 1986 read together with the MPRDA sections 37 - 46 and section 28 of the National Environmental Management Act 107 of 1998. Section 22 of the Environment Conservation Act 73 of 1989.

⁴²⁶ 1998 sections 34(I)(b), 35(3) and section 38(4)(d).

⁴²⁷ See also ‘section 64.-(1) Where the mining operations intended to be carried out under a mining licence or a gemstone mining licence fall within a scale of operations set out in the Regulations, the applicant for the mining licence or the gemstone mining licence shall commission and produce an environmental impact assessment on the proposed mining operations from independent consultants...’

⁴²⁸ 1998.

⁴²⁹ Section 13.

⁴³⁰ Section 46.

licences.⁴³¹ With regards to exclusive primary area licences⁴³² the dealer's and broker's licence⁴³³ the Tanzanian Mining Act⁴³⁴ contains elaborate regulatory terms of the Tanzanian mining industry. There appears therefore to be a rigorous approach to regulating access to the Tanzanian diamond industry as similarly provided for in the South African Diamonds Act.⁴³⁵

The Tanzanian Mining Act⁴³⁶ deals with criminal offences relating to licences however the Tanzanian laws pertaining to criminal prohibitions and offences are not as rigorous as those provided for in the South African Diamonds Act.⁴³⁷

On the point of prevention on conflict diamonds, the Tanzanian Mining Act⁴³⁸ unlike the South African Diamonds Act⁴³⁹ does not mention the KPCS, which seems undesirable for a Tanzanian diamond relates law since Tanzania is a participant. It is possible however that Tanzania has other pressing legislative

⁴³¹ Sections 64 and 65.

⁴³² Sections 71 and 72.

⁴³³ Part V sections 73 to 75.

⁴³⁴ 1998.

⁴³⁵ 56 of 1986 section 3 which provides for the SADPMR and sections 26 – 39 which provides for licences and permits in order to regulate access to the industry.

⁴³⁶ 1998 section 74(b) and section 81(c). See section 74 whole which provides for grant of licence and criminal sanction. The Tanzania Act states that 'Grant of 74.-(I) An applicant for a Dealer's Licence Whose dealer's application was properly made as provided in section 73 shall licence entitled to the grant of a dealer's licence for which he has applied unless -

(a) he has previously held a dealer's licence and he is not entitled to renew that dealers licences as provided in subsection (4) of section 75; or

(i)

he has surrendered his dealer's licences without sufficient reason for so doing;

(ii)

(b) he has been convicted of a criminal offence relating to the buying and selling, or possession of raw gold or gemstones.' See section 81 'Grant of 81.-(I) An applicant for a broker's licence whose broker's application was properly made as provided under section 80 shall licence be entitled to the grant of a broker's licence unless -

(a) he is disqualified from holding a broker's licence under subsection(3) of section 80;

(b) he previously held a broker's licence and was disqualified from obtaining a renewal of that licence under section 83;

(c) he has been convicted of a criminal offence relating to the buying, possession, and export or selling of raw gold or gemstones.

(2) A broker's licence granted under this section shall be valid for a period of twelve months from the date of issue.'

⁴³⁷ 56 of 1986 sections 18, 19, 20, 21, 22, 23, 24 and 25.

⁴³⁸ 1998.

⁴³⁹ 56 of 1986.

needs other than dealing robustly in law with conflict diamond provisions which may not be a pressing issue on their legislative agenda. In conclusion of the consideration of Tanzanian diamond law, it is submitted that the consideration of the Tanzanian diamond regulations certainly creates an opportunity to exchange diamond law development ideals in order to ensure that Africa's diamonds are dealt with in an optimal and most economically and environmentally sound manner.

1.7 Conclusion

This chapter has investigated the diamond regulatory framework of South Africa through a historical timeline by analyzing the progress in the developments which have resulted in modern diamond regulations. It is submitted that South Africa has significantly shifted away from economic unfairness. There are still challenges with the implementation of equality in practice as contained in the ideals of written law. It is submitted however that with positive changes in law have ameliorated the situation.

It has been established in this chapter that with the dawning of the Constitutional era through the government of national unity, many developments have taken place in the country's diamond laws. What is evident in the theme of the developments in South African diamond law is that South Africa has taken positive legislative action to develop more Constitutionally sound national diamond laws while taking part in the international understanding⁴⁴⁰ and efforts to keep international diamond trade free from illicit and more specifically conflict diamonds.

These developments in national diamond laws clearly illustrate that by 2009 Constitutional values of fairness, equitable access to national resources and justice have been fully captured in South Africa's legislation. This is evident in the form of enabling statutory law and regulations as well as the international laws as

⁴⁴⁰ In the form of the KPCS.

adopted by the United Nations. These laws are being actively applied internally and externally in South African diamond trade activities with the purpose of achieving international harmony for the common good of the Republic by encouraging broad based socio-economic empowerment and equal access to resources for all South Africans and the common good of mankind as a whole by enacting methods of diamond trade that will condemn and curb trade in conflict diamonds.

The legislative survey of the South African Constitutionally based diamond laws when compared to the provisions of other diamond trading States illustrates legislative leadership which can be used as a basis and model for other States to strengthen their existing diamond laws.

This is not to suggest that South African diamond law is a flawless model as it is possible and encouraged that South Africa undertakes to learn from the diamond laws of other countries. One of the main lessons from the diamond laws of other countries expounded in this chapter is that South Africa is on par with the most progressive statutory provisions that regulate the diamond industries of other foreign States. For example the environmental impact concerns, the internal procedures for licensing and other authorizations and finally the participation in the KPCS shows the progressive trend of national diamond laws.

The constant re-evaluation of diamond law developments and study mirrored against other diamond trading States will assist South Africa to continue to develop a diamond industry that is flourishing. The industry can flourish through the attraction of foreign investment and national skills development by encouraging the use of local goods and services in diamond trade. State policy for the diamonds and minerals sector supports these developments. It is submitted in conclusion that South Africa has set cogent and rigorous laws to successfully eradicate conflict diamonds which perpetrates the violation of human rights while having achieved significant success in moving towards the

achievement of equity in the utilization of national mineral resources and for the purposes of this study, the utilization of national diamond resources.

Chapter 2: Diamond Sales and the Regulatory

2.1 Introduction

It is essential in this study of South African diamond regulation laws to investigate the extent to which the regulatory framework facilitates and promotes diamond trade through sales transactions as this is at the core of sustaining the industry. The ultimate objective of diamond related companies, as any other commercial entity, is to be involved in profitable business either by selling a product or providing a service. The diamond sales concern the selling of the finished diamond product either as a jewellery piece, a rough diamond or diamonds or cut and polished diamonds. The sale may also involve the sale of diamonds for industrial purposes. It may be some competition from the laboratory diamond sector however this study is only concerned with the diamond mineral as it occurs in nature.

Diamonds by nature are luxury items of significant value that last for generations therefore properly managed diamond sales generally contribute to a diamond producing State's GDP⁴⁴¹ in a significant way.

Sales, whether national or international, form the economic base of all industry whether, the achieved are through the traditional markets, legally regulated structures or e-bay. International trade is one of the most regulated commercial activities and it is important to understand such regulation particularly for the purposes of this chapter. International trade or sales such as the recession that is taking place in international markets which have had a devastating impact on international trade in 2007-09. Other challenges include threats such as criminal elements as in the case of illegal supply of poached ivory as reported by investigations by the International Fund for Animal Welfare (IFAW).⁴⁴² In the

⁴⁴¹ www.dme.org.za 21 march 2010. Report R61/2007.

<http://www.statssa.gov.za/publications/P0441/P04413rdQuarter2007.pdf> 25 March 2010.

⁴⁴² Brown Jonathan *Illegal Trade in Ivory Boosted by eBay Sales* 21 May 2007 The Independent Newspaper, UK.

same way diamond sales are also threatened by the existence of black market trading.

Further, various laws in the form of tax incentives and other regulation are being adopted in many countries to bolster exportation of own products and services. This is a trend which is evident in South African diamond regulations as will be seen in the progression of this chapter.⁴⁴³ In South Africa the MPRDA and the Diamonds Act⁴⁴⁴ both encourage local beneficiation of South African minerals in order to obtain a higher value for such products in the international market and to uplift the local beneficiation market skills and to attract revenue from cutting and polishing diamonds.

However, questions arise in the case of diamond sales with regard to who is responsible for ensuring that issues of access and equity expressed in diamond laws are implemented in the diamond sales market, whether locally or internationally. Further, it is important to study the institutions or business and market structures involved in determining viable diamond prices and diamond trade. It will be shown herein that the study of international diamond sales from a legal perspective is imperative in any study of diamond trade.

To avoid duplication of the discussion of the Diamonds Act⁴⁴⁵ in chapter one will endeavor to focus only on the aspects of the Diamonds Act⁴⁴⁶ that relate only to the sales aspect of diamond laws. There will be a particular focus on the duties of the State organs, discussed in chapter one, in ensuring that such diamond sales are conducted within the confines of equity and fairness. There will therefore be a study of diamond market regulation in the broad sense as well as a particular focus on involvement of South Africa in international diamond market regulation.

⁴⁴³ Thomson Reuters West *Corpus Juris Secundum: Internal Revenue P. Taxation of Foreign Earned Income and Income of Aliens and Foreign Corporations* (2008) 2.

⁴⁴⁴ 56 of 1986.

⁴⁴⁵ 56 of 1986.

⁴⁴⁶ 56 of 1986.

The chapter will consider diamond sales regulations in order to cast light on how global economic influences drive and affect diamond sales. This is done through the study of the legal and economic participation of diamond stakeholders in South Africa insofar in both local and international markets. Diamond market issues will be analysed with reference to the world economic downturn which took place in 2008 and 2009 or global financial crisis (GFC).

The view upon which this chapter is premised upon is that pertinent international market trends often have an influence on the national trends.⁴⁴⁷ It is however submitted with respect that though international diamond market forces are influential to national diamond trade trends and laws, South Africa remains a sovereign State endowed with all the legislative powers to make and adopt necessary laws and regulations to make its diamond sales internationally competitive. This State sovereignty is expressly recognized by the MPRDA.⁴⁴⁸

This chapter also examines important local institutions and other private business stakeholders in the diamond market such as the SDT as established under the Diamonds Act⁴⁴⁹ and the SADPMR. In the private sector study this chapter will examine⁴⁵⁰ past traditional monopolies and of current important players in the diamond market such as the De Beers Group, which has gained a success and fame in diamond production and trade.

The aim is to give a broader understanding of diamond laws and ultimately to illustrate whether or not the ideals expressed in South African diamond legal policies are being achieved from the diamond sales perspective which in

⁴⁴⁷ This view was confirmed by the Constitutional Court in *Richter v Minister of Home Affairs and Others* 2009 (3) SA 615 (CC), where the court stated at page 368 E – F. of the judgment that: ‘In reaching this conclusion I am influenced by the fact that, as several of the parties noted, we now live in a global economy which provides opportunities to South African citizens and citizens from other countries to study and work in countries other than their own. The experience that they gain will enrich our society when they return, and will no doubt enrich, too, a sense of a shared global citizenship.’

⁴⁴⁸ 28 of 2002 section 2(a).

⁴⁴⁹ 56 of 1986.

⁴⁵⁰ Chapter 3 of this contribution.

essence together with mining, marketing and demand for product ultimately form the crux of the industry. The importance of co-operation between the State and private entities will be highlighted especially in forging economic relationships and strategies that will benefit all citizens of South Africa.

2.2 The South African Diamond and Precious Metals Regulator

2.2.1 The SADPMR Regulations

The South African Diamond and Precious Metals Regulator, SADPMR (herein referred to as the Regulator), is established under of the Diamonds Act,⁴⁵¹ as amended. The Regulator has a Board constituted by members which are appointed by the Minister in terms of the Diamonds Act.⁴⁵² The day to day functions of the Regulator are the responsibility of appointed Chief Executive Officer (CEO) appointed by the Minister subject to instructions and directions issued by the Board. The persons appointed as members of the Board and the CEO must conduct themselves with integrity to discharge their functions diligently.⁴⁵³

The definitions of the SDT⁴⁵⁴ and the SADPMR⁴⁵⁵ must be understood as those defined in terms of the Diamonds Amendment Act.⁴⁵⁶ The amending law was subsequently created to further ensure that the policy on local beneficiation and broad-based economic empowerment is regulated.⁴⁵⁷

Since the defining provisions relating to the Regulator⁴⁵⁸ have been clearly provided by the Diamonds Amendment Act⁴⁵⁹ and the latest diamond regulations as promulgated in the *Government Gazette* dated 4 April 2008⁴⁶⁰ are crucial in

⁴⁵¹ 56 of 1986 section 3(1).

⁴⁵² 56 of 1986 section 6(2).

⁴⁵³ Diamonds Act 56 of 1986 sections 8(d), 17A and 17B(1)(d).

⁴⁵⁴ Diamonds Amendment Act 29 of 2005 section 1(p).

⁴⁵⁵ Diamonds Amendment Act 29 of 2005 section 1(o).

⁴⁵⁶ 29 of 2005.

⁴⁵⁷ Diamonds Amendment Act 29 of 2005 Preamble.

⁴⁵⁸ Diamonds Amendment Act 29 of 2005 section 1(o).

⁴⁵⁹ 29 of 2005.

⁴⁶⁰ GN R386 in GG 30942.

understanding the diamond trade structure. The Diamonds Amendment Act⁴⁶¹ has revolutionized the structures of the South African State as the custodian of the nation's diamond resources. It is important to understand the provisions of the Diamonds Act,⁴⁶² as amended by the Diamonds Amendment Act,⁴⁶³ have a direct bearing on the ultimate working of diamond sales within the South Africa.

The provisions of the Diamond Amendment Act⁴⁶⁴ are outlined in the preamble and the main objective of the Act is to provide for a more progressive statute that takes away some of the obsolete and unnecessary provisions of the Diamonds Act.⁴⁶⁵ It is created to establish a more regulated approach to diamond trade in order to ensure that the policy goals of broad-based socio-economic empowerment policy are implemented. This is done by giving the Minister more

⁴⁶¹ 29 of 2005.

⁴⁶² 56 of 1986.

⁴⁶³ 29 of 2005.

⁴⁶⁴ Act 29 of 2005 preamble. 'To amend the Diamonds Act, 1986, so as to define certain words and expressions and to amend and delete certain definitions; to establish the South African Diamond and Precious Metals Regulator; to provide for its objectives and functions; to provide for the Constitution of its Board and the management of the Regulator by the Board; to provide for the chief executive officer and other staff of the Regulator; to provide for the finances of the Regulator; to establish the State Diamond Trader; to provide for its objectives and functions; to provide for the Constitution of its Board and the management of the Trader by its Board; to provide for the chief executive officer and other staff of the Trader; to provide for the finances of the Trader; to require diamond producers to offer a percentage of all diamonds produced in a production cycle to the State Diamond Trader; to do away with the requirement that licensees have to display their names and other particulars at their business premises; to require a licensee to retain a note of receipt of purchase in respect of unpolished diamonds for five years and not only two years; to provide that only synthetic diamonds are exempted from export duty; to repeal the provision providing for the deferment of payment of export duty; to make it obligatory that the registering officer examine unpolished diamonds registered for export and verify particulars furnished in respect thereof; to adjust the amount of the fine payable if the value of an unpolished diamond as assessed on behalf of the Regulator exceeds the value of the diamond as specified by the exporter; to provide anew for the release of unpolished diamonds for export; to require an exporter to, within three months from the date on which an unpolished diamond has been released for export, submit proof that the proceeds of the transaction have been repatriated to the Republic; to make it obligatory that the registering officer examine polished diamonds registered for export and verify particulars furnished in respect thereof; to make it an offence to sell synthetic or enhanced diamonds without disclosing that they are synthetic or enhanced diamonds; to replace certain obsolete provisions and to delete others; and to empower the Minister to make regulations regarding guidelines for, and the implementation of, broad-based socio-economic empowerment; and to provide for matters connected therewith.'

⁴⁶⁵ 56 of 1986.

power to make such regulations as necessary in the industry to ensure the achievement of the diamond law objectives.⁴⁶⁶

This approach to regulated trade in the diamond sector is analogous to the regulation approach adopted in the National Ports Act⁴⁶⁷ which has similar objectives of ensuring fairness and regulated competition in the ports sector.⁴⁶⁸ This illustrates a trend in South Africa's management of national resources. It appears that the main aim of these developments in law is to ensure equitable access while retaining merit practices in these industries.

The relevant provisions related to the establishment of the Regulator can be found in Chapter II of the Diamonds Act.⁴⁶⁹ What is important to note is that the Regulator is a juristic person⁴⁷⁰ to which the Public Finance Management Act (PFMA)⁴⁷¹ is applicable. In terms of the preamble PFMA⁴⁷² is intended to regulate financial management in the national government and provincial governments ensuring that all revenue, expenditure, assets and liabilities of those respective governments are managed efficiently and effectively. The PFMA further provides expressly the responsibilities of persons entrusted with the management of those public funds.⁴⁷³ This is a further administrative check and balances system in the law in order to ensure that the functions of the Regulator are fully accounted for in a transparent manner in line with democracy.

⁴⁶⁶ Preamble. See 'and to empower the Minister to make regulations regarding guidelines for, and the implementation of, broad-based socio-economic empowerment; and to provide for matters connected therewith.'

⁴⁶⁷ 12 of 2005.

⁴⁶⁸ National Ports Act 12 of 2005 section 2 and 11.

⁴⁶⁹ 56 of 1986 section 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13.

⁴⁷⁰ Public Finance Management Act section 3.

⁴⁷¹ 1 of 1999.

⁴⁷² 1 of 1999.

⁴⁷³ Public Finance Management Act 1 of 1991 section 5(1)(a) and (b) which provides for the establishment of the National Treasury where the Minister of Finance is the head of such a treasury and the department or departments responsible for financial and fiscal matters. Section 5 must be read together with section 6(1) and (2) of the Act which provides for the functions and powers of the National Treasury.

The main objectives of the Regulator as clearly outlined in chapter one of this study are to ensure that the diamond resources of South Africa are exploited and developed in the best interests of the people of South Africa, to promote equitable access to and local beneficiation and compliance with the KPCS.⁴⁷⁴ The objectives herein outlined must now be taken and related directly to diamond sales transactions for the purposes of this chapter.

The objective of enhancing local beneficiation by the Regulator is important in the diamond industry. South Africa is a dual economy with features resembling third and first world economies.⁴⁷⁵ Traditionally the diamonds produced in South Africa were typically exported as raw materials and their value were generally benefited outside the Republic.⁴⁷⁶ This brought about the bare minimum of the total value that the product could fetch in the international markets.⁴⁷⁷

In response to the above trade scenario the Regulator is now tasked with the responsibility of ensuring local beneficiation of diamonds produced within the Republic in order to enhance South Africa's involvement in diamond trade.⁴⁷⁸ This means that South African diamond producers can be more skilled to produce a more finished product. This means all the revenue which such sales

⁴⁷⁴ Diamonds Act 56 of 1986 section 4(a), (b) and (c).

⁴⁷⁵ See Address by Mr. Tito Mboweni, Governor of the Reserve Bank of South Africa titled 'South Africa's Economic Policy Challenges' at the XVI meeting of the Central Banks Governors.' Club held in Irkutsk, Russia, 2 September 2006. The governor stated that South Africa, in terms of financial and banking services was ranked higher than some developed states such as Spain, United Kingdom, France and Ireland. (2006) 5.

⁴⁷⁶ Robinson I.C and Von Below M.A. *The Role of the Domestic Market in Promoting the Beneficiation of Raw Materials in South Africa* The Journal of the South African Institute of Mining and Metallurgy Vol. 90 no. 4 Apr. (1990) 91 p 92 - 94.

⁴⁷⁷ <http://www.dme.gov.za/ministry/Presentations/COM%20presentation%20to%20DME%20Beneficiation%20Launch%2031%2003%202009.ppt> 02 March 2010. Baxter R. Chief Economist Chamber of Mines, to the Launch of DME Draft Beneficiation Strategy *Facilitating Minerals Beneficiation in South Africa* 31 March (2009). In this paper is a useful definition of beneficiation as relates to raw materials where it is explained as follows: 'The term beneficiation, used broadly to describe the successive processes of adding value to raw materials from their extraction through to the sale of finished products to consumers, covers a wide range of very different activities. These include large-scale and capital-intensive operations like smelting and technologically sophisticated refining as well as labour-intensive activities such as craft jewellery'. Minerals Policy White Paper, October 1998.'

⁴⁷⁸ Diamonds Act 56 of 1986 section 5 and 15 as amended by the Diamonds Amendment Act 29 of 2005 read together with section 2 and 26 of the MPRDA.

and beneficiation can produce is ultimately kept within South Africa. It is submitted that with time South Africa will have a diamond cutting and polishing reputation that resembles countries with world-class skills such as Belgium⁴⁷⁹ and India.⁴⁸⁰

In practice this means the Regulator would have to accept and promote endeavors to provide world-class training and facilities to be invested in the local beneficiation industry in order to achieve this goal. The obvious benefits of job creation, skills development and value addition are now within reach of South Africa's diamond industry. This ultimate objective to be reached through statutory means ensures the development of the diamond industry for the best interests of South Africa. It is submitted that there is a sense of commitment by the State through this law to commit itself to investing necessary resources to enhance the nation's diamond trade.

The objective to promote the best interests of the people of the South Africa is captured through-out the Diamonds Act⁴⁸¹ as a prevalent theme. It is expressed clearly in the Act that when the Regulator is considering an application for any licence or permits under the Diamonds Act,⁴⁸² it must have due regard to the broad-based socio-economic empowerment Charter contemplated in the MPRDA.⁴⁸³ This is an important development theme for South Africa particularly in the Constitutional era.

⁴⁷⁹ http://diamonddepot.co.za/index.php?option=com_content&view=article&id=14&Itemid=10 02 March 2010. Belgium, China, India, Israel, Russia and the US, among other countries including some of the more experienced cutters in Southern Africa are among those who are known for their diamond cutting skills. 'Cutting a rough diamond takes great skill. A well-cut diamond reflects light within itself, from one facet to another, as well as through the top of the diamond, bringing out its spectral brilliance. The most popular cut is the 57 facet round brilliant. After a stone has been cut, it is then polished and classified again, this time by its cut, colour, clarity and carat weight, also known as the "Four Cs."'

⁴⁸⁰ *Ibid.*

⁴⁸¹ 56 of 1986.

⁴⁸² 56 of 1986 sections 4(a) and section 5(2)(a).

⁴⁸³ 28 of 2002 section 100.

The Regulator's legal responsibilities include, *inter alia*, considering applications for licences with the aim to achieve equitable access to and local beneficiation of South African diamonds.⁴⁸⁴ This task may be costly and expose the Regulator to tremendous public liability therefore it must insure itself against various risks and liabilities.⁴⁸⁵ The Regulator is responsible for appointing an expert in respect of market prices and for that person to be the State's diamond valuator and to advise the Minister of Minerals and Energy on related or incidental matters in diamond regulation.⁴⁸⁶ Further, no one in South Africa may trade in diamonds without a proper licence⁴⁸⁷ therefore the Regulator is in control of such licensing and will assist small scale miners with appropriate licenses so that they are able to participate in the formal diamond market economy.

The proper appointment of the State valuator is crucial in diamond sales so that the true market value of diamonds sold is correctly reflected. This must be done carefully so that no revenue is lost to South Africa through national trading endeavors. Improper valuations have plagued artisanal diamond diggers⁴⁸⁸ in many African countries⁴⁸⁹ as a result of the lack of proper returns being attached to diamond sales in those unregulated areas.⁴⁹⁰

The Regulator is crucial in the determination of the market price of diamonds through the use of government diamond valuator's expertise as stated in section 5(1)(c). This is most beneficial as it promotes a uniform standard for diamond pricing. This removes the danger of individuals and especially monopolies

⁴⁸⁴ Diamonds Act 56 of 1986 section 4(a), (b) and section 5.

⁴⁸⁵ Diamonds Act 56 of 1986 section 5(1)(b).

⁴⁸⁶ Diamonds Act 56 of 1986 section 4 and section 5(1)(a), (b), (c) and (d).

⁴⁸⁷ Diamonds Act 56 of 1986 section 20. The section provides expressly that, 'No person shall purchase any unpolished diamond unless-

(a) he or she is a licensee; or

(b) he or she is the holder of a permit referred to in section 26 (e).'

⁴⁸⁸ <http://www.worldlabour.org/eng/node/259> 29 October 2009.

⁴⁸⁹ www.un.org 29 October 2009. www.ddiglobal.org 29 October 2009.

⁴⁹⁰ Diamonds Act 56 of 1986. The proper valuation of diamonds under the Diamonds Act is well provided for under sections 5(1)(c) which provides for a Regulator appointed person with expertise in diamond valuations to act as a government diamond valuator. Sections 59B 5, 6, 7 and 8, sections 65, 65A and 72 also provides for the regulation of diamond valuations.

inequitably controlling, influencing and dominating the market in a manner that is contrary to the South African industrial and economic policies. These policies are aimed at increasing participation by small and new entrants, market accessibility and equity and fair competition. It is submitted that for larger diamond producers instead of stockpiling to influence the diamond markets, they may take the route of scaling down on mining operations so that the diamonds are left in the ground until the market is fit.

It has been beneficial to have a regulated equity determined diamond market in South Africa. Regulation has led to the prevention of the situation where a dominant producer is able to control the market using anti-trust⁴⁹¹ offensive methods. Practically to achieve this in an unregulated market, a dominant producer would keep elaborate diamond stock-piles of and starve the market of the stones until they are able to introduce them to the market at the value set by the dominant producer. This may also be done in collusion with another dominant producer.⁴⁹²

⁴⁹¹ Antitrust also known as anti-monopoly law which relates to a body of laws and regulations designed to protect trade and commerce from unfair business practices. wordnetweb.princeton.edu/perl/webwn 03 January 2009. See *American Natural Soda Ash Corporation and Another v Competition Commission and Others* 2005 (6) SA 158 (SCA) 167 A - E.

⁴⁹² Sivier L. *Competition Law Narrative Division X – Enforcement by the Regulatory Authorities Chapter 16 Fair Trading Act 1973 The Making of a Monopoly Reference to the Competition Commission* Competition Law Narrative extracted from the United Kingdom's Butterworths Competition Law Service par. E. (2007) 1. See Competition Act 89 of 1998. See Chapter 2A on complex monopoly conduct inserted as section 10A of the Competition Act and described as follows:

‘(1) Complex monopoly conduct subsists within the market for any particular goods or services if-

- (a) at least 75% of the goods or services in that market are supplied to, or by, five or fewer firms;
- (b) any two or more of the firms contemplated in paragraph (a) conduct their respective business affairs in a conscious parallel manner or co-coordinated manner, without agreement between or among themselves; and
- (c) the conduct contemplated in paragraph (b) has the effect of substantially preventing or lessening competition in that market, unless a firm engaging in the conduct can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.

(2) For the purposes of subsection (1) (b) 'conscious parallel conduct' occurs when two or more firms in a concentrated market, being aware of each other's action, conduct their business affairs in a cooperative manner without discussion or agreement.’

The powers of the Regulator are exercised within certain statutory limits. In terms of the Diamonds Act⁴⁹³ persons who feel aggrieved by the decisions of the Regulator with respect to the issuing of licences may appeal to the Minister.⁴⁹⁴ The Minister upon considering the appeal may confirm, set aside or vary the decision appealed against. Where appropriate the Minister may substitute the decision complained of with a decision that in his opinion ought to have been taken by the Regulator.⁴⁹⁵ This inherently means that the rules of natural and administrative justice apply. Such decisions may have to be tested against the Promotion of Administrative Justice Act.⁴⁹⁶ The underlying rationale is to promote equity and further socio-economic justice while at the same time ensuring that the industry continues to be competitive and profitable.

The court's interpretation of the appeal process⁴⁹⁷ was considered in *Mofschaap Diamonds (Pty) Ltd v The Minister for Minerals and Energy and Others*.⁴⁹⁸ The case dealt specifically with the review of a decision of an organ of State under the MPRDA and is distinguishable in that manner. However the court's interpretation and application of the provisions relating to this type of appeal serves as a useful guide to understanding the relationship between the Regulator and the Minister who may have to test its decisions in an appeal.⁴⁹⁹ The decision of the court above made the important point that an appeal procedure is only truly available when the State organs have acted independently in the decision making process not under the scheme of the deconcentration of public power.⁵⁰⁰

⁴⁹³ 56 of 1986 section 39(1)(2).

⁴⁹⁴ Diamonds Act 56 of 1986 section 39 (1). Such an appeal must be launched according to the prescribed manner within prescribed time limits section 39(2).

⁴⁹⁵ Diamonds Act 56 of 1986 section 39 (2).

⁴⁹⁶ 4 of 2000.

⁴⁹⁷ Diamonds Act 56 of 1986 section 39 (1)(2).

⁴⁹⁸ (3117/2006) [2007] ZAFSHC 51 (14 June 2007). See also *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd and Others* Case Number: 3215/06 in the High Court of South Africa (Orange Free State Provincial Division), judgment delivered on 13 December 2007.

⁴⁹⁹ Chapter 1.

⁵⁰⁰ See chapter one paragraph 1.4.2 headed as The Mineral and petroleum Resources Development Act 28 of 2002.

In terms of section 39(2) on appeal the Minister shall consider the appeal lodged by an aggrieved person and take the decision to confirm, set aside, vary the decision or substitute for that decision any other decision which the Regulator in the opinion of the Minister ought to have taken. It is clear that the appeal process to the Minister provided for in section 39 recognizes the need to view the Minister as independent of the Regulator and in this manner provides a system of ensuring that the Regulator's exercise of public powers is kept within the limits of fair administrative action.

In the interests of diamond trade, section 59(a) provides that the Regulator shall implement, administer and control all matters relating to the purchase, sale, beneficiation, import and export of diamonds. Section 59(b) provides that the Regulator shall establish Diamond Exchange and Export Centres (DEEC) which will facilitate all matters pertaining to diamond trade. The Regulator is therefore the central controlling body in these matters. It is submitted that the tenor of the Diamonds Act⁵⁰¹ is such that a self regulatory approach is favored in contrast to the command and control method. As such, the Regulator is in the best position to account for the specific needs of the industry and the best interests of the country in making decisions related to its duties and responsibilities. This means the Regulator can take decisions to direct that sales flow into a particular direction to ensure that the local markets are sufficiently supplied with diamonds.

Further in terms of section 75 of the Diamonds Act,⁵⁰² the Regulator in connection with the export of diamonds is endowed with powers to take a decision as to whether any diamond is an unpolished or a polished diamond. This provision may become relevant in cases where a partly processed diamond is to be imported or exported. It will depend on the finding by the Regulator whether that diamond is a rough one or not so that the correct law is applied in such a situation.

⁵⁰¹ 56 of 1986.

⁵⁰² 56 of 1986.

Section 95(1) places the Regulator in a unique and necessary position of influencing the content of regulations to govern various activities related to the diamond industry. This exemplifies delegated legislation whose contents are determined not by Parliament but by the Regulator who is closer to the diamond market. Of importance to diamond marketing is the setting of guidelines for broad-based socio-economic empowerment in terms of the existing mining laws or charters as well as any matter which the Minister may consider necessary or expedient to prescribe or regulate in order to achieve objects of the Diamonds Act.⁵⁰³ The Regulator can utilize this section to influence regulations that affect the export of diamonds. He or she can use this section to influence the local diamond trade and also adopt international trends and practices in the interests of the local diamond market.

The regulations mentioned in the preceding paragraph are crucial to the diamond sales aspect of the diamond industry. It is therefore essential to consider them carefully as they control the manner in which those involved in diamond sales are to conduct business. The regulations determine the implementation of equitable access regimes to the diamond market and beneficiation (an important aspect of the broad based socio-economic empowerment⁵⁰⁴ and the best interests of the people) in South Africa. The regulations are dated 2008 which means that the diamond industry has been rather slow in ensuring some of the equity goals that ought to have been introduced by regulation at an even earlier stage.

Apart from the objectives of the Regulator as contemplated in the Diamonds Act,⁵⁰⁵ the Regulator's functions with regard to diamond trade includes implementing, administering and controlling all matters relating to the purchase

⁵⁰³ Diamonds Act 56 of 1986 section 95(1)(a), (b), (c), (d), (e), (f), (g) and (h). Further section 96 provides that the Regulator shall to consult the Minister in respect of exercising its powers as the Minister determines periodically.

⁵⁰⁴ This is in line with, for instance, statutes such as Broad-Based Black Economic Empowerment Act 53 of 2003.

⁵⁰⁵ 56 of 1986 section 5(1) and (2) in particular.

and sale of diamonds.⁵⁰⁶ Further the Regulator is responsible for the establishment of Diamond Exchange and Export Centres (DEEC) which facilitate the buying of diamonds and matters connected with such activity.⁵⁰⁷ Since the diamond industry is regulated in this manner, it is submitted that the Regulator will promote a clear partnership between the public and private sector in the marketing of diamonds as intended in the MPRDA and the DME strategic planning endeavours.⁵⁰⁸

The DEEC framework requires that all rough diamonds intended for export must be offered via a tender process at a DEEC for sale.⁵⁰⁹ However, in the case of large producers, the Minister of Minerals and Energy (DME) may waive the requirement to offer all rough diamonds on the DEEC.⁵¹⁰ This waiver is, for practical reasons, to ensure that the DEEC tendering process is not overwhelmed by large volumes of very small rough diamonds.⁵¹¹ The activities of the DEEC appear to be accommodating the practical requirements of private business in order to apply the diamond regulations effectively.

⁵⁰⁶ Diamonds Act 56 of 1986 preamble, section 59 which provides that, 'The Regulator shall-
(a) implement, administer and control all matters relating to the purchase, sale, beneficiation, import and export of diamonds; and
(b) establish diamond exchange and export centres, which shall facilitate the buying, selling, export and import of diamonds and matters connected therewith.'

⁵⁰⁷ Diamonds Act 56 of 1986 section 59(b). www.sadb.co.za 23 November 2009. In terms of section 48A of the Act, 'All unpolished diamonds intended for export purposes must first in the prescribed manner be offered at a diamond exchange and export centre.'

⁵⁰⁸ www.sadb.co.za 23 November 2009.

⁵⁰⁸ <http://www.dme.gov.za/ministry/Presentations/COM%20presentation%20to%20DME%20Beneficiation%20Launch%2031%2003%202009.ppt> 02 March 2010. Baxter R. Chief Economist Chamber of Mines, to the Launch of DME Draft Beneficiation Strategy *Facilitating Minerals Beneficiation in South Africa* 31 March (2009).

⁵⁰⁹ Diamonds Act 56 of 1986 section 48A.

⁵¹⁰ Diamonds Act 56 of 1986 section 61(2A) read together with sections 74 and 74A. With regard to further exemption from the DEEC section 64 provides for temporary exemption from the diamond exchange and export centre if the diamond exported is removed, for example, for exhibition section 64(1)(a)(i).

⁵¹¹ TABLING OF THE DIAMOND EXPORT LEVY BILL, 2007 NATIONAL ASSEMBLY TREVOR A MANUEL, MP MINISTER OF FINANC 19 JUNE 2007 (Ministry of Finance). See also speech by Minister Lindiwe Hendricks, introducing the Diamonds Amendment Bill at the National Assembly. www.sadpmr.co.za 23 November 2009. Diamonds Act 56 of 1986 section 61(2A) read together with sections 74 and 74A.

The existing type of co-operation between the Regulator and the private sector in regulating diamond sales is not a partnership in the true sense because the Regulator must interact with the public and private sector in a manner that will be most beneficial for all in the diamond industry while still maintaining its role as a guardian of the industry.⁵¹²

The regulations⁵¹³ promulgated under the Diamonds Act⁵¹⁴ will be considered in depth below. These regulations have been amended by subsequent legal developments and are made by the Minister of Minerals and Energy, in consultation with the SADPMR.⁵¹⁵

The study of these legal consequences of the regulations have been used as a developmental tool to inform even other branches of industry on the best practice processes for a successful State appointed Regulator. It is submitted that although each industry's Regulator and ministerial or departmental consequences may be influenced by different industry peculiarities there are important legal themes in the ambit of the SADPMR which are common to many other South African industries. These include equity and access⁵¹⁶ to South Africa's natural resources for benefit of all in South Africa.

Regulation 2Z provides that in order to keep proper records of diamond sales every producer is required to have submitted a completed Form J(viii),⁵¹⁷ for diamond sales when involved in such sales as part of national or international

⁵¹² Diamonds Act 56 of 1986 sections 4, 5, 59, 75, 78, 79, 85 and 96.

⁵¹³ GN R680 in GG 10684 of 1 April 1987. Regulations published under any form of law are an important tool to bridge the gap between the objectives of a written statute and the 'how' or practical aspects of achieving those statutory objectives. Often regulations are promulgated once the department responsible for implementing that law has thoroughly consulted with the stakeholders and persons affected by that law within the Republic. The regulation then is implemented to deal with any *lacunae* in the law to make the statute possible to implement and to deal with any industry related contradictions.

⁵¹⁴ 56 of 1986.

⁵¹⁵ Diamonds Amendment Act 29 of 2005 preamble.

⁵¹⁶ Particularly Constitutional goals revolving around affirmative action and broad based socio-economic empowerment. Constitution of the Republic of South Africa Act, 1996 section 9(2), MPRDA section 100, Diamonds Act 56 of 1986 section 5.

⁵¹⁷ Annexure A to 4 April 2008 Regulations.

trade transactions. This form requires each producer to fully disclose its identification information together with a certified copy of the permit or right. Although this form is simple to complete and to submit, the consequences that follow it are crucial for the producer who intends to engage in diamond sales. The Regulator issues to the producer a unique registration number which must always be reflected in all engagements with the Regulator.

The unique registration number issued by the Regulator gives the persons involved in the diamond trade peace of mind because the transactions can be accounted for in a lawful manner. Traders who deal with such lawful diamonds are assured that the diamonds are KPCS certified diamonds.

It must be noted that there are other important diamond industry related forms marked in the regulations from Form J (i) – (vii) as required in terms of section 57 of the Diamonds Act.⁵¹⁸ The most crucial form that affects a diamond producer is Form J (viii) because it is a diamond register for a permit to sell diamonds.⁵¹⁹ Section 57 of the Diamonds Act⁵²⁰ provides for registers in respect of unpolished diamonds. The Act requires that every producer, manufacturer of synthetic (laboratory) diamonds, dealer or diamond beneficiator shall keep or cause to be kept the prescribed register to record prescribed particulars.⁵²¹

The availability and accessibility of the regulations and the necessary forms that will assist diamond producers to engage as diamond dealers are in compliance with the Constitution and Diamonds Act⁵²² ideals of access to information and necessary documentation to be readily available in the public domain. This is

⁵¹⁸ 56 of 1986 section 57(1) of the Act provides that, ‘Every producer, manufacturer of synthetic diamonds, dealer or diamond beneficiator shall keep or cause to be kept the prescribed register, in which shall be entered the prescribed particulars in respect of unpolished diamonds and polished synthetic diamonds.’

⁵¹⁹ GN R680 in GG 10684 of 1 April 1987 p 5 – 12. Section 13(h) of the regulations which provides that, ‘(h) Form J(viii) is a diamond register for a permit to sell, export and import unpolished diamond.’

⁵²⁰ 56 of 1986.

⁵²¹ Diamonds Act 56 of 1986 section 57(2), (3) provides for the time frames in which records are to be entered.

⁵²² 56 of 1986.

also in keeping with the Promotion of Access to Information Act⁵²³ which is aimed at giving effect to the Constitutional right of access to any information held by the State for the purposes of exercising or protecting rights.

Access to information allowing South Africa's private and public sectors to register as part of the diamond industry as contained in the regulations prove that the objectives of equity and access to diamond sales in order to secure participation by all the people in diamond industry are being addressed. However, the Regulator clearly has not over-prescribed how the industry should be regulated. This is an important aspect particularly when dealing with a resource that is limited⁵²⁴ and the danger is that the State must also control over-subscription to a limited resource industry.

2.3 The Regulator's Industry Report: Facilitating Diamond Sales

Having considered parts of the diamond regulations it is essential to follow up with a consideration of the SADPMR and its involvement in facilitating diamond sales. The information used in this part of the chapter is available in the public domain⁵²⁵ as part of the Regulator's 2008 Annual Report. The report forms a very important to the study of the activities of the SADPMR. It provides insight to the actual methods employed by the Regulator to facilitate diamond sales particularly regarding transparency and accountability on the part of the SADPMR.

The Executive Committee chaired by the Chairperson of the Board sits at least four times a year as may be necessary in order to monitor the performance of the

⁵²³ 2 of 2000.

⁵²⁴ The issue of the recognition of limited availability of resources was raised in the (*Phambili II*) *Bato Star Fishing (Pty) Ltd v Minister of Environmental affairs and Others* 2004 (4) SA 490 (CC). The court *in casu* was considering equitable access by all to the South African hake industry. The court stated that all access to national resources must be granted according to the availability of the resource to be allocated. In this case the court used the measure of the Total Allowable Catch (TAC) as a descriptive measure to determine whether or not quotas given to the industry participants in this case were fair in the circumstances.

⁵²⁵ www.sadpmr.co.za 27 October 2009.

SADPMR. The Board ensures that matters pertaining to the diamond industry are in line with policy and the Executive Committee recommends proposals for adoption to the Board.⁵²⁶

There is also a Finance Committee, an Audit and Risk Committee and a Technical Committee as well as an additional Management Committee (MANCO) which consists of executive management, line managers and senior staff members as established in September 2007 for the sole purpose of involving senior staff in the formulation and revision of policies and guidelines and these proposals are made as recommendations to respective Board Committees. It is clear that with a management structure with vast expertise the SADPMR is able to successfully regulate the industries pertaining to it. To oversee the SADPMR's legal compliance issues, the Regulator has a Legal Services Division which was established on 1 July 2007 and deals with all matters of a legal nature on behalf of the Regulator.⁵²⁷

It is important to note that the diamond industry allowed a transitional period permitting old licences to continue while this new regulatory regime was coming into place and this period lasted until the 30 June 2008 dead-line date.⁵²⁸ The 2008 report shows that from 1 July 2007 to 31 July 2008 the largest amount of licences issued were that of diamond dealers, diamond beneficiation and export permit to diamond beneficiators. In 2008 there were fewer applications for licences to carry on a diamond trading house or diamond research and in the same period there were no applications for permits to possess unpolished diamonds.⁵²⁹ These permit and license statistics inform the diamond sales trends in South Africa.

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.*

⁵²⁸ South African Diamond and Precious Metals Regulator *Annual Report* (2008) 14.

⁵²⁹ South African Diamond and Precious Metals Regulator *Annual Report* (2008) 14 – 17.

This report illustrates a very interesting picture for the value of the diamond particularly in relation to the national economy. The report highlights the importance of making a full account of the possession of unpolished diamonds for in the South African State's record books.⁵³⁰ The report also illustrates that there is hope for the local beneficiation industry as more licences were issued and this is in line with State policy for improving the market in that area.⁵³¹ Support for local beneficiation illustrates that the Regulator is behind the proposals for State supported marketing of South African brands and hallmarks.

True to its mandate in terms of the Diamonds Act⁵³² the SADPMR has established the South African Diamond Exchange and Export Centre in terms of the Diamond Amendment Act⁵³³ and the centre has been in operation since 14 January 2008.⁵³⁴ This is a very important aspect of South African law in regulating diamond sales. The DEEC hosts diamond tenders for various mines and independent licensees and from its inception a significant number of goods and viewers have passed through the DEEC. In March 2008 alone after only three months of the operation of the DEEC a total of 14 263, 52 carats qualified for export.⁵³⁵

It is important to note that the DEEC also records and monitors market behavior by recording all the statistics pertaining to the number of parcels that are received by the DEEC, the number viewers and the amount of exports made. The statistics on diamond trade as reported from the year 2007 reveal that a total number of 14 953 664, 89 carats of large scale diamonds were sold to the value of R 8 104 415 793.00.⁵³⁶ In medium scale diamonds 592 602, 32 carats were sold to the value of R 498 661 005.00⁵³⁷ and in small scale diamonds 142 898,

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.* See aims of the SADPMR www.sadpmr.co.za 27 October 2009.

⁵³² 56 of 1986 section 59.

⁵³³ 30 of 2005.

⁵³⁴ South African Diamond and Precious Metals Regulator *Annual Report* (2008) 1 – 17.

⁵³⁵ South African Diamond and Precious Metals Regulator *Annual Report* (2008) 23 – 24.

⁵³⁶ South African Diamond and Precious Metals Regulator *Annual Report* (2008) 25 – 26.

⁵³⁷ *Ibid.*

75 carats were sold to the value of R 292 915 105.00.⁵³⁸ Statistically the report of the SADPMR reveals that from the period of the year 2000 to 2007 there has been a steady trade in large scale diamonds.⁵³⁹ From the statistics it would appear that the diamond industry is still proving to be a sustainable economic activity that brings significant revenue into the country.

As previously mentioned one of the threats to legitimate diamond sales is the existence of criminal elements which contrary to law are attempting to deal in diamonds.⁵⁴⁰ The SADPMR is aware of this issue and as a result they have provided rough diamond valuation services to the South African Police Service.⁵⁴¹ In both Kimberley and Johannesburg diamond valuation services were provided to the Police for the valuation of diamonds that were confiscated in illegal transactions and for the audit of State diamonds that were used in operations against the suspected criminals.⁵⁴²

It is submitted that dissemination of information concerning equal access to the diamond industry will prove helpful for dealing with such undesirable elements. It is clear that the Diamonds Act,⁵⁴³ the Diamonds Amendment Act,⁵⁴⁴ the regulations under these statutes and the Constitution and other industry specific law such as the MPRDA, all serve the purpose of encouraging all groups in South Africa as natural or legal persons in the diamond industry by obtaining proper licences to avoid black market sales.

The SADPMR also reports a successful application of the KPCS which is an international effort to combat trade in conflict diamonds. This has been very important for compliant countries as they are able to benefit from legitimate diamond sales and benefit also through taxes and duties payable. South Africa

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

⁵⁴⁰ South African Diamond and Precious Metals Regulator *Annual Report* (2008) 34.

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*

⁵⁴³ 56 of 1986.

⁵⁴⁴ 29 of 2005.

has had successful trade with other KPCS compliant countries such as Australia, Brazil, Botswana, Canada, Central African Republic, Chinese Taipei, China (The People's Republic), Democratic Republic of Congo, India, Israel, Lebanon, Malaysia, Mauritius, Namibia, Sierra Leone, Switzerland, Tanzania, Togo, United Arab Emirates, US of America and Zimbabwe.⁵⁴⁵

In the endeavor to monitor KPCS compliance South Africa through the support and initiatives of the Regulator is also involved with the following working groups namely, the Working Group of Diamond Experts (WGDE), Working Group on Statistics (WGS), Working Group on Monitoring (WGM), Working Group of Alluvial and Artisanal Producers (WGAAP) and the Participation Committee (PC).⁵⁴⁶ These working groups are chaired by various countries and they also form international groups that share information and ensure that the KPCS countries maintain standards in terms of the scheme. Recently Liberia was welcomed as the newest member of the KPCS.⁵⁴⁷

It is interesting to note that the SADPMR supports and encourages uniform dealing with diamond resources and sharing of knowledge with other African producers. It has been reported that the DRC has indicated its desire to move for diamond legislation that is similar to that of South Africa which is viewed as having benchmark diamond legislation.⁵⁴⁸

2.4 The State Diamond Trader

One of the most important features of diamond sales in South African law is the involvement of the statutory creature in the form of the State Diamond Trader.⁵⁴⁹

It is important to note that the mining giant De Beers assisted the SDT to set up the operations of the SDT in accordance with the requirements of the Diamonds

⁵⁴⁵ South African Diamond and Precious Metals Regulator *Annual Report* (2008) 35.

⁵⁴⁶ South African Diamond and Precious Metals Regulator *Annual Report* (2008) 37.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ Diamonds Act 56 of 1986. State Diamond Trader established in terms of section 14 and definition of State Diamond Trader inserted by section 1 of the Diamonds Amendment Act 29 of 2005.

Act.⁵⁵⁰ This act by De Beers exemplifies initiatives of broad-based socio-economic empowerment in assisting the country to sell its own diamonds.⁵⁵¹ It is submitted that there has been a generally positive relationship created between the State and the private sector in ensuring that the State policy on minerals is achieved.

The SDT is an organ of State to which the Public Finance Management Act⁵⁵² is also applicable. This means that financial dealings pertaining to the SDT are subject to the scrutiny the South African Auditor General. The objectives and functions of the SDT are very similar to that of the Regulator, in that it is to promote equitable access to and local beneficiation of the Republic's diamonds. It must comply with the KPCS but it is a body with a distinguishable mandate and that is to trade in diamonds.⁵⁵³

In terms of the Diamonds Act,⁵⁵⁴ the SDT may acquire diamonds from other diamond producing countries and enter into agreements with any person including the State for the performance of any function or the rendering of a particular service. The SDT is controlled by a Board whose members are appointed by the Minister.⁵⁵⁵ In terms of the Act⁵⁵⁶ the Minister has the power to appoint a chief executive office in concurrence with the SDT Board and such a chief executive officer will manage and control the daily functioning of the SDT subject to the directions and instructions issued by the Board.⁵⁵⁷

The SDT is by nature a State business entity that engages in buying and selling of diamonds. The SDT is empowered to acquire and supply unpolished

⁵⁵⁰ 56 of 1986. See www.debeersgroup.com 20 August 2008.

⁵⁵¹ www.debeersgroup.com 20 January 2007. See internal report by Smith N. *De Beers Reveals Canny BEE Deal* 9 November (2005).

⁵⁵² 1 of 1999.

⁵⁵³ Diamonds Act 56 of 1986 Part 2 section 15 and 16.

⁵⁵⁴ 56 of 1986 section 16(2)(a);(b).

⁵⁵⁵ The Minister is also entitled to dissolve such a Board and appoint a new Board if good cause is shown.

⁵⁵⁶ Diamonds Act 56 of 1986 section 17G.

⁵⁵⁷ Diamonds Act 56 of 1986 Part 2 section 17 (whole).

diamonds to local diamond beneficiaries.⁵⁵⁸ The SDT is also empowered to promote the diamond industry through research, support and development.⁵⁵⁹ The provision was inserted into the Diamonds Act⁵⁶⁰ by the Diamonds Second Amendment Act⁵⁶¹ which illustrates a trend or effort by the State to continue its self development in being able to deal efficiently with diamond trade.

In terms of the Diamonds Act⁵⁶² there is an important provision for the diamond industry in terms of the obvious legal and commercial implications of the State's stringent control and involvement in the industry. This includes the obligation on diamond producers to offer unpolished diamonds to the SDT.⁵⁶³ In terms of this provision diamond producers are to offer unpolished diamonds to the SDT. The amount of diamonds produced in a production cycle to be offered to the SDT for buying and local beneficiation is periodically determined by the Minister and published in a *Government Gazette*. This means that the individual diamond producers must constantly update themselves with the latest figures as determined by the Minister for the amount of diamonds they are to offer to the SDT.⁵⁶⁴

In terms of the Diamonds Act⁵⁶⁵ the percentage of diamonds contemplated as diamonds to be offered to the SDT may be based on carats and value and will form a representative sample of the production cycle of any diamond producer. This is almost a picture of a 'first fruits offering' of a diamond producer to the State however within the boundaries of an equitable commercial transaction. Therefore the State will protect and give permissions and authorizations to producers as long as such producers respect at all times the State's custodianship over the diamonds. The custodianship also includes the ability of

⁵⁵⁸ Diamonds Act 56 of 1986 section 59A(a).

⁵⁵⁹ Diamonds Act 56 of 1986 section 59A(b).

⁵⁶⁰ 56 of 1986.

⁵⁶¹ 30 of 2005.

⁵⁶² 56 of 1986 section 59B.

⁵⁶³ *Ibid.*

⁵⁶⁴ Diamonds Act 56 of 1986 section 59B(1)(a).

⁵⁶⁵ 56 of 1986 section 59B(1)(b).

the State to investigate the minerals mined and participate in the trade of such diamonds.

The process of offering diamonds to the SDT by a diamond producer can be succinctly outlined as follows. At the end of every production cycle a diamond producer must offer at a fair market value all its unpolished diamonds produced in that production cycle (with only a percentage of those diamonds to be considered by the SDT in accordance with section 1(a)(b)) to enable the SDT to inspect those diamonds for the purpose of selecting some of the diamonds for buying.

The SDT will have one week to buy the selected diamonds after the government diamond valuator has verified the diamond prices offered by the diamond producer or if the producer and government valuator cannot agree on the prices, the Regulator⁵⁶⁶ will appoint an independent valuator to fix a price regarded as a fair market price. If the SDT fails to purchase the diamonds offered within the prescribed one week period, the producer may withdraw all its diamonds.⁵⁶⁷

Having established that the SDT is expected in law to supply unpolished diamonds to local beneficiaries and not dealers or exporters,⁵⁶⁸ the SDT's clientele are limited in this regard. The aim is for the SDT to invest in the local diamond market. In practice it has been reported by the SDT's executive that the aim is to obtain a portion of the large unpolished diamond production of South Africa⁵⁶⁹ to invest it in the local markets in order to facilitate developmental support services.⁵⁷⁰

⁵⁶⁶ In terms of section 59B(8) if the Regulator has had to step in to appoint an independent diamond valuator, the cost of such valuation is borne by the diamond producer and the SDT equally. There appears to be an unintended valuation costs incentive for agreeing to the fair market value as determined by the government diamond valuator without involving the Regulator.

⁵⁶⁷ Diamonds Act 56 of 1986 section 59B(1), (2) (3), (4), (5), (6), (7) and (8).

⁵⁶⁸ Diamonds Act 56 of 1986 section 59A as per Diamond Amendment Act 29 of 2005 and Diamond Amendment Act 30 of 2005, which effectively extends the power of the Regulator and the SDT.

⁵⁶⁹ www.statediamondtrader.gov.za 25 February 2009.

⁵⁷⁰ These services include access to training, development strategies, finance and access to national as well as international jewellery markets.

In terms of the SADPMR's 2007 annual report, a public statement providing the following was made:⁵⁷¹

'As the fourth largest diamond producer in terms of value worldwide (behind, Botswana, Russia and Canada), South Africa can proudly say that it is in the centre of the constantly changing global diamond industry. Our knowledge and experience of the diamond industry enables us to impact positively in the on-going changes. Our position in international diamond affairs is well articulated in conference presentations, diamond industry publications and the electronic media. Our ultimate goal is to further enhance our leadership role in international diamond affairs and to build a globally competitive diamond industry that is capable of growing the industry and the wealth of its employers and employees. We maintain our position as the fourth largest diamond producer. During the year under review, we produced approximately 13 million carats valued at US\$1.2 billion (ZAR7.8 billion). Over 50% (by value) of diamonds we produced are economic to cut and polish in South Africa. Our cutting and polishing industry is respected and competitive in beneficiating rough diamonds of greater value, where the cost of manufacturing is less than the polished diamond price. The industry employs 28 000 people: 13 000 in mining; 9 000 in jewellery retail; 3 000 in jewellery manufacturing; 2 100 in cutting and polishing and 900 in sorting and valuing diamonds. The average

⁵⁷¹ South African Diamond and Precious Metals Regulator *Annual Report* (2007)
<http://www.sadpmr.co.za/UploadedFiles/58abf416735a4ed2a249dfd818e41e1c.pdf> 08 March 2010.

cost of labour in South Africa can be compared to that of Israel and Belgium. Going forward the South African diamond industry needs to focus on improving levels of beneficiation and access to rough diamonds. The government is currently finalising a piece of legislation that is aimed at enforcing the promotion of equitable access to and beneficiation of our diamond resources. This legislation is aimed at setting a clear mandate for the South African Diamond Board.'

The diamond industry by its nature is one that is closed and highly protected especially in the light of the fact that those already benefiting from it may not necessarily wish to share the benefits derived from such a resource. Therefore it is up to the State to find equitable means to allow interested and qualifying peoples of South Africa to become part of the industry. While empowering the people through diamond trade laws the State has also engaged in a form of social engineering to root out unfair competition in the industry. It is submitted that South African diamond laws may be used as an African bench-mark to show how the State can control the country's resources for the benefit of all peoples.

It is clear that without these Constitutional developments and their implementation, the diamond industry might have remained closed to new entrants. This would have left local beneficiators under-prepared when attempting to compete with international markets as a result of lack of development or State investment in local beneficiation. It is recommended therefore that the Regulator and the SDT should continue to make recommendations for providing more incentives for the continual enhancement of the local beneficiation so that South Africa's diamond products can successfully fly the South African flag in the international markets.

2.6 The Impact of the Diamond Export Levy (Administration) Act 14 of 2007 on Diamond Sales

The promulgation of the Diamond Export Levy (Administration) Act⁵⁷² did not come about without serious debate and consideration as it radically altered the position pertaining to the supply of diamonds to the local market for beneficiation. The Diamond Export Levy (Administration) Act⁵⁷³ which came into effect on 1 November 2008 came about as a result of the need to further regulate the diamond industry. On 23 August 2007 the National Assembly held a debate with the Minister of Finance concerning what was then 'The Diamond Export Levy Bill, 2007.'⁵⁷⁴ What essentially emerged from this debate is that the imposition of an export levy on rough diamonds as contained in the Diamonds Act⁵⁷⁵ was insufficient under the Constitutional dispensation and therefore a separate Money Bill was required.⁵⁷⁶

It was established during the Parliamentary debate concerning the Diamond Export Levy Bill, 2007, which the intention of the imposition of an export levy on rough diamonds was to facilitate adequate and regular supplies of rough diamonds to local cutters and beneficiators.⁵⁷⁷ In terms of the Diamonds Act,⁵⁷⁸ prior to amendments in line with the Diamond Export Levy (Administration) Act,⁵⁷⁹ the export levy on rough diamonds was set at fifteen per cent with generous and open-ended exemptions. It was proposed in the debate that the Diamond Levy Bill, 2007 would reduce the export levy on rough diamonds to five

⁵⁷² 14 of 2007.

⁵⁷³ 14 of 2007.

⁵⁷⁴ See National Assembly Debate Minister of Finance (MP) dated 23 August 2007. This debate is helpful in clarifying the South Africa's interests which were to be protected under the proposed Diamond Export Levy Bill.

⁵⁷⁵ 56 of 1986, particularly in light of the amendments made to the Diamonds Act in 2005 by the Diamonds Amendment Act 29 of 2005 and the Diamonds Second Amendment Act 30 of 2005.

⁵⁷⁶ National Assembly Debate Minister of Finance (MP) dated 23 August 2007.

⁵⁷⁷ This terminology suggests that the government had to create a legislative framework to direct the flow of rough diamonds into South Africa to be accommodated by local capacity. This means that the bill contained certain incentives that would allow more rough diamonds to be beneficiated locally.

⁵⁷⁸ 56 of 1986.

⁵⁷⁹ 14 of 2007.

per cent but with tightened relief provisions in order to increase the effectiveness of the implementation.⁵⁸⁰

The Diamond Export Levy Bill, 2007, proposed the following relief measures or exemptions (which are incentives) that would fall in line with local demand as there would be no need to force diamonds into the local market beyond its capacity. The incentive based approach to regulate the levy is meant to encourage producers to supply the local market with rough diamonds and the remainder can be exported tax free. Secondly, the Diamond Export Levy Bill, 2007, made reference to three types of producers. The large producers, whose annual sales is in excess of R3 billion; the medium producers, whose annual sales are between R20 million; and R3 billion and small producers, whose annual sales do not exceed R20 million. In the case of small producers there are anti-avoidance measures which would prevent producers from splitting sales across several controlled companies for purposes of qualifying as small producers and thereby avoiding the levy.⁵⁸¹

The debate surrounding the diamond Export Levy Bill, 2007, also dealt with the issue concerning the capacity of local beneficiators to handle diamonds by providing relief to them as well. It was accepted that it is not always possible for a diamond beneficiator to cut and polish 100 per cent of the diamonds it has purchased. In such instances the Regulator may grant a beneficiator permission to export rough diamonds if the local beneficiator will cut and polish at least 80 per cent of the diamonds it has purchased. Upon issue of such permit, the diamond beneficiator is exempt from the export levy in respect of the 20 per cent

⁵⁸⁰ National Assembly Debate Minister of Finance (MP) dated 23 August 2007. See section on revised levy rate.

⁵⁸¹ The relief measures proposed in the bill were as follows; for large producers the Minister of Minerals & Energy may waive the requirement to offer all rough diamonds on the DEEC further, if a large producer has met certain conditions, such a large producer would be exempt from the diamond export levy. Medium producers can obtain relief from the diamond export levy if 15 per cent of that producer's total annual gross sales are to local diamond beneficiators. Small producers may have the exemption granted to them provided that their total annual sales do not exceed R20 million.

remainder or off-cuts that may be exported.⁵⁸² This regulatory framework is a classic example of a plausible model for regulated competition in the diamond industry.

The debate around the Diamond Export Levy Bill, 2007, acknowledged that the historical context and the nature of how the local diamond market players operate shows that there is a higher local beneficiation requirement on large producers. This means that in addition to the requirement to sell a certain percentage of their output to the SDT, usually ten per cent, large producers also have a forty per cent local sales requirement, whereas medium producers have a fifteen per cent requirement and small diamond producers simply offer their diamonds to the DEEC.

The main point of the export levy as captured in the Diamond Export Levy Bill, 2007, is that it would not be tax deductible for income tax purposes (because of its penalty or punitive nature). This is because it is a levy that can be fully avoided if producers meet the requirements necessary to supply local beneficiators. This means that the diamond export levy in essence operates as a type of penalty for a producer who fails to meet the local supply requirements.

The bill was subsequently enacted in the form of the Diamond Export Levy (Administration) Act.⁵⁸³ It will therefore be important in light of diamond sales law to consider the effects of some of its provisions on South African diamond trade. The Act is essentially concerned with the regulation of the export levy on unpolished diamonds (excluding synthetic diamonds),⁵⁸⁴ probably because of the obvious trade value involved in the two different types of diamonds.

⁵⁸² See parts 1 – 4 of debate.

⁵⁸³ 14 of 2007.

⁵⁸⁴ Preamble.

The Diamond Export Levy (Administration) Act⁵⁸⁵ must be read in conjunction with the Income Tax Act⁵⁸⁶ and the Diamonds Act⁵⁸⁷ particularly when assigning the meaning of words or expressions unless the context is clearly contrary. In terms of the Diamond Export Levy (Administration) Act⁵⁸⁸ persons who qualify to register with the Commissioner for the South African Revenue Service for the purposes of this Act are clearly defined and relate to persons involved in diamond trade, for instance, producers, diamond dealers, diamond benefactors and holders of diamond export permits. By virtue of the undertakings or entities to which the Diamond Export Levy (Administration) Act⁵⁸⁹ applies, it is clear that it is a law that has an impact in the diamond industry, particularly sales (exports). This explains the expedient attention and activity around its creation.

The Diamond Export Levy (Administration) Act⁵⁹⁰ expressly provides for an assessment period that is determined by whether the registered person involved is a natural⁵⁹¹ or juristic person.⁵⁹² This distinction is in line with principles of income tax law where companies and individuals have distinguishable tax assessment periods depending on the financial year end of each institution. However, it is the prerogative of the Commissioner to increase or decrease the assessment period.⁵⁹³ The Diamond Export Levy (Administration) Act⁵⁹⁴ provides for the maintenance of records of registration, import and export of unpolished diamonds, their description and value and retention of all documented records the in prescribed manner relating to exemptions and other commercial

⁵⁸⁵ 14 of 2007.

⁵⁸⁶ 58 of 1962. This means that the levy payable is calculated subject to the assessment periods as determined by the Income Tax Act 58 of 1962 and further provided for within the Diamond Export Levy (Administration) Act 14 of 2007.

⁵⁸⁷ 56 of 1986.

⁵⁸⁸ 14 of 2007 section 2 and 3.

⁵⁸⁹ 14 of 2007.

⁵⁹⁰ 14 of 2007.

⁵⁹¹ Diamond Export Levy (Administration) Act 14 of 2007 section 4(2)(a).

⁵⁹² Diamond Export Levy (Administration) Act 14 of 2007 section 4(2)(b).

⁵⁹³ Diamond Export Levy (Administration) Act 14 of 2007 section 4. Section 5 of the same provides for payment of the levy in accordance with the return submitted in terms of section 4.

⁵⁹⁴ 14 of 2007 section 7.

transactions relating to the submission of returns under this Act.⁵⁹⁵ Clearly this provision is necessary for evidentiary purposes and accountability in diamond sales and levies.

It is not intended here to delve into the Diamond Export Levy (Administration) Act⁵⁹⁶; however, a few aspects thereof have been pointed out in order to insightfully study the structure of the Act and its impact on the diamond sales aspect of the diamond regulatory framework in South Africa. It has been established in law that the purpose of the export levy is mainly regulatory in nature and not intended for the purpose of raising revenue. The raising of revenue may be achieved through import credit and exemptions only if deemed necessary for instance to fund the activities of the Regulator. However, where the Regulator is running on budget there is no need to raise revenue from export levies.

One of the crucial provisions in the Diamond Export Levy (Administration) Act⁵⁹⁷ is that it provides for diamond producers or diamond beneficiators to elect⁵⁹⁸ in respect of an assessment period that any person buying an unpolished diamond at a DEEC from that producer or diamond beneficiators during that assessment period is not subject to a levy in respect of that diamond.⁵⁹⁹ This election must be submitted to the Commissioner for the South African Revenue Service in the assessment period immediately preceding the assessment period for which that election will apply.⁶⁰⁰

⁵⁹⁵ Diamond Export Levy (Administration) Act 14 of 2007 section 7(1).

⁵⁹⁶ 14 of 2007.

⁵⁹⁷ 14 of 2007.

⁵⁹⁸ Pursuant to the Diamond Export Levy (Administration) Act 14 of 2007 section 6 of the which provides for the form, manner and place to be determined by the Commissioner for the purposes of registrations, returns, forms etc.

⁵⁹⁹ Diamond Export Levy (Administration) Act 14 of 2007 section 8(1), which provides as follows: 'Notwithstanding section 2 (1) of the Levy Act, any producer or diamond beneficiator may elect pursuant to section 6 of the Levy Act in respect of an assessment period that any person purchasing an unpolished diamond at a diamond exchange and export centre from that producer or diamond beneficiator during that assessment period is not subject to the levy in respect of that diamond.'

⁶⁰⁰ Diamond Export Levy (Administration) Act 14 of 2007 section 8(2).

The election is granted so long as it is within a prescribed format and it allows an encouragement of buyers of diamonds from the DEEC. The rest of the Diamond Export Levy (Administration) Act⁶⁰¹ provides for the manner that assessments are to be determined, time limits applicable to them, the interests, refunds and application of the Income Tax Act⁶⁰² while the schedule to the Diamond Export Levy (Administration) Act⁶⁰³ provides a table for the amendment of laws as expressly provided for in the third column of the table in the Schedule.⁶⁰⁴ For purposes of assessing compliance with certain conditions diamond producers are able to consult the *Government Gazette* periodically to ensure adherence to regulations established in this statute.

2.7 Impact of Certain International Conventions on Diamond Sales

By virtue of their commercial nature as subjects of international trade, diamonds are subject to international law of sale of goods. The Conventions that are relevant to diamond sales for the purposes of this subject include the Uniformity of International Sale Laws Under the United Nations Convention on Sale of Goods, 1980 (CISG), South African Law on International Agency and South African Legislation On Cross-Border Insolvency. Each aspect of these international instruments will be considered in depth in the dedicated subsequent chapters of this study; however, for the purposes of this chapter it is important to note the potential application of these instruments of diamond sales law in the international context.

⁶⁰¹ 14 of 2007.

⁶⁰² 58 of 1962.

⁶⁰³ 14 of 2007.

⁶⁰⁴ See amended sections of the Diamonds Act 56 of 1986 as contained in the Levy Act Schedule, e.g. section 1, definition of unpolished diamond, section 60 relating to export an import of unpolished diamonds, section 61A registration of unpolished diamonds for import, section 44 temporary exemption from diamond exchange and export centre, section 65A examination and valuation of unpolished diamonds for import, section 67 fine in case of difference in values section 69B release of unpolished diamonds for import. The Diamonds Amendment Act 29 of 2005 is also amended by repeal of section 66 and 68 and the Diamonds Second Amendment Act 30 of 2005 is also amended by the insertion of section 74 in the form of section 74A dealing with relief for certificated purchases.

2.8 Conclusion

This chapter elucidated the regulatory framework of the core aspect of the diamond industry particularly the sales element. What emerges from the overview is that there are national laws that have set up clear regulations on how the import and exports or international trade in diamonds ought to be approached. The first point that comes across clearly in South Africa is that there is a regulated model of diamond sales. This regulated model of sales is controlled at the helm by the SADPM Regulator and the SDT. These State bodies are crucial to ensuring that the diamond related Constitutional goals are achieved in local markets as well as international markets.

Considering that all market participants are by nature competitors, this chapter has provided the relevant insight on how fair competition can be achieved in diamond sales and local diamond beneficiation. It has also emerged from the study that the regulatory framework as reflecting the Constitutional values has assisted diamond stakeholders to participate freely on the market without infringing on the right of other market entrants without compromising the market integrity of the diamond industry.

Further, this chapter provides an academic insight on the State's role in ensuring that diamond sales are handled with the strictest accountability from the State's perspective. Through statutorily prescribed means of registering diamonds to be sold, accountability and oversight of all diamonds by the South African State is plausibly achieved. The most important contribution being in the tax incentives provided to producers who participate in State efforts to enhance the local diamond industry.

In conclusion it is submitted that the State bodies created in the Diamonds Act⁶⁰⁵ are clearly identifiable with their specific mandates and this allows for optimal structures that regulate diamond sales law in South Africa. It is also submitted

⁶⁰⁵ 56 of 1986.

that the law reflects measurable processes to ensure equitable access to diamond market. It is submitted that South Africa reflects diamond trade laws that are extremely sophisticated and it is submitted that with participation of new groups in the private sector, the diamond sales aspect will be enhanced for the benefit of the industry, the economy and various diverse groups involved.

Chapter 3: De Beers and its Participation in South African Law

3.1 Introduction

In the South African diamond industry, whether it is mining, exploration or trade, the contribution made by the De Beers⁶⁰⁶ family of companies has been crucial in the development of the diamond sector. It is therefore essential to consider the extent of De Beers', general participation, influence where and involvement in the reforms of South African laws on diamonds. This producer based case study for the application of South African diamond laws as they have developed over time.

This chapter aims at providing insights on the practicalities of legislative measures now applicable to the diamond industry particularly where a prominent diamond producer is involved. What will be evident in this chapter is the manner in which De Beers while being hosted by South Africa has showed commitment to the rule of law of the country by adhering to legal principles as illustrated in their dealings with tax law, labour law, patents laws, commercial law, environmental law and maritime law all of which are important to the diamond industry.

The diamond industry, through efforts of diamond entities such as De Beers is recognized as having added to or influenced diamond regulations. The company has made a significant contribution to the socio-economic status of South Africa because of the vast amount of human resource that the company utilizes.

De Beers achieved a successful presence at the forefront of exercising economic rights in the diamond industry as well as the respect of the rule of law particularly, in respect of unfair discrimination. De Beers has partnered with the State to

⁶⁰⁶ For the purposes of this chapter the use of the identification 'De Beers' is a general and generic term to identify the diamond producer being discussed in this chapter. For correct reference to juristic persons forming part of De Beers, kindly refer to www.debeersgroup.com 16 September 2008.

ensure that mineral resources are accessible to all the peoples of South Africa through various BEE partnerships.⁶⁰⁷

It is clear that De Beers is a diamond producer that is in transformation and this must be acknowledged and studied. To define the meaning of transformation of a pioneer previously white owned entity according to Constitutional principles, the case of *(Phambili II) Bato Star Fishing (Pty) Ltd v Minister of Environmental affairs and Others*⁶⁰⁸ is a useful guide. The court stated that when measuring transformation of a company, one must determine the ownership, distribution of wealth created through access to resources and the extent to which the company in question employs people from historically disadvantaged sectors of community.

This chapter will be considering some of these transformational aspects of De Beers. It is submitted that although necessary to employ black people in a previously white dominated industry or company it also injures the dignity of such employed black people to be paraded just for the sake of proving that a company is complying with legislation. True transformation will come when the law no longer forces the employment of black people but such hiring takes place naturally on merit and hard work which the peoples of South Africa are perfectly capable of with the right educational tools and skills development. This applies by analogy to the employment and empowerment of women.

The influence and involvement of De Beers will be considered in this chapter in order to dismiss past notions that the involvement of De Beers in diamond industry is just another vehicle for upholding dominant capitalist ideals. Prior to the 1994 elections transformation and the upliftment of black peoples would have been the last priority for many of the diamond companies, however this is no longer the problem. The participation of De Beers in South African laws illustrates

⁶⁰⁷ DBCM is 26 per cent owned by BEE Company Ponahalo Holdings.

⁶⁰⁸ 2004 (4) SA 490 (CC).

how industry laws are based on sound considerations of equity and commercial freedom both of which are foundational to democracy.

The De Beers Group is historically tied to Anglo American group which itself is one of the major participants in global diamond mining and trading. Famous for their slogan 'A Diamond is Forever', De Beers group have always had notoriety in diamond trade in South Africa and the world diamond markets. Obviously the leadership advantage of De Beers is also largely due to the advantages obtained during the apartheid era where the intention of the law was to boldly enrich one race group to the exclusion of another. It must be noted that there are other diamond producers in South Africa whose involvement in diamond trade is also quite significant.

All diamond producers regardless of size are significant contributors to the economy of South Africa and there is no doubt that they may even more so because of potentially lower overheads and larger profits that are common in smaller dealers in comparison with larger companies. De Beers, the State and other diamond producers all have an important economic role, however, De Beers have had a special role in international law as well as national law on this point.

The name 'De Beers' is used in the introductory parts of this chapter as a general generic term for the entire group, however, it is important to note that within this group are certain juristic persons that have specifically registered company names in accordance with national law. These juristic persons will be distinguished as this chapter progresses. De Beers as a group specifically produce to sell its products to a group of clients called Sight holders.⁶⁰⁹ The sale of diamonds is dictated by the requirements of the market and De Beers invariably seek to satisfy their Sight holders. De Beers Consolidated Mines Ltd

⁶⁰⁹ De Beers has mining interests in South Africa, Namibia, Canada, South African Sea Areas (SASA) and recently Russia. They are the most influential diamond producers who often sell diamonds up to 25 carats mostly required for industrial purposes.

(DBCM)⁶¹⁰ export and bring into the country revenue in foreign currency. They are therefore also affected by threats and recession facing the international markets in the same manner as all other sectors.

The specific selection of De Beers Consolidated Mines Ltd (DBCM) for analytical study purposes is not to ignore the contribution made by other producers but to simply highlight the most influential and internationally recognizable diamond producer that has set the pace for other diamond producers. De Beers has contributed more to the industry as their activities are not only limited to land mining but also the more expensive offshore mining. This means that to study De Beers diamond trade involvement is to study a company whose influence in the global diamond industry is extensive and important.

De Beers related companies that form part of the large family group. One of the companies to be discussed in more detail in this chapter is specifically De Beers Marine (Pty) Ltd DBM a company contracted by DBCM to mine in the South African Sea Areas (SASA) under license ML3/2003.

This chapter will also consider DBCM's diamond sales activities through its Diamond Trading Company (DTC) and the Diamond Trading Company South Africa (DTCSA) and its involvement in an international landmark case that deals with anti-competitive behavior in international law. The analysis of the application of modern law to De Beers will illustrate that there has truly been a significant shift in its activities to reflect more equitable diamond law practices.

3.2 Sir Ernest Oppenheimer and the Early Days of De Beers

History reveals that De Beers Consolidated Mines Limited was consolidated upon registration of the amalgamated De Beers and Kimberley mines in 1888. This merger resulted in a company which became dominant in diamond mining in

⁶¹⁰ Through the Diamond Trading Company (DTC), this is the rough diamond distribution arm of the De Beers Group. More information about the DTC can be found on www.debeersgroup.com 14 September 2008.

southern Africa. In 1929 Sir Ernest Oppenheimer became the chairperson of De Beers Consolidated Mines Limited and took the helm in steering the company through the world depression in the 1930s⁶¹¹ which was threatening all industries, including the diamond business.⁶¹²

According to writer Viljoen Christie although De Beers controlled the upward market power within the diamond industry, it was in fact a mining scene that offered capital owners an advantage of building mining empires.⁶¹³ In her paper Viljoen argues that De Beers distinguished themselves from the original diamond industry supply trends of countries such as India and Brazil,⁶¹⁴ who were traditional earlier suppliers, by controlling the entire network of the diamond supply chain which created a monopoly which had its original power held by minority elites. These elites gained their earlier wealth through primitive techniques based on the 'hard labour of a quasi-slave nature.'⁶¹⁵ The writer acknowledges the race-bar that was created by the rise of the De Beers monopoly,⁶¹⁶ it is submitted that to this day the Republic of South Africa is still grappling with the negative legacy of the rise of monopolies of this nature.

⁶¹¹ Hebert I. *The Diamond Diggers South Africa 1866 to the 1970s*, Crompton Press (1971) 111 describes Sir Ernest Oppenheimer as the third great man in diamonds.

⁶¹² Chilvers *The Story of the De Beers Group* (Issued by De Beers Consolidated Mines), undated, 9. Viljoen C. *Evolution of Market Power In the Diamond Industry Supply Chain (800 B.C. – 1930 A.D.): Why De Beers Was So Different September* (2008) 1. <http://www.ekon.sun.ac.za/ehssa/Viljoen.pdf> 23 March 2010. See Wagner P. A. *The Diamond Fields of Southern Africa* The Transvaal Leader Publishers (1914) 171, 241 where the writer records that the diamond mining methods used are clearly not as sophisticated as modern day methods with a concern for environmental damage. The writer also mentions that the greater concern in early diamond mining seemed to be more concentrated on economic advantage rather than environmental safety.

⁶¹³ *Ibid.* Abstract.

⁶¹⁴ Viljoen C. *Evolution of Market Power In the Diamond Industry Supply Chain (800 B.C. – 1930 A.D.): Why De Beers Was So Different September* (2008) 3 <http://www.ekon.sun.ac.za/ehssa/Viljoen.pdf> 23 March 2010.

⁶¹⁵ Viljoen C. *Evolution of Market Power In the Diamond Industry Supply Chain (800 B.C. – 1930 A.D.): Why De Beers Was So Different September* (2008) 1 <http://www.ekon.sun.ac.za/ehssa/Viljoen.pdf> 23 March 2010. Abstract.

⁶¹⁶ Viljoen C. *Evolution of Market Power In the Diamond Industry Supply Chain (800 B.C. – 1930 A.D.): Why De Beers Was So Different September* (2008) 2 <http://www.ekon.sun.ac.za/ehssa/Viljoen.pdf> 23 March 2010.

Wagner Percy Albert, in his book on diamond mining in Southern Africa stated that the economic value of the diamond is essential to capitalist ideals in that if the demand for the diamond would cease even the richest of mines will be relegated to geological curiosity exercises.⁶¹⁷ Wagner admits that the diamond industry was directed at the wealthier classes of buyers particularly those of countries such as the US who were all apparently fascinated by the costly and popularized 'stones of fire.'⁶¹⁸ It is submitted that De Beers at this time was not seeking to share the wealth of the country of South Africa.

Wagner submits that De Beers as a leading earlier diamond producer achieved more of their success through the De Beers Company and the London Diamond Buying Syndicate which rigidly carried out a 'traditional valorization policy' which was made successful by the merging of leading interests in the industry.⁶¹⁹

It is notable based on the submission above that De Beers not only had assistance from discriminatory laws but its success also came about as a result of businesses talent which was supported De Beers's vision to be a dominant producer. It is submitted that while De Beers is the focus of this study, by virtue of its proverbial market success as a group, it is submitted that one reading this analysis must also take into account that there were other earlier producers who were also significantly benefited by the discriminatory laws. It is important to keep a realistic view of this historical fact so as to avoid focusing on the flaws of one particular company's history. This submission is based on the argument that it was against the law for blacks to have mining rights of any kind.⁶²⁰

⁶¹⁷ Wagner P. A. *The Diamond Fields of Southern Africa*, The Transvaal Leader Publishers (1914) 241.

⁶¹⁸ *Ibid.*

⁶¹⁹ Wagner P. A. *The Diamond Fields of Southern Africa*, The Transvaal Leader Publishers (1914) 241, 242.

⁶²⁰ See www.anc.org.za/ancdocs/history/ruling.html 27 October 2009.

It is submitted⁶²¹ that the social engineering that came with the western model of the establishment of colonial capitalist relations into southern African states, such as Namibia, Angola and South Africa, all contributed to apartheid. The countries mineral resources were suddenly in the hands of the elite minority which lead to the imposed patterns of foreign dominance and exploitation of the Namibian people (and their resources), for example, which is likened by the writer to apartheid well known South African racist regime.⁶²² Companies such as De Beers were as the author submits allies of apartheid.

The black labourers working conditions were grim, particularly in light of the fact that they could not work in the industry in any other capacity other than to provide manual labour were grim.⁶²³ The work was hard and the days extremely long with absence of proper medical aid and onslaughts of camp fever. The shelter for the workers consisted of makeshift hovels which were a breeding ground for disease.⁶²⁴ From this account of history it is evident that diamond trade was developing but without respect for human rights, at least for those who were not the capitalist elite.

It is reported⁶²⁵ that death and mine accidents were the order of the day in early mining activities. It has been submitted that underground accidents were caused by competition to increase production in the struggle for total control of the four main mines in the 1880s. De Beers was known for pushing its workers to the limit in order to catch up with the greater productive capacity of the Kimberley Central mine. It was reported that the attitude among De Beers's management at the

⁶²¹ See collection of papers edited by Cooper A. *Allies in Apartheid: Western Capitalism in Occupied Namibia*, The Macmillan Press Ltd (1988), essay by Melber H. *Introduction II: Socio-Economic Interaction of Colonial Capitalist Relations in Namibia Before and During German Rule* 8; 9.

⁶²² *Ibid.*

⁶²³ Roberts Brian *Kimberley: Turbulent City*, Pioneer Press (Pty) Ltd (1976) 24, 221.

⁶²⁴ *Ibid.*

⁶²⁵ Turrel R. V. *Capital and Labour on the Kimberley Diamond Fields 1871 – 1890*, Cambridge University Press (1987) 159.

time was that regulations were harassments. This led to a fire breaking out in the De Beers underground mine in 1888.⁶²⁶

In the earlier days of Sir Ernest Oppenheimer set about to create a system of rationalized diamond sales which included companies associated with De Beers. This system, known as the Central Selling Organization (CSO),⁶²⁷ purchased, sorted evaluated and marketed rough diamonds. This, together with its ability to stockpile large quantities of rough diamonds, enabled it to maintain the stability of rough diamond prices by balancing supply and demand, which greatly influenced diamond trade to this day.⁶²⁸

It is stated in Chilvers, a De Beers historical record book, that Sir Ernest Oppenheimer believed that the only way in which diamond trade would become a success was not only through marketing strategies and policies but co-operation between diamond producers. This vision was essential in allowing diamond resources in South Africa to be managed in a manner that best represents lawful and proper trade. This approach by Sir Ernest Oppenheimer created a cogent way forward by suggesting that the few controlling diamond producers be permitted to manage the diamond resources for the benefit of all by producer co-operation. This approach has led to a lawful and functional present day model of DBCM. Clearly this philosophy agreed with the 'too many cooks spoil the

⁶²⁶ *Ibid.* Out of a workforce of 67 white workers and 625 black workers, only 24 white workers died and 178 black workers died.

⁶²⁷ See <http://www.miningbasics.com/diamonds-and-cso> 24 March 2010. The CSO is described as an organisation established by the South African company De Beers Consolidated Mines in 1930 to promote the marketing of diamonds from its own mines. It has since been expanded to include other producers. While the Central Selling Organization has been successful in establishing a marketing agreement with Russia, which is a major diamond producer, some mines there have been selling some of their diamonds outside this agreement in recent years. However, companies from most other diamond producing nations are still permitting their rough gems to be sorted, valued and distributed through the CSO. It is therefore important to have an understanding of the relevance of this organisation in modern international diamond trade.

⁶²⁸ Chilvers *The Story of the De Beers Group* (Issued by De Beers Consolidated Mines), undated, 9.

broth'⁶²⁹ theory. On the other hand De Beers can be criticized as not creating an environment that would support resources and power sharing.

The management of diamond resources in this co-operative manner wiped out the possibility of illicit diamond trading that could possibly end in diamonds either entering conflict torn zones or being introduced into the system from conflict zones outside the country's borders. For example, as history presently shows us that it becomes dangerous if diamond management is left to un-cooperative disorganized rebel groups who may use diamond trade for militant activities thus bringing about conflict over the management of diamond resources.⁶³⁰ The activities of De Beers Group in diamond mining and trading were in conformity with the law existing at the time and the Group has had much diamond business related involvement with such laws.

The history of De Beers discussed above by De Beers themselves obviously does not mention the apartheid conditions from which it developed. Notwithstanding De Beers has contributed significantly to the economy and infrastructure of South Africa over the last 120 years. It is essential that their contribution be noted as it is more appropriate to use diamonds to build schools, hospitals and roads rather than promoting war through people trying to fight for the control of the country's diamond resources.⁶³¹

It is submitted that 'a worker is worthy of his or her wages' and in this sense De Beers group ought to be acknowledged for their contribution in diamond trade. Further, in modern times as a result of seeking to develop humanity De Beers as a company has also been active in developing and promoting the KPCS of

⁶²⁹ It is submitted that where there are no lawful controls in diamond trade, that is where problems with conflict diamonds or illicit diamond trade obtains a breeding ground to the detriment of a thriving diamond producing country.

⁶³⁰ Though South Africa has not traditionally had a problem with the presence of conflict diamonds due to relative political calm and stability, it is proposed that the diamond legislative framework has contributed to the best practices of diamond trade within the country.

⁶³¹ Chilvers *The Story of the De Beers Group* (Issued by De Beers Consolidated Mines), undated, 9.

diamond production and trade.⁶³² However having acknowledged the contribution of De Beers to the development and practices of the South African diamond trade, the views of other learned authors⁶³³ as discussed in this study are important in that they provide a proportionate account and analysis of De Beers's activities.

3.3 De Beers and the 1996 Constitution

De Beers as a group have been actively involved in Constitutional mandates for the promotion of equal access to diamond resources for all South Africans an ideal sought through transformation and black economic empowerment.⁶³⁴

The Constitutional ideal is to ensure that the affirmative action goals⁶³⁵ and similar positive rights are upheld and promoted by individuals, the State and economic influences such as De Beers. The protection of environmental rights as expressed the Bill of Rights⁶³⁶ is highly prioritized by DBCM in their activities. It is submitted that even if mistakes were made in the past, the presence of De Beers and other important participant as key players in the diamond industry has been progressive and beneficial for South Africa's diamond regulatory framework and economy.⁶³⁷

⁶³² According to De Beers's modern diamond trade practices keeping conflict diamonds out of legitimate trade forms part of their mandate. Further, De Beers gives a firm guarantee that their diamonds are 100 per cent conflict free. See <http://www.debeersgroup.com/Sustainability/Ethics/Conflict-diamonds/> 24 March 2010.

⁶³³ Viljoen C. *Evolution of Market Power In the Diamond Industry Supply Chain (800 B.C. – 1930 A.D.): Why De Beers Was So Different* September (2008) 1 and See Wagner P. A. *The Diamond Fields of Southern Africa*, The Transvaal Leader Publishers (1914) 171, 241 and 242.

⁶³⁴ DBCM is 26 per cent owned by BEE Company Ponahalo Holdings representing a wide range of shareholders in communities, gender and disabled, employees and retired De Beers's workers, as well as leading empowerment business people. www.debeersgroup.com 20 January 2007. See internal report by Smith N. *De Beers Reveals Canny BEE Deal* 9 November (2005).

⁶³⁵ Constitution of the Republic of South Africa Act, 1996 section 9(2).

⁶³⁶ Constitution of the Republic of South Africa Act, 1996 section 24.

⁶³⁷ Other significant players in the industry include Rio Tinto, Petra Diamonds, Alrosa, BHP Billington. In South Africa, other important diamond producers include Trans Hex, Alexkor Ltd, Rex Diamond Mining, Messina Diamonds and Benguela Concessions. There are also approximately 1500 alluvial diamond diggers who as a group are also significant suppliers to the diamond industry.

3.3.1 De Beers and its Compliance with Diamond Laws

Having studied the diamond laws of South Africa in the preceding chapters, it is necessary to consider the extent to which De Beers can be said to be in compliance with these laws. This part of the study will consider in a parochial manner compliance of De Beers with the Diamonds Act⁶³⁸ in relation to taxation, compliance with the transformations goals of the MPRDA⁶³⁹ and the Constitution of the Republic of South Africa Act⁶⁴⁰ and compliance with principles of fair market competition.

The three listed aspects of this part of the study are isolated specifically as they are often or recently have been a cause for concern in the diamond industry particularly when dealing with a large corporate entity such as De Beers. It is therefore crucial to analyze and determine the diamond law compliance status of a flagship diamond producer. Further, in terms of general compliance with licensing and other diamond trade issues De Beers has illustrated sound practices therefore it will not be necessary to repeat that discussion.

With regard to compliance with the Diamonds Act⁶⁴¹ and tax exemptions, De Beers was subject to an investigation by the Standing Committee on Public Accounts (SCOPA).⁶⁴² This was reported by the Parliamentary Monitoring Group in January 2008, which was the time when an investigation into De Beers and compliance with the Diamonds Act⁶⁴³ was under SCOPA's consideration. It emerged from the investigation that De Beers had allegedly entered into an agreement, on 3 December 1992 with the South African Diamond Board. In terms of the agreement De Beers was permitted to export to London a stockpile of unpolished locally mined diamonds to the total of 20 million carats valued at

⁶³⁸ 56 of 1986.

⁶³⁹ 28 of 2002.

⁶⁴⁰ 108 of 1996.

⁶⁴¹ 56 of 1986.

⁶⁴² http://beta.parliament.gov.za/live/commonrepository/Processed/20090730/57733_1.doc
<http://www.pmg.org.za/minutes/20070611-interaction-minister-minerals-energy-scopa-62nd-report-2005-sa-diamond-board> 23 October 2009.

⁶⁴³ 56 of 1986.

USD 822 million. This transshipment of diamonds was not accompanied by payment of export duty. There was however no documentary evidence produced by the South African Diamond Board showing that it had authorized such a large shipment of diamonds to London.⁶⁴⁴ This is part of the controversy that surrounded this transaction.

SCOPA had to determine the legality of the above agreement. It was established in the SCOPA hearings and subsequent report that the point of contention in this instance revolved around the payment of export duties in terms of sections 59,⁶⁴⁵ 62⁶⁴⁶ and section 63⁶⁴⁷ of the Diamonds Act.⁶⁴⁸ The investigation focused on the applicability of section 63 which gave the South African Diamond Board powers to grant an exemption from export duty to a producer if the diamonds of the producer, among other things, were first allocated or offered to a diamond cutter or tool maker pursuant to the old section 59 of the Diamonds Act.⁶⁴⁹ In terms of the old section 59 the Board could enter into an agreement with a South African producer provided that such a producer has endeavored to supply unpolished diamonds to South African cutters and tool makers.⁶⁵⁰

It was established by SCOPA that the intention of the old section 59 of the Diamonds Act⁶⁵¹ was to ensure the application of the South African State policy. This policy of Parliament intended the economic development of South Africa to encourage the cutting and polishing of diamonds locally. The alleged agreement allowing the export of diamonds concluded by De Beers and the South African Diamond Board in this case was criticized as being a strategy of exporting large

⁶⁴⁴ <http://beta.parliament.gov.za/files/docs/090204report.rtf> 10 August 2009.

⁶⁴⁵ Section 59 prior to substitution by section 17 of the Diamonds Second Amendment Act 30 of 2005.

⁶⁴⁶ Section 62 prior to repeal by s. 19 of the Diamond Export Levy (Amendment) Act 14 of 2007.

⁶⁴⁷ Section 63 of the Diamonds Act 56 of 1986 prior to amendments by s. 10 of the Diamonds Amendment Act 10 of 1991, s. 115 (1) of the Taxation Laws Amendment Act 8 of 2007 and subsequently repealed by s. 19 of the Diamond Export Levy (Amendment) Act 14 of 2007.

⁶⁴⁸ 56 of 1986.

⁶⁴⁹ 56 of 1986.

⁶⁵⁰ <http://beta.parliament.gov.za/files/docs/090204report.rtf> 10 August 2009.

⁶⁵¹ 56 of 1986.

numbers of diamonds shortly before the end of apartheid officially ended⁶⁵² and the agreement was simply a façade to permit De Beers to loot the diamonds out of the country as suggested by the SCOPA chairman in the reports.⁶⁵³

The matter above was still not finalized in 2007. However it was provided in subsequent reports that De Beers is still expected in terms of the SCOPA reports to co-operate with the DME and the South African Reserve Bank (SARB) in order to make full account of De Beers's exports from the period of 3 December 1992 to 19 March 1998.⁶⁵⁴ On 27 May 2008⁶⁵⁵ in the proceedings of the National Assembly it was reported to Parliament in a speech as follows:

'We are happy to indicate that despite years of procrastination and obfuscation that have characterized this process, at the hearing, all parties were prepared to co-operate and were awaiting the recommendations from Parliament. We are happy therefore to present this first report that seeks to assist with the way forward to resolve this matter of principle, law and national interest. ...The message that we are sending to one and all is that Parliament will never equivocate where matters of public interest are concerned, whether it relates to public institutions or private capital.'⁶⁵⁶

The implications for finding De Beers in the wrong in this matter mean that there will be large amounts of tax liability against De Beers as a result of the exported

⁶⁵² Michael Hamlyn *Business Report News Article: MPs Challenge De Beers Over Mysterious Exports* 13 June 2007.

⁶⁵³ <http://beta.parliament.gov.za/files/docs/090204report.rtf> 10 August 2009.

⁶⁵⁴ <http://beta.parliament.gov.za/files/docs/090204report.rtf> 10 August 2009.

⁶⁵⁵ www.parliament.gov.za/live/commonrepository/.../122503_1.doc - 10 August 2009.

⁶⁵⁶ Mr. N.T. Godi CONSIDERATION OF FIRST REPORT OF COMMITTEE ON PUBLIC ACCOUNTS – INVESTIGATION RELATING TO EXPORT AND SALE OF DIAMONDS, IN TERMS OF DIAMONDS ACT, 1986 (27 May 2008). www.parliament.gov.za/live/commonrepository/.../122503_1.doc - 10 August 2009.

diamonds. With regard to compliance with the Diamonds Act⁶⁵⁷ in this case, it seems that that is questionable in light of the fact that the large disposition on diamonds certainly did not enhance the local cutting and polishing industry as intended in the Diamonds Act.⁶⁵⁸

On the other hand the matter opened a door for vast amounts of legislative amendments to take place. The main problem with De Beers's actions in this case is that the export of diamonds is seen in a negative light. This is a situation similar to that of unlawful dispositions in company law. SCOPA investigated as a result of concerns about the export's detrimental effect on South African diamond interests. For De Beers it seems that they are eager to cooperate with the Government on finalizing the investigation.⁶⁵⁹

It is submitted that the export of diamonds was within the commercial prerogative of De Beers however the lack of taxation casts suspicion to the transaction. Perhaps the best way forward is to remedy the tax liability if it is so established. The next step would be to focus on the Constitutionality of future accurate business transactions in diamond trade and a stern reminder that diamond exports must be done with respect to South African diamond law at all times.

Perhaps it was the concern about the unknown governmental regime that motivated the export. Be that as it may in this case De Beers fell short of compliance with the actual objectives of the Diamonds Act,⁶⁶⁰ however, whether a law was offended or not is still to be considered more carefully. What is important now is that decisions taken by De Beers should no longer be motivated by political panic but rather the respect for the cogent State policy expressed in the diamond laws.

⁶⁵⁷ 56 of 1986.

⁶⁵⁸ 56 of 1986.

⁶⁵⁹ Mr. N.T. Godi CONSIDERATION OF FIRST REPORT OF COMMITTEE ON PUBLIC ACCOUNTS – INVESTIGATION RELATING TO EXPORT AND SALE OF DIAMONDS, IN TERMS OF DIAMONDS ACT, 1986 (27 May 2008). www.parliament.gov.za/live/commonrepository/.../122503_1.doc - 10 August 2009.

⁶⁶⁰ 56 of 1986.

With regard to transformation objectives as established in South African diamond laws De Beers appears to be committed to these goals as will be illustrated below. This commitment to transformation however will be considered herein in a parochial manner as this study does not wish to be overly pre-occupied with racial differences. While affirmative action measures of the Constitution of the Republic of South Africa Act, 1996⁶⁶¹ are absolutely necessary in South Africa. This study seeks to achieve is a progressive South African view of respect for national diversity based on equality. This State endeavor to assist the historically or previously disadvantaged is in line with the Constitution of the Republic of South Africa Act.⁶⁶²

What one can aim for in a truly transformed company is equality among race groups on the basis of *ubuntu* or *menswaardigheid*. This is a process that requires individual introspection as racism in the law may be removed but if it not removed from the hearts and minds of South Africans, transformation will suffer. Often racism is viewed as only based on the oppression by white people of the black people. While this is a classic case of apartheid it must be acknowledged that racism goes deeper than that. Racism involves discrimination on the basis of race, colour or creed therefore black people may also be just as racist. This offends moral and Constitutional values because no single person decides on the colour of their skin so judgment should not simply be passed on that basis alone. Transformation will take place when these negative attitudes are exposed and dealt with positively.

In achieving transformation, a company like De Beers, for example, must avoid tokenism in applying transformation targets as this undermines the true dignity of the equity. Tokenism occurs when a person is appointed in order to fulfill a racial, gender or disability profile without being truly given the power or the necessary

⁶⁶¹ 108 of 1996 in terms of section 9(2).

⁶⁶² 108 of 1996.

tools and training for the purposes of functioning optimally and competently in that appointment or position of responsibility. In positions of this nature the candidate normally gets ignored such that they are seen as less valuable because they are different. This leads to the candidate being unable to compete freely and fairly within the working environment. Fortunately where transformation is properly executed it becomes a true tool for empowering individuals.

De Beers transformation strategies are commendable not only through their famous Black Economic Empowerment agreement that was signed between De Beers and Ponahalo Holdings (Proprietary) Limited. They also have engaged in investing in empowerment programmes such as the recently reported Women in Mining projects. De Beers acknowledge the need for transformation and through projects of this nature are able to invest in true transformation. In a media release De Beers stated the following:

‘De Beers Consolidated Mines (DBCM) in the Northern Cape celebrated and shared their “Women in Mining” projects at a function this week with the Minister of Minerals and Energy Buyelwa Sonjica, and with leaders from the mining sector, provincial government and women in technical positions from both Kimberley Mines and Finsch Mine. Women make up 52% of the adult population in South Africa and 41% of the working South African population, but only constitute 16.8% of all executive managers and 11.5% of all directors in the country. The mining industry aspires to a baseline of 10% participation of women in technical disciplines by May 2009. In DBCM we acknowledge that this is an area of strategic importance which requires a special focus and currently (2008) 10% of our employees across the country are women employed in

technical disciplines. In the Northern Cape our operations have embarked on various initiatives achieving a 12% level of employees in technical disciplines being women. To advance this programme Finsch and Kimberley Mines have recently appointed 26 ladies to the 'Women in Mining Development Programme'; a technical leadership experience in mining, metallurgy and engineering.'⁶⁶³

On the point of De Beers working within the limits of fair market competition, De Beers has been viewed as dominant in the diamond markets. Even in the international domain concerns about De Beers's dominant role is still a cause for concerns among the EU competition authorities particularly in light of the international decision allowing De Beers to purchase Russian diamonds from the company Alrosa.⁶⁶⁴ In South African law De Beers has appeared before the Competition Tribunal on several occasions in order to test that it is not in a position to abuse its dominant position. The issue of anti-competitive behavior will be dealt with more extensively in the subsequent parts of this chapter.

In a matter before the Competition Tribunal in *DB Investments SA v De Beers Consolidated Mines Ltd & De Beers Centenary AG*⁶⁶⁵ the court issued a merger clearance certificate. It was established in the matter that such a merger would not result in the substantial lessening of competition within either the either of the diamond industry or natural resource sectors. This decision is an example of De Beers's involvement and compliance with all aspects of diamond laws.

3.4 De Beers in Litigation

With regard to De Beers' contribution to diamond laws, it is important to consider some judicial decisions where De Beers has had some involvement. The study of

⁶⁶³ Media release 30 May 2008. www.debeersgroup.com 18 September 2009.

⁶⁶⁴ De Beers Diamond Deal Faces Fresh EU Scrutiny 18 September 2009. <http://www.busrep.co.za/index.php?fArticleId=5170123> 18 September 2009.

⁶⁶⁵ Case Number: 20/LM/March 2001.

these cases will be limited to some reported South African judgments, a landmark international judgment of the Luxembourg court and some modern South African unreported judgments. The cases considered span over a period of time including the pre-Constitution era. The consideration of these judgments serves to illustrate the common problems and points of dispute that are a common concern typically for a diamond producer. This means that the precedents set herein is an essential educational tool from a practical as well as academic point of view to bringing legal solutions to those problems experienced by diamond producers.

What is interesting about the judgments is that they illustrate sound application of laws (commercial law, taxation laws etc.) pertaining to the diamond industry. It seems however that none of the judgments addressed 'the elephant in the court room' which was the unjust manner in which the socio-economic rights of black people in the diamond trade industry and their participation in the South African formal economy. It is however understandable that that was never an issue raised before the courts in such clean cut commercial cases.

The consideration of some of these decisions affords an opportunity to consider whether or not South African diamond laws are being applied in an equitable manner, equity being one of the main ideals of Legislature in South African diamond laws. It is important however at all times to distinguish in litigation the client in this case De Beers from perhaps the over-eager or misguided efforts of a legal counsel. This happens in law and that is the reason why courts are approached to interpret laws to achieve the best possible outcome.

Clearly a system of law based on the dominant class's legal ideals only may be problematic if such an ideal is not based on equity. Such a situation would be a very obvious threat to the South African Constitutional democracy. De Beers influence on the law as will be considered in case law in this chapter generally illustrates De Beers' respect for the core values of justice and the rule of law

which must be upheld by South African courts in the development and interpretation of South African diamond laws. De Beers group are no stranger to the courts as evident in the discussed reported judgments part of various matters.⁶⁶⁶ This is not just a record demonstrating that they are litigious but it is significant to note their involvement in interpretation of diamond laws from a practical perspective, in light of the freedoms that South Africa enjoys as a young democracy. To avoid turning this work into a De Beers law report, only a few selected cases will be considered in this chapter.

3.4.1 Offshore Diamond Mining and Payment of Tax

In *De Beers Marine (Pty) Ltd v The Commissioner for the South African Revenue Service (SARS)*⁶⁶⁷ the main consideration in this case revolved around the interpretation of the word 'export' within the context of the Customs and Excise Act,⁶⁶⁸ particularly section 20(4)(d). Section 20⁶⁶⁹ has since been interpreted to

⁶⁶⁶ This includes, *inter alia*, matters such as, *De Beers Consolidated Mines Ltd v Minister of Mines & Another* 1956 (3) SA 45 (W), *Rabinowitz & Another v De Beers Consolidated Mines Ltd & Another* 1958 (3) SA 619 (A), *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T), *Commissioner For Inland Revenue v De Beers Holdings (Pty) Ltd* 1984 (3) SA 286 (T), *De Beers Holdings (Pty) Ltd v Commissioner For Inland Revenue* 1986 (1) SA 8 (A), *De Beers Industrial Diamond Division (Pty) Ltd v General Electric Company* 1987 (4) SA 362 (T), *De Beers Consolidated Mines Ltd v Commission For Conciliation, Mediation & Arbitration & Others* (2000) 5 LLD 276 (LAC), *De Beers Marine (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (5) SA 136 (SCA), *National Union of Mine Workers & Others and RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB), *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* (2006) 27 ILJ 1909 (LC) and most recently, *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan NO & Others* (2008) 29 ILJ (LC). The fact that De Beers fight their battles in court show that they are an entity that is willing to use sophisticated and civilized methods that are acceptable in a society based on justice.

⁶⁶⁷ 2002 (5) SA 136 (SCA).

⁶⁶⁸ 91 of 1964.

⁶⁶⁹ Section 20 at present provides as follows 'Goods in customs and excise warehouses

(4) Subject to section 19A, no goods which have been stored or manufactured in a customs and excise warehouse shall be taken or delivered from such warehouse except in accordance with the rules and upon due entry for any of the following purposes-

(a) home consumption and payment of any duty due thereon;

(b) re-warehousing in another customs and excise warehouse or removal in bond as provided in section 18;

[Para. (b) substituted by s. 6 (a) of Act 84 of 1987.]

(c)

[Para. (c) deleted by s. 6 (b) of Act 84 of 1987.]

(d) export from customs and excise warehouse (including supply as stores for foreign-going ships or aircraft.) (This provision was the focus of the case).

[Sub-s. (4) amended by s. 14 (a) of Act 45 of 1995 and by s. 41 (1) of Act 19 of 2001.]

accommodate the decision of the SCA in this judgment. It is submitted however that any influence of interpretation of the law must be tested against what is justifiable influence in order to ensure that powerful diamond producers will not be perceived as using litigation as a tool to bully the legal system or the courts to suit their own commercial ends.

The facts of the case illustrate that it involved De Beers Marine (Pty) Ltd (DBM)⁶⁷⁰ a company belonging to the De Beers group. DBM is based in Cape Town and carries on business providing contracting and consulting services in the exploration, evaluation, mining and management of underwater diamond deposits. The facts show that for its business purposes, at the time DBM owned five mining vessels that carried vertical drilling equipment for the recovery of diamond bearing gravels from the seabed.⁶⁷¹

The mining activities in question were being carried on in marine mining concession areas. The marine concession areas were in this instance divided into a grid pattern of blocks which are further divided into sub-blocks of 50 meters X 50 meters. Vessels carried on drilling operations in these blocks in order to cover the whole area and would spend up to two years at sea exploring and mining these areas before returning to Cape Town where these vessels are registered.⁶⁷²

The refueling of these vessels however would take place at sea.⁶⁷³ Since the chosen bunkering point was located 50 miles offshore it was thus outside the pollution zone and just south of the boundary line (the boundary line being

(4) *bus* No person shall, without the written permission of the Controller, divert any goods entered for removal from or delivery to a customs and excise warehouse, except goods entered for payment of the duty due thereon, to a destination other than the destination declared on entry of such goods or deliver or cause such goods to be delivered in the Republic except in accordance with the provisions of this Act.

[Sub-s. (4) *bis* inserted by s. 4 (d) of Act 95 of 1965 and substituted by s. 14 (b) of Act 45 of 1995].’

⁶⁷⁰ and whose diamond mining activities involve marine aspects will be considered in a more in depth manner in this chapter.

⁶⁷¹ 140 A - D.

⁶⁷² *Ibid.*

⁶⁷³ 141C

described in the founding papers as the boundary between the northernmost South African marine concession and the southernmost Namibian marine concession areas). The mining vessels were for the most part exploring on the Namibian concession area, however, they had to cross the boundary and return to the rendezvous point to bunker. When they were fuelled up they returned to the Namibian concession area.⁶⁷⁴

It was established in the case that in terms of section 20 of the Customs and Excise Act⁶⁷⁵ delivery of goods from a warehouse for the purposes of export does not attract excise duties and fuel levies. On the other hand if the disclosed purpose of the delivery is for home consumption which is defined in section 1 of the Act as 'consumption or use in the Republic' it would attract the relevant duties and levies.⁶⁷⁶ It was argued by counsel for DBM that export meant 'to take out' of the Republic whereas counsel for SARS argued that export meant 'to take out' of the Republic 'for import into a foreign country for commercial purposes', therefore the Commissioner's argument had additional elements of defining the destination of the goods taken out.⁶⁷⁷

Nienaber JA in the Supreme Court of Appeal took the correct view that export in this case should be interpreted in light of the ordinary commercial meaning of the word as intended by Legislature and therefore the Commissioner's interpretation of export was correct.⁶⁷⁸ It is submitted that the basis for arguing that the court was correct *in casu* is based on the specific commercial considerations that are specific to this case.

The commercial circumstances were such that the bunker fuel used was subject to relevant duties and levies which would not be in issue if such fuel was intended for export into another country for commercial import purposes. It is

⁶⁷⁴ 141 A - D

⁶⁷⁵ 91 of 1964.

⁶⁷⁶ 141 I.

⁶⁷⁷ 142 E.

⁶⁷⁸ 142 I - 143F.

submitted that while SARS should lawfully refund tax to persons or grant exemptions to tax in terms of the Customs and Excise Act⁶⁷⁹ in appropriate circumstances, this case is distinguishable as there was no lawful ground for avoiding tax liability (in the form of bunker fuel duties and levies) in this case. The commercially sound interpretation of export in this case, accepted by the court, demonstrated that the fuel in question was being consumed within the Republic for DBM's internal benefit as a result tax liability attached as opposed to such products being consumed imported into Namibia. The point of where the fuel was actually consumed, Cape Town or Namibia is arguable however it is my submission that the circumstances the bunker fuel was not exported in light of the interpretation accepted by the SCA.

He further stated that when interpreting export one may not simply interpret such as a removal without considering the 'purpose of removal' of such exported goods. The court finding for the Commissioner rejected the interpretation of export given by DBM stating that it would ultimately result in no duties and levies being payable in respect of the bunker fuel supplied to its vessels on the high seas which would benefit DBM and prejudice other taxpayers.⁶⁸⁰

Some interesting points in the case are that when one reads the facts it seems that the papers used to declare where the fuel was destined seemed incorrect. In this regard the court held that it is usual practice in commercial activities that what is declared is not necessarily what takes place.⁶⁸¹ For instance goods may have been declared as goods intended for export but end up being consumed in the Republic, which occurs in commercial activities on a regular basis. Thus the fact that the bunker fuel in this case was entered for the Congo or Gabon ultimately was not in issue before the court.

⁶⁷⁹ 91 of 1964.

⁶⁸⁰ 143 G.

⁶⁸¹ 142 B.

The legal position above was similar to that of an earlier judgments of *Commissioner for Inland Revenue v De Beers (Pty) Ltd*,⁶⁸² an appeal from a decision of the Transvaal Income Tax Special Court taken by a full bench in the Transvaal Provincial Division, and later on appealed by De Beers in *De Beers Holdings (Pty) Ltd v Commissioner for Inland Revenue*.⁶⁸³ Having considered these judgments it becomes clear that that tax law implications must be brought before the courts as an open forum in order to ensure that whatever tax liability is attached to De Beers or any other business entity that is an active economic participant. Tax liability must be justifiable and in line with the law as contained within South African statutes. While that is an obvious point to make it is submitted that more important point to note in these case discussions involves the significant contribution to the interpretation of tax law and other business law which has been enriched in case law by active commercial entities such as De Beers.

Further, the interpretation to the applicable tax laws given by the courts in their judgments against large companies like De Beers must be cogent in order to ensure that even a powerful diamond producer is not abused through unclear tax practices. The judgments above form a significant practical interpretation and application of law. It is submitted that in a country where the rule of law is respected, it is not justified to call for tax liabilities that are unlawful based on the notion that certain companies are able to afford to pay such taxes. On the other hand it is essential that the correct amount of tax is paid by companies at all levels.

3.4.2. Patents and Diamond Laws

The diamond industry, like any other important industry, is held together by strict patents which must be protected in law. The protection of intellectual property in this industry is critical to the progress and success of the diamond sector. A

⁶⁸² 1984 (3) SA 286 (T).

⁶⁸³ 1986 (1) SA 8 (A).

patent is defined as an exclusive right granted by a government to an inventor to manufacture, use and sell an invention for a certain number of years. It may also refer to a document that proves this right.⁶⁸⁴ The case pertaining to patent rights and De Beers to be considered in this chapter is *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka*.⁶⁸⁵ The diamond industry survives through special inventions and designs therefore it is essential that the exclusive use of such inventions is protected in order to protect the commercial interests of the inventor and the company that uses the benefit of such an invention.

This was an appeal from the decision of the Commissioner of Patents where it was held that De Beers were unsuccessful objectors in this case. The facts illustrate that in 1968 a certain Ishizuka from Japan had made an application for a patent under an international agreement numbered as 68/1735 and effective from 23 March 1967. This patent covered an invention entitled as a 'large sized high temperature high pressure apparatus.' In December 1969 a company known as Adamant Laboratories (Pty) Ltd gave notice of opposition to the granting of the patent on the grounds of obviousness of the invention. The matter was heard 9 years later. By then the entitlement of the invention was amended to an 'apparatus for producing high temperature and high pressure' further the name of the objector had been amended to reflect De Beers Industrial Diamond Division (Pty) Ltd.⁶⁸⁶

The notice of opposition given by De Beers was also amended setting out the grounds of opposition as 'obviousness, anticipation, insufficiency and "that the alleged invention as set out in the claims is not an invention defined in the Act."⁶⁸⁷ When the matter was initially heard by the Commissioner of Patents, he took the decision that the objection based on non-invention is not a competent

⁶⁸⁴ A. S. Hornsby *Oxford Advanced Learner's Dictionary: International Student's Edition* 7 ed (2005).

⁶⁸⁵ 1980 (2) SA 191 (T). It must be noted that this case made reference to 'protection of the monopoly', however it must be noted that laws pertaining to the diamond industry have so developed so as to accommodate in national and international anti-competitive laws to which De Beers subscribes and therefore they are no longer a monopoly of diamonds.

⁶⁸⁶ 192 A.

⁶⁸⁷ The repealed Patents Act 37 of 1952.

ground of opposition as established in terms of section 23(1) of the now repealed Patents Act.⁶⁸⁸ The letters for the patent were subsequently granted by the Commissioner in terms of the South African Patent Application No. 68/1735.

De Beers appealed against the Commissioner's finding and order. The invention in question was described as 'an apparatus for producing high temperature and high pressure to be used for the production of diamonds and for various high pressure experiments.' In the description of the invention in question it was explained that there was an already existing and known apparatus 'formed of opposed punches, a die, a reaction chamber defined between the punches and die and containing reaction materials, means for providing a relative motion between the punches and the die to compress the reaction materials and gaskets provided between the punches and the die.'⁶⁸⁹

From the facts it appeared that the inventor had noted the deficiencies of the already existing apparatus and provided formulas to solve the deficiencies in the existing apparatus. One of the deficiencies being that a larger apparatus would be needed in order to produce larger diamond crystals and since he had succeeded in producing such a larger invention with sufficient capabilities to produce the required temperature and pressure he was entitled to patent the invention and hence the application in question. However, the court needed to get over the obstacle presented in the case where the court had to decide as to how to deal with the impasse which revolved around the fact that the description of the latter invention was substantially the same as an already existing apparatus with a few additional features which did not exist in the prior

⁶⁸⁸ 37 of 1952, repealed.

⁶⁸⁹ 193 D. This description of the already existing machine obviously relates to the scientific, chemical and mechanical properties of the invention which may not be crystal clear to a non-engineering mind, however, these scientific attributes of the new apparatus were used by the court to determine whether such a machine formed an invention in terms of the repealed Patents Act 37 of 1952 as that would be the basis of the objector's case.

apparatus, for example, a laminates steel frame and a different manner of regulating the die in the frame body of the new apparatus.⁶⁹⁰

The different manner of die regulation became the point of contention as this additional feature created or provided for a 'new' method of the functioning of the latter apparatus. The court therefore had to determine whether De Beers had a right to claim that feature and successfully object to the granting of the patent.

In dealing with the question of objecting to a patent as a result of an existing feature of an invention forming basis of the objector's claim, Nicholas J gave guidance by stating that in such claims 'the question of substance is whether the feature is essential to the invention or not.'⁶⁹¹ The court also outlined the importance of an objectors claim by stating that it is a legal tool used 'to define a monopoly, so that others know the exact boundaries of the area within which they will be trespassers.'⁶⁹²

Having made a point concerning contextual interpretation of the word 'regulating' the court found that the word 'regulate' used in the claim meant a mechanism that adjusts and corrects. The court did not accept the objector's definition that 'regulate' means maintaining and keeping. Therefore having considered the mechanical and technical attributes of the invention the court held that 'in the invention something more is provided which could correct and adjust misalignments during the course of application of a load in the device.'⁶⁹³ In conclusion to this point it became clear that the court took the view that this new apparatus was an invention providing something new, an advancement with special features and thus worthy of patent.

⁶⁹⁰ 194 A - 195A.

⁶⁹¹ 195 E.

⁶⁹² 195 F. With De Beers in this case being an obvious monopoly protected in terms of the existing laws of that time were acting well within their rights to object to an approval of a patent if they felt that the new so-called invention contained integers or 'essential constituent elements' (195 D) that reflected an apparatus that they had a right to protect as an apparatus whose features belong exclusively to the monopoly.

⁶⁹³ 197 B - G.

On the grounds of objection based on anticipation⁶⁹⁴ the court held that since it was conceded that the elements of the prior art apparatus referred to in claim 1 were essential integers of the applicant's claim therefore the grounds of objection relied on by the objector did not constitute anticipation. On the grounds of objection based on obviousness in this case, it was established by the court that the decision on obviousness revolves around the following elements: 'what is common knowledge in the art at the effective date of the patent in suit, whether the invention was a step forward on such common knowledge, whether the light of such common knowledge that step was inventive' or in other words not obvious.⁶⁹⁵

It was established in the objector's claims that as a whole the invention contained a combination of a number of integers which were a combination of integers from the prior apparatus with two new integers. This combination in law is not a bar to a valid patentable invention as long as the combination of integers is placed in such a manner that when inter-related the apparatus produces a new or improved result.⁶⁹⁶ The objector's arguments for obviousness in this case were also rejected by the court. The appeal was dismissed with costs.⁶⁹⁷

The question of patents in diamond production activities was also raised in the case of *De Beers Industrial Diamond Division (Pty) Ltd v General Electric Company*⁶⁹⁸ in this case the respondent was a patentee of a patent entitled as 'A Composite Compact Components fabricated with high temperature filler metal and method of making the same.' De Beers as appellant in the matter launched

⁶⁹⁴ The objector relied on the publication of the US Patent No 2722174 (Albers) and this patent was the only grounds it had relied on to prove anticipation.

⁶⁹⁵ 200 H. Further, the onus of proving the alleged obviousness of the invention is borne by the objector.

⁶⁹⁶ 201 A. Clearly the conclusion of this case and the decision of the court turned on this legal principle particularly in this case. In the diamond industry, designs are created to keep abreast with technological advances, as much as a monopoly may wish to protect its patent rights, the courts do not have a duty to halt technological advancements by denying patents simply because they contain integers which may already exist in prior products. The court's mandate at the end of the day is not to regulate the designs themselves but to protect patents by ensuring that the invention represents something new in terms of patents law.

⁶⁹⁷ 206 H.

⁶⁹⁸ 1987 (4) SA 362 (T).

an application for the revocation of this patent. And the respondent opposed the application and filed a special plea seeking that the proceedings be stayed in order to give the respondent sufficient opportunity to amend the specification of the invention. The application to amend was opposed by the appellant however when the matter was set down for hearing before a Commissioner of Patents and the Commissioner granted the amendment. On appeal by De Beers in this case the court once again dismissed the application on the basis that De Beers in this case failed to discharge the onus on it to prove its case.⁶⁹⁹

The cases on patents above where De Beers' involvement in litigation contributed to the court's interpretation of the language of Patents Law as pertaining to the diamond industry particularly where the rights of significant corporate entities such as De Beers need to be protected in law. What is interesting in the two cases is the old order legal policy of protecting monopolies in law. Further, the court's seemed to protect such monopolistic entities with vigor however this was always done within the confines of justifiable law.

3.4.3 De Beers and the Repealed Precious Stones Act 44 of 1927

Another example of De Beers in litigation to be considered in this chapter involves the case of *Rabinowitz and Another v De Beers Consolidated Mines Ltd and Another*.⁷⁰⁰ Although this case deals with the Precious Stones Act⁷⁰¹ which has been repealed it forms an important historical lesson as to the courts application of diamond laws. This case is pre-Constitution in nature and deals with the transference of mineral rights and the application of common law to such transference. It is important to note that though diamond regulations are heavily legislated, it is important not to ignore the application of Roman-Dutch law.

⁶⁹⁹ 362. A further reading of this judgment is essential as it covers areas of the Patents Act 37 of 1952 (now repealed) which are illustrated in the judgment of the learned MacArthur J. This judgment is useful in showing how such provisions are open to interpretations which the court had to necessarily make a positive statement on which of the parties had interpreted the application of the Patents Act correctly in these circumstances. However arguably from a jurisprudential perspective it seems that the courts have taken generally took harsher stance against the monopoly in most cases.

⁷⁰⁰ 1958 (3) SA 619 (A).

⁷⁰¹ 44 of 1927 repealed.

Further, as part of understanding the historical contribution to the development of laws that have repealed the old Precious Stones Act⁷⁰² it is important to show the progression of the law that lead to the repeal of the Precious Stones Act.⁷⁰³ The Precious Stones Act⁷⁰⁴ was replaced by the Precious Stones Act,⁷⁰⁵ which was in turn repealed by the Minerals Act.⁷⁰⁶ The Minerals Act⁷⁰⁷ with the exclusion of certain exceptions was repealed by the MPRDA⁷⁰⁸ on 1 May 2002.

The facts of the case illustrate that Rabinowitz and another approached the appellate court to prove that they were the rightful holders of discoverer's certificates and not De Beers who were the respondents in the matter. In the judgment of Schreiner J.A. with De Beer J.A. (no relation to the respondent), Beyers J.A, Van Blerk J.A. and Price A.J.A concurring Rabinowitz's appeal was unsuccessful as in the lower courts' decisions.⁷⁰⁹ The claim had resulted from a history of over 30 years where in 1927 a syndicate referred to as the Port Syndicate had acquired 24 prospecting licenses under the Cape Precious Stones Act⁷¹⁰ where the holders of the certificates could prospect certain Crown land in the then Namaqualand. On 1 April 1927 the Port Syndicate sold its interest to an agent Sir Julius Jeppe who was acting for an undisclosed principal H.M. Association.⁷¹¹

It was agreed that upon delivery of the prospecting licences the agent was to pay the syndicate an agreed sum together with certain legal expenses incurred by it. It was also agreed that if a discoverer's certificate was held by the syndicate such a certificate should be delivered to the agent who would pay the syndicate £ 10

⁷⁰² 44 of 1927 repealed.

⁷⁰³ 44 of 1927.repealed.

⁷⁰⁴ 44 of 1927 repealed.

⁷⁰⁵ 73 of 1964.

⁷⁰⁶ 50 of 1991.

⁷⁰⁷ 50 of 1991.

⁷⁰⁸ 28 of 2002.

⁷⁰⁹ 637 H.

⁷¹⁰ 11 of 1899.

⁷¹¹ 626 C – D.

000,00. It was also agreed that after the payment for the certificate was made, the agent would float the company and take over all assets including recovered diamonds (which the syndicate would receive 30 per cent of the vendor's shares), however, the agreement to float the company was not followed through.⁷¹²

On 6 April 1927 the deceased Solomon Rabinowitz a member of the Port Syndicate signed, prior to his death, a power of attorney irrevocably and *in rem suam*⁷¹³ in favour of a certain Sandenbergh who had fraudulently presented himself as Jeppe's nominee. The documents signed allowed Sandenbergh to deal as he saw fit with licence No. 13077 and gave him power over all discoverer's claims that might be granted in respect of an area pegged by the licence. This meant that Sandenbergh could also transfer these rights to further parties. Further, pursuant to licence No. 13077 the Mining Commissioner issued Solomon Rabinowitz a discoverer's certificate in terms of the Cape Precious Stones Act.⁷¹⁴ The certificate was a specialized one in that it carried a right to select 20 claims on the proclamation of an alluvial digging place. No such proclamation had taken place until the 1952 amendment of the Union Precious Stones Act⁷¹⁵ as such discoverer's claims could not be selected in the Cape until that amendment was made. However in this matter the court did make reference to the amendment.⁷¹⁶

The discoverer's certificate issued by the Mining Commissioner to Solomon Rabinowitz was apparently also delivered to Jeppe or his apparent representative Sandenbergh in pursuance of the agreement on 1 April 1927. On 16 November 1927 the 1952 amendment of the Act came into force, the same

⁷¹² 626 F.

⁷¹³ This is a doctrine drawn from Scottish law, this means that one is acting as attorney as to his own property.

⁷¹⁴ 11 of 1899.

⁷¹⁵ 44 of 1927 repealed.

⁷¹⁶ 626 H – 627 A. In reading this paragraph of facts it appears from the onset that the Mining Commissioner issuing a discoverer's certificate in terms of Act 11 of 1899 (Cape), such an issue of the certificate would stand only if empowered by Act 19 of 1952, an amending Act which permitted the issue of such a certificate in the Cape at the time.

date upon which a receipt reflecting the agreed payment was given to the members of the Port Syndicate by the agent Jeppe on behalf of H.M. Association. On 27 January 1928 the agent ceded all the rights acquired in the agreement to his principal, H.M. Association who agreed to take over the business of the Port Syndicate. On 29 August 1928 Sandenbergh also ceded the discoverer's certificate to H.M Association.⁷¹⁷

H.M. Association subsequently went into liquidation but ceded its certificate to Voltas Syndicate who comprised of two companies and a deceased estate. On 4 July 1947 Solomon Rabinowitz died and was survived by his wife who was also sole heir and second appellant in the matter. The first appellant was a son of Solomon Rabinowitz who had discovered that the discoverer's certificate was registered in his father's name in the Mining Commissioner's books and there was no amendments made reflecting change in ownership of interests in the certificate. With the permission of Solomon's widow, the son took steps to register ownership in the certificate by endorsement of a duplicate certificate in the Commissioner's office. Thereafter the son applied to the Minister of Mines for authority to select 20 claims in terms of the 1952 Amendment Act, which repealed the Cape Precious Stones Act⁷¹⁸ and governed the relationship between parties in the matter.⁷¹⁹

In light of the facts above the court considered the applicable law very carefully by going through the relevant wording of the provisions of the 1952 Act. The court found that there was nothing in the language of the Act excluding a company from being a holder of 'a right and interest' in connection with claims represented by a discoverer's certificate.⁷²⁰ With regard to whether registration had been correctly effected allowing ownership to pass to the company should it be found that a company is able to hold such a right, the court held that the

⁷¹⁷ 627 B – C.

⁷¹⁸ 11 of 1899.

⁷¹⁹ 627 D – H.

⁷²⁰ 632 G.

procedure requiring registration of transfer of discoverer's certificates was only applicable in the Transvaal.⁷²¹ The court held that the common law position should prevail in this matter where it is sufficient that rights are transferred by cession with the full recognition of a practice that if such rights are represented by a document, that such a document be delivered to the transferee.⁷²² This case is important to the understanding of the protection of common law rights in diamond trade activities.

3.4.4 De Beers and Labour Laws

With regard to De Beers having to deal with laws pertaining to labour relations it is important to consider that aspect of their activities in this chapter although succinctly as it is very well established that in diamond trade that De Beers very well contribute to the socio-legal climate of diamond laws through the employment that such an industry provides. This section considering De Beers and Labour Law will consider two reported judgments which cast a light on two issues pertaining to labour relations. The first case deals with dismissal of employees for misconduct while the second case deals with retrenchment. Retrenchment is obviously a threat which a reality in mineral companies which have a limited lifespan.⁷²³ Retrenchment may also be a direct result of the influence of crashing world markets on a diamond producer therefore these judgments are essential to understanding the influence and participation of De Beers in diamond laws.

To illustrate how De Beers handles misconduct it is important to consider the facts and outcome of *RSA Geological Services (a Division of De Beers*

⁷²¹ 636 A. Further the court explained that such registration is not equivalent to registration required for instance in the registration of ownership in a house or shares.

⁷²² 636 F – G. It is clear from this case that the rights represented by the discoverer's certificate were so ceded to the respondents and the appellants had no case.

⁷²³ A case of this nature before the courts provides invaluable insight as to how the industry is to handle the consequences of a mine closure. It is important to note that the Koffiefontein mine was eventually sold to Petra Diamonds Ltd (Petra) in July 2007 for US\$ 12 million. See De Beers *Living Up to Diamonds from Natural Resources to Shared National Wealth: Operating and Financial Review* (2007) 9.

*Consolidated Mines) v Grogan NO & Others.*⁷²⁴ This is a case that illustrates how a diamond producer in law may protect its mining interests in labour related matters. This matter revolved around the dismissal of employees as a result of alleged misconduct. One of the main problems in this case is that the culprits were not identified. Therefore this case provides unique guidance as to what an employer particularly a diamond producer whose product requires heavy security and protection even in its rawest form is entitled in labour law to deal with threatening employee conduct.

The facts of the case show that the appellants RSA Geological Services, a division of De Beers, were operating the Kimberley Micro Diamond Laboratory, KMDL, where they tested samples of kimberlite for diamondiferous potential. This process allowed KMDL to determine the amount of diamonds in the kimberlite in order to invest resources accordingly. Diamonds recovered in this difficult and tedious process were recorded in terms of law and kept safe and the remainder of the kimberlite would be kept by KMDL in order to avoid distorting the results in the subsequent reports to clients. In April 2002, however, information was received by the management of KMDL from a secret informer stating that kimberlite samples were being dumped down two boreholes.⁷²⁵

The boreholes in question were subsequently excavated and 453 kilograms of kimberlite was recovered from them. What linked this recovered kimberlite to the kimberlite used for sample testing was the fact that the recovered kimberlite was stored in the same sample bags marked with tags from the sample bags. The security staff interviewed all the employees about the discarded kimberlite, without obtaining any useful information, however, after some interviews and a polygraph test a certain Chaka admitted to throwing a sample down the

⁷²⁴ (2008) 29 ILJ 406 (LC). This matter was an application for review from the private arbitration before Grogan, the details of the private arbitration are obtainable as cited in *National Union Of Mineworkers & Others and RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB).

⁷²⁵ 409 E – G. The informer was subsequently subjected to a polygraph test which indicated that he was telling the truth.

borehole⁷²⁶ and in his statement he also implicated two other employees. The security invited the employees to submit to a polygraph test which, it was proposed by the employer that it would end any further investigations if the results showed no deception. Initially the employees were amicable to this suggestion however due to advice from the first respondent, National Union of Mineworkers (NUM) all the employees withdrew their initial consent to the polygraph test.⁷²⁷

The process manager of KMDL warned the employees that they would be dismissed if they were withholding information. The process manager also provided the employees with an anonymous number which they could contact in order to volunteer information for the investigation, however, none of the employees contacted the number. The process manager together with the human resource of KMDL further encouraged the employees to cooperate with the investigation however the employees collectively refused to assist with the investigation as they stated that they did not know about the discarding of the kimberlite sample. The employees were all given letters of suspension effectively suspending them from work. These letters bore an anonymous number which any of the recipients could use to contact and give information to assist with the information, however, these letters were returned. After a disciplinary enquiry the employees were found guilty and dismissed. The employees' appeals and conciliation attempts before the CCMA were unsuccessful and the whole matter was referred to private arbitration.⁷²⁸

The main questions to be considered by the arbitrator was whether any of the dismissed employees discarded the sample or failed to assist the employer in identifying the culprits who had actually discarded the sample. There were fifteen employees, whose individual circumstances of dismissal were considered by the arbitrator. The arbitrator found that the dismissals of employees, Chaka, who had

⁷²⁶ 409 G – J.

⁷²⁷ 410 A.

⁷²⁸ 410 A – E.

voluntary admitted to discarding the sample and four other employees were fair as they were implicated. Further, there was strong evidence pointing to their participation in this illicit act.⁷²⁹

On the face of the matter it initially appeals to reason upon the reading of the facts initially that the arbitrator's decision was correct in that it identified the employees who had participated in the scam and allotted the appropriate sanction, however there were some unclear cases for instance where the employer felt that the superintendent of KMDL should also have been dismissed for not being able to pick up from the surveillance camera that a scam was taking place. These unclear aspects of the case were considered more carefully by the labour court.

The matter subsequently came before the labour court for review at the instance of the employer. The review was based on the grounds that the arbitration award was unjustifiable on the facts. Counsel for the employer argued that the arbitrator had applied an incorrect time period in determining the period of the discarding of the sample.⁷³⁰ Further, employer's counsel argued that the arbitrator erred in basing his decision on the financial motive of the employees without considering the non-financial motive tendered by the employer. The financial motive for the employees was payment of overtime while the non-financial motive explained by employer's witnesses was that the dumping would reduce the unpleasant workload, make the work easier, allowing the employees more time to relax. Counsel for the employer argued that using these incorrect criteria allowed the arbitrator to arrive at an erroneous conclusion of exonerating and re-instating ten of the fifteen dismissed employees.⁷³¹

⁷²⁹ 411 A – H.

⁷³⁰ It was common cause that the arbitrator had considered the period up to March 2000 as the end of the period in which the sample was discarded, however it was argued by the employers that the dumping had continued until May 2002. However it became apparent on review and it was accepted by the employees' counsel that the exact period of dumping could not be determined precisely.

⁷³¹ 412 E – F.

The court accepted the arguments made by the employer and an order allowing the review and substitution of the arbitrator's award was granted.⁷³² The court rejected the finding by the arbitrator as to the time period of dumping. Further, the facts proved *prima facie* that many of the employees may have taken part in the discarding of the sample because an opportunity to discard the sample existed even during normal working hours and further the sheer scale of the scam showed that all the employees could have known about it. From the facts the court accepted that the employer had proved that all employees participated in the scam.⁷³³

The court went into an extensive consideration of the evidence given before the arbitrator and established that the dearth of co-operation with the employer to investigate the matter proved that the employees were not innocent.⁷³⁴ One of the more important contributions of this case involves the further understanding of labour jurisprudence of the concept of 'derivative misconduct', which is described as a form of misconduct that is inferred from the employees' failure to offer reasonable assistance to an employer to identify actual individuals responsible for the misconduct.⁷³⁵

On the argument of derivative misconduct in this case the court held that derivative misconduct may diminish the culpability or fault of the employee for the principal misconduct however it does not diminish the standard of proof. This means that De Beers had to prove in this case on a balance of probabilities that the employees knew or must have known about the principal misconduct and chose to be unjustifiably secretive about what they knew. By proving this

⁷³² 420 A. The order stated that the dismissals of all 15 employees was fair.

⁷³³ 413 E – 414I.

⁷³⁴ 416 A. The court stated that 'anyone who was innocent would have testified as the risk of losing one's job was great.'

⁷³⁵ 418 G. Derivative misconduct is often found in cases where a group of employees or individuals decide to participate in some form of misconduct but others chose not to expose them or identify them, for instance in a group of strikes a person can be assaulted, it becomes difficult to determine who exactly struck the blows unless other members of that strike expose the culprit. Therefore, derivative misconduct distinguishes between those who participated in the principal misconduct and those who knew about it but fail to disclose it. The question as to who must bear sanction is determined according to this maxim.

knowledge the employer is also able to prove that dismissal is a fair sanction for the principal misconduct by way of participating in and lending support or associating themselves with the offence.⁷³⁶ The court held that derivative misconduct is only an appropriate charge if employees who participated in the principal misconduct are distinguishable from those who knew about it and elected silence. The court held that this was not a case of derivative misconduct and the inference to be drawn is that all employees knew and had participated in the scheme.⁷³⁷

This case shows how important it is for employers to recognize that at times threats to a business may come from within in the diamond industry. The solution in cases of this nature is to investigate what would potential drive employees to act in this manner. One of the common complaints faced by diamond producers is the low salary rate miners often complain of, this may be one of the causes of turning to corruption & crime to make illicit profits. Having said that, however, South Africa cannot as a country adopt and tolerate a culture of deriving income from criminal activities.

With regard to retrenchment De Beers' involvement in labour laws was dealt with in *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd*⁷³⁸ which involved the retrenchment employees of DBCM at the Koffiefontein mine. This diamond mine was reported as having run at a consistent loss over its inconsistent operative years which culminated in a R75 million rand loss in the budget year of 2005. In 2005 DBCM seriously contemplated closing the mine, however, instead of closing the mine cost-saving measures were implemented and only 36 employees were retrenched.⁷³⁹

⁷³⁶ Although derivative misconduct was not fitting in the circumstances of this case because all the employees were charged with the principal conduct, there are elements of 'derivative misconduct' in that clearly the employees did not use the informer telephone number to offer any assistance which may have assisted with the investigation. Some of the employees simply refused to testify in that way supporting and associating themselves with the offence.

⁷³⁷ 419 C – D.

⁷³⁸ (2006) 27 ILJ 1909 (LC).

⁷³⁹ 912 A.

The strategy of implementing cost saving measures in 2005 and retrenching fewer employees in 2005, suggests an intention of the employer to take a decision that would at least assist the economic state of the employees by keeping the mine running *albeit* at a loss. This means that the employer is not to be viewed as a draconian business entity with little consideration for the employee masses. However, with the difficult task to save jobs and keep the mine running ultimately the employer caught in such a situation has to face the economic fact that it is impossible to support itself and its employees if the raw material mined in that particular mine causes significant financial losses. This is the reason negotiations pertaining to retrenchments at mines have to be conducted within the parameters of what is within the Labour Relations Act⁷⁴⁰ and consequently the decisions taken from proper consultation may be beneficial for all parties involved.

The facts of the case show that the Koffiefontein mine was operating under an 'old order' mining right which was to expire in 2006. DBCM attempted to sell the Koffiefontein mine. In order to be successful in this strategy DBCM needed to secure a purchaser of the mine by 20 January 2006. Negotiations took place between DBCM and the potential purchaser. The National Union of Mineworkers (NUM) was kept fully informed about any developments in the sale negotiations as an interested party however the sale fell through. DBCM then undertook to inform the Union that it had given the Department of Minerals & Energy 14 days notice of intention to close the mine which would also be followed by a notice in terms of section 189 of the Labour Relations Act.⁷⁴¹

It must be noted that in terms of the MPRDA if a seller of a mine has an old order mining right, such a seller must convert such a right prior to the sale. Therefore *in casu* in order to sell the Koffiefontein old order mining right, DBCM had to convert

⁷⁴⁰ 66 of 1995.

⁷⁴¹ 66 of 1995. 912 F – J & 913 A.

the old order mining right and then apply for Ministerial consent in terms of section 11 of the MPRDA to transfer the mining right to the purchaser.

DBCM gave a notice in terms of section 189(3) of the Labour Relations Act⁷⁴² to the Union on 26 January 2006 showing DBCM's intention to commence consultations regarding a potential retrenchment of 329 employees. Consultation meetings were held with NUM however no agreement was reached.⁷⁴³ On 28 March 2006 DBCM informed the Union that it intended to issue notices of termination of employment as contemplated in the retrenchment consultations, these letters were delivered by DBCM on 31 March 2006 showing that the contracts of employment would terminate on 30 April 2006.⁷⁴⁴

The Union referred the matter to the CCMA with one of their main complaints being that the notices pertaining to retrenchment were given in contravention to section 189A (8) read with section 64(1) of the Labour Relations Act⁷⁴⁵ and as a result the notices were premature and unlawful. Further, the Union contended that because the employer had failed to consult adequately in respect of the proposed retrenchments, all the effected dismissals were unfair. The employer denied these contentions therefore the Union made an urgent application to the labour court for an order including, *inter alia*, a notice declaring the notices of termination dated 31 March 2006 null and void and an order interdicting DBCM from giving notices of termination of employment contracts until the periods mentioned in section 64(1) (a) read with section 189A (8) (a) of the Labour Relations Act⁷⁴⁶ have elapsed.⁷⁴⁷

The labour court dealt with the matter by dealing firstly with the question of validity of the dismissal notices. The court established that because of the

⁷⁴² 66 of 1995.

⁷⁴³ 913 D. All mining operations had ceased at this stage.

⁷⁴⁴ 911 F.

⁷⁴⁵ 66 of 1995.

⁷⁴⁶ 66 of 1995.

⁷⁴⁷ 912 A – B.

number of employees affected section 189A was applicable as expressed within the provisions of the section. In terms of section 189A(3) a CCMA appointed facilitator must be present in such circumstances to assist the parties engaged in consultations subject to certain conditions which did not apply in this case and as a result no facilitator was appointed. Further the court pointed out that in terms of section 189A (7) which provides that ‘if a facilitator is appointed...and 60 days have lapsed from the date on which notice was given in terms of section 189(3) an employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act.’⁷⁴⁸ In this case the Union would be left with various choices set out in the statute in response to the employer’s actions within the Act.

The court further pointed out the provisions of section 189A (8) of the Labour Relations Act⁷⁴⁹ as being directly relevant to the dispute. This provision⁷⁵⁰ stated that, if a facilitator is not appointed as in the present case, ‘a party may not refer the dispute to a council or CCMA unless a period of 30 days has lapsed from the date on which the notice was given in terms of section 189 (3)’ therefore the time periods were of essence in this case. Further and most importantly section 189A (8)(b) provided that once the periods mentioned in section 64(1)(a)(i) have elapsed an employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act⁷⁵¹ once again leaving certain choices to a registered Union to respond in such circumstances.⁷⁵² The Labour Relations Act⁷⁵³ contained clear provisions with regard to the time periods within which an employer may terminate contracts for operational requirements.

⁷⁴⁸ 75 of 1997. 914 E – I. Section 189A (7)(a) empowers employer to terminate employment contracts.

⁷⁴⁹ 66 of 1995.

⁷⁵⁰ Labour Relations Act 66 of 1995 section 189A (8).

⁷⁵¹ 75 of 1997.

⁷⁵² 915 A - C.

⁷⁵³ 66 of 1995.

After considering the arguments of both parties Senior Counsel with regard to whether the notices were given within the correct periods of the Labour Relations Act,⁷⁵⁴ the court took the view that the notices to terminate the employees' employment contracts were given prematurely and therefore in breach of section 189A(8)(b)(1). This could be deduced from the fact that the Union had referred the dispute, in accordance with section 189A (8) (a), in respect of the retrenchments to the CCMA on 30 March 2006 therefore according to section 189A (8) (b) (i) in these circumstances an employer must wait for the periods in section 64(1) (a) before it can give notice to terminate.⁷⁵⁵ The court accepted the Union's contention based on the reasoning set out above that the notices were invalid and were of had no force or effect.⁷⁵⁶

With regard to the interdictory part of the Union's prayer counsel for the Union argued that the Union was entitled to the interdict because the period from the referral of the dispute until a certificate of outcome had been issued had not yet elapsed.⁷⁵⁷ Therefore, according to counsel's argument, it was not important that 30 days had already passed since the referral was received by the CCMA as long as the certificate of outcome was not issued the relevant period had not lapsed and it therefore remained unlawful for DBCM to issue notices of termination. This argument was rejected by the court on the basis that the use of the word 'periods' by Legislature in section 189A (8)(b)(i) meant that it was sufficient that one of the periods must have elapsed therefore it was not necessary for both periods to elapse.⁷⁵⁸ The court concluded this point by refusing to grant the interdict as DBCM became entitled to issue the notices of

⁷⁵⁴ 66 of 1995.

⁷⁵⁵ 916 D - J.

⁷⁵⁶ 917 G.

⁷⁵⁷ 918 A - E. It is important to note that this matter was argued more than 30 days after the referral to the CCMA. Counsel for the Union argued that in terms of section 189A(8)(b) only once the periods mentioned in section 64(1)(a)(i) and section 64(1)(a)(ii).

⁷⁵⁸ 918 A - I. 919. The court warned that if the contention expressed by the Union's counsel in this case were accepted by the court, it would not only bastardize the Legislature's intention of making these periods mutually exclusive. This would result in an unfortunate consequence where an employer would be exposed to the risk of being unable to give notices of termination for an uncertain period of time that hangs on the issue of a certificate of outcome if it is ever issued.

termination after the 30 day period had lapsed as determined in section 64(1) (a) (ii).⁷⁵⁹

On the issue raised by the Union stating that there had not been adequate consultation in this matter, the court disposed of that point expeditiously by pointing out that this point was not raised in the founding affidavit but only raised in the replying affidavit; as a result a fair opportunity was not given to DBCM to address the point. Further the court stated that since this matter was one based on section 189A (13) read together with section 189A (14)⁷⁶⁰ which required the court to grant necessary relief if the employer fails to comply with fair procedure. It was held by the court that on the facts there was no proof of such non-compliance with fair procedure and the consultations held were sufficient.⁷⁶¹

The court pointed out that it had the power to determine on the facts whether there had been sufficient consultation or not. In answering this question the court very importantly pointed out that DBCM was facing a crisis of having to close its Koffiefontein mine, however, its involvement in post-retrenchment activities within the community showed that it was not a company that was slack in observing its duties in terms of law in circumstances of this nature. The Union was successful in nullifying the initial notices of retrenchment because the notices were issued pre-maturely however from the case it becomes clear that apart from a miscalculation on the part of DBCM with regard to the 31 March 2006 notices, the process followed was fair although not in accordance with correct time limits.

The cases above form a very strong basis from which one is able to study the lawful socio-legal influences of an influential diamond producer on South African diamond industry labour relations and other aspects of the regulatory framework of South African legislation. This is a crucial expansion of knowledge that will mark that important link between law and commerce.

⁷⁵⁹ 920 A.

⁷⁶⁰ Labour Relations Act 66 of 1995.

⁷⁶¹ 920 D - G.

3.4.5 De Beers and the MPRDA

De Beers in the Constitutional dispensation observe all the South African diamond laws as previously shown in the earlier parts of this chapter. The legal compliance around the MPRDA is generally uneventful for De Beers in the like manner. However in a recent judgment involving the application and interpretation of the MPRDA with regard to the mining of tailings dump, De Beers successfully challenged the provisions of the Act. The landmark case on De Beers and the MPRDA is captured in the South African judgment of *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others*.⁷⁶²

This matter reflects a case where De Beers were practically influential to the development of diamond law in South Africa. This matter involved an impasse in law with regard to licenses for mining the tailings dump which were found in the matter to not have been provided for in the MPRDA.⁷⁶³ This case is important to the development of diamond legislation which has led to a creation of an amending bill which would deal with this gap in law.

The arguments raised by De Beers in this case show their understanding of the law and the technicalities that apply in the minerals' industry and this has led to the proposal of amending legislation will deal with this issue. This case as dealt with in depth in chapter 1 of this study and it clearly demonstrates a situation where a notable and successful diamond mining entity, De Beers is able to influence policy on legislation to govern laws on diamond regulation or mineral resources. Further, the arguments raised by De Beers in this case support the empowerment Constitutional mandate within the confines of Constitutional principles and values such as right to compensation in a case of expropriation and the right not to be arbitrarily deprived of property.

⁷⁶² Case Number: 3215/06 in the High Court of South Africa (Orange Free State Provincial Division), judgment delivered on 13 December 2007.

⁷⁶³ 28 of 2002.

Other decisions of the court pertaining to the MPRDA and the application of South African common law are also fully applicable to De Beers even though they do not necessarily involve De Beers as a party in the proceedings. An example of such case law includes the case of *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*⁷⁶⁴ where the court dealt with the ambit of mineral rights for open cast mining where the rights of the surface owner and the holder of mineral rights were conflicting. In this case the court held that the English law doctrine of subjacent support does not form part of South African law.⁷⁶⁵

It was held that conflicting rights between holders of servitural rights and owners of servient properties must be resolved by applying South African law. The court in this case found that where the ambit of mineral rights is not expressly provided for in statute, the common law must be applied. In this case the common law position was that a holder of the mineral rights may do what is reasonably necessary to remove minerals provided it is done in a manner that is least injurious to the surface owner's interests.⁷⁶⁶ The scenario illustrated above in this case clearly shows that as developed as South African mining laws are and as much as there is an inclination in such matters to rely on English law, the courts are committed to the proper application of South African common law principles where appropriate. These common law principles as shown in this case are perfectly cogent to protect neighborliness in the exercise of one's mineral rights.

3.5 De Beers Marine (Pty) Ltd: Legal Compliance in Diamond Mining

As briefly mentioned in the initial parts of this chapter, there will be a focused study of the inner workings of the company contracted to mine diamonds on behalf of DBCM.⁷⁶⁷ That specific entity is De Beers Marine (Pty) Ltd, (DBM) and this entity works according to South African diamond laws and this is expressed in their daily diamond law business protocols. Some of these strategies are also

⁷⁶⁴ 2007 (2) SA 363 (SCA).

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid. Meepo v Kotze & Another* 2008 (1) SA 104 (NC); Michael O. Dale *Mining Law Annual Survey*, Juta (2002).

⁷⁶⁷ DBCM ultimately belong to the Anglo-American group of companies.

expressed under the licence held by De Beers and operated by De Beers Marine as mining Licence ML 3/2003 and Environmental Management Programme Report.⁷⁶⁸ The mining licence together with the report form an important document⁷⁶⁹ insofar as it illustrates how DBCM being a concession holder in the sea areas through DBM apply the Diamonds Act,⁷⁷⁰ apply environmental laws and laws relating to the maritime environment specifically in the diamond mining context.⁷⁷¹

Since this work is concerned about diamond regulation laws it is important to study the legal aspects to be prioritized in law by a concession operator under its mining licence. DBM has been selected for this purpose particularly for their involvement in the more expensive and perhaps more curious sea diamond mining and exploration. Thus it will form a useful and unique study for legal analysis purposes to concentrate on the sea areas mining licence held by DBM as they produce the most valuable product for the concession holder, DBCM.

One of the most important concerns for DBM is the protection of the value of the diamond. They therefore work with various intelligence teams and informers to ensure that the integrity and safety of their product is not compromised.⁷⁷² DBM also has an elaborate legal compliance team that is tasked with ensuring that all in-house processes, procedures and business undertakings comply with the law. These are implemented through updated training of employees and an audit of these legal strategies is conducted from time to time by reputable companies.

⁷⁶⁸ DBCM's Environmental Management Programme as compiled by Lesley Roos, De Beers Marine (Pty) Ltd, P. O. Box 87 Cape Town 8000.

⁷⁶⁹ The document is a very thorough and substantial document therefore only selected aspects thereof will be considered in this chapter.

⁷⁷⁰ 56 of 1986.

⁷⁷¹ It is important to note that DBM is strategically chosen as a point of analytical study to the practical understanding of the application of diamond mining laws in the South African context. Obviously this study will be concerned with the legalistic perspective of sea areas mining and the scientific or geological aspects will be left to experts in such a field though it will be interesting to see the marriage between law and many aspects of the scientific processes and regulations in diamond mining.

⁷⁷² Even persons visiting De Beers premises are investigated in order to ensure that they are not acting in a manner that would promote industrial espionage.

Examples of in-house processes, procedures and business undertakings to comply with law include the undertaking by DBM to employ a company known as SRK Consultants⁷⁷³ to analyze the socio-economic impact of offshore diamond mining. This study revealed that the investment of ZAR 900 million made by DBM would attract an economic value of ZAR 100 million per annum during the lifespan of the mine. This would have the impact of creating 155 positions of permanent employment which would according to DBM records take into account the Employment Equity Programme designed to alter the profile of the company to reflect the broad demographic profile of the country.⁷⁷⁴ This entire project was also reported as having the potential of contributing up five per cent growth to the GDP.⁷⁷⁵ This example of legal compliance with mining laws is in line with the socio-economic concerns of the Constitution of the Republic of South Africa Act⁷⁷⁶ the MPRDA and the Diamonds Act.⁷⁷⁷

DBM also complies with Environmental laws in their mining activities and this is further evidenced by the South African Bureau of Standards approved implementation of the ISO14001 Environmental Management System (EMS). All of DBM activities are ISO14001 certified and this is in line with the laws related to effect an environmentally sound diamond mining activity. The ISO14001 has elaborate and express action plans for dealing with all potential environmental challenges. To further conserve the environment, DBM also uses seawater in the sampling and mining treatment process.

DBM also keeps within their Environmental Management Plan an elaborate list of interested and affected parties (IAPs), the contact persons of those parties and a very elaborate method of communicating information with such parties. This is an important initiative that will ensure that all law pertaining to the mining activity is

⁷⁷³ Environmental Management Programme Report for South African Sea Areas Mining Licence ML 3/2003. Page iii.

⁷⁷⁴ Environmental Management Programme Report for South African Sea Areas Mining Licence ML 3/2003. A3 – 11.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ 108 of 1996.

⁷⁷⁷ 56 of 1986.

observed. Among the IAPs are the relevant bodies such as the Department of Minerals and Energy, Provincial Government, Other offshore mining and petroleum companies, statutory bodies such as SANParks, the fishing industry, marine specialists, the Northern Cape Provincial Coastal Committee and other parties such as the University of Cape Town and dolphin protection bodies. It is after full consultation with these bodies that DBM operations were able to legitimately conduct diamond mining operations.

What is most interesting about DBM is that it produces the high quality diamonds which allows DBCM to be a step ahead of its competitors particularly if there any factors beyond De Beers control that are likely to impact on sales. It is an economically plausible strategy for DBCM to stockpile its diamonds as it allows the market to survive and ultimately contribute to significant economic activity in South Africa. It has also taken great financial effort on the part of DBCM to maintain the value of the diamond and shows exceptional business talent by making profits from the probable market illusion of the scarcity and virtue of diamonds and other ethical business concepts.

It is submitted that any complaints about the South African diamond industry should be kept in perspective through a balanced view of what is taking place in some unprotected mining environments. It is important to acknowledge that diamond mining practices in South Africa, particularly for De Beers are in line with the spirit and purport of the Bill of Rights.⁷⁷⁸ When comparing De Beers's efforts to enhance the diamond industry with those of the DRC, for example, a grim picture is painted about the DRC's mining practices.⁷⁷⁹ Perhaps the comparison is unfair considering that South Africa has always experienced relative political calm. However this comparison serves to illustrate the high

⁷⁷⁸ Environmental Management Programme Report for South African Sea Areas Mining Licence ML 3/2003. See application of *inter alia* of for National Environmental Management Act 107 of 1998 chapter 5 authorisations, section 24 and section 9 of Constitution of Republic of South Africa Act, 1996 in De Beers mining activities.

⁷⁷⁹ Childress Sarah *for Congo's Military, A Mine of Difficulties* (29 October 2009) <http://online.wsj.com/article/SB125676476068414179.html> 29 October 2009.

levels of human rights protection in South African diamond practices generally in the hands of the South African State and companies such as De Beers particularly in the Constitutional dispensation.⁷⁸⁰

As recently as 29 October 2009 in the DRC it was reported that even though military power has shifted significantly from rebel groups to the DRC national military there is still doubt as to whether minerals there are being mined legally or humanely. In fact it has been reported that mining is the only real source of income for many of the people in the DRC but it is grueling work with miners sometimes not taking baths for weeks as they sleep below the surface, their clothes are severely tattered and a miner is considered fortunate if he or she owns a pair of shoes. Women are still harassed on a regular basis.⁷⁸¹

In a similar media report dated 10 October 2009 it was confirmed that there are further abuses by Chinese Mining companies in the DRC. It was stated in the report that when European and US companies are compared with the Chinese mines in the same country, the Chinese mines failed miserably. They are criticized for not caring about the environment, they are not transparent, their approach to safety is abysmal, they do not care to remunerate sick or injured miners, they have no commitment to social development as they rely heavily on illegally-sourced minerals and profit from the misery of artisanal miners.⁷⁸² With these sad realities surrounding diamond mining, South Africa must be commended for its efforts in humane diamond mining.

⁷⁸⁰ Environmental Management Programme Report for South African Sea Areas Mining Licence ML 3/2003. See application of *inter alia* of, environmental section 24 of Constitution of Republic of South Africa Act, 1996 in De Beers mining activities.

⁷⁸¹ Childress Sarah *for Congo's Military, A Mine of Difficulties* (29 October 2009) <http://online.wsj.com/article/SB125676476068414179.html> 29 October 2009.

⁷⁸² <http://www.worldlabour.org/eng/node/259> 29 October 2009. See Childress Sarah *for Congo's Military, A Mine of Difficulties* (29 October 2009) <http://online.wsj.com/article/SB125676476068414179.html> 29 October 2009.

3.5.1 Compliance with Mining Licence Conditions

The mining licence held by DBCM under ML3/2003 issued by the Department of Minerals and energy in accordance with section 9(1) read with section 9(3) (e) of the Minerals Act⁷⁸³ is valid until 31 December 2015 or 'until the mineral the mining of which is hereby authorized can no longer be mined economically by the holder of the land concerned.' The licence specifically indicates that the mineral to be mined is diamonds. Further the licence expressly provides that the laws of the land are binding upon the holder thereof.⁷⁸⁴

An important *caveat* in mining as each mine has a specific life-span. One of the important undertakings by the concession operator is to ensure that long term effects of mining are assessed and strategies for surviving post-mining operations for each area must be projected and appropriately provided for. These aspects are all determined by the licence grantor through the use of information required in law as provided by various experts.

The concession area covered by this licence is situated in about 500km north of the port of Cape Town and 5km to seaward of the coastal mining towns of Kleinsee in the South and Alexander Bay in the north. The area is contained within the boundaries of the predetermined sea diamond concession areas which can be viewed in the sketch plans contained in DBM documents. The closest coastal towns which have benefited from these mining operations include Alexander Bay, Port Nolloth and Kleinsee. Port Nolloth and Alexander Bay have small fishing harbors and are not able to accommodate DBM vessels. Kleinsee on the other hand has no harbour at all. It is reported that the closest ports of sufficient size to accommodate DBM vessels are Saldanha Bay and Cape Town.⁷⁸⁵

⁷⁸³ 50 of 1991.

⁷⁸⁴ See Appendix E.

⁷⁸⁵ DBCM's Environmental Management Programme as compiled by Lesley Roos *Environmental Management Programme Report for South African Sea Areas Mining Licence ML 3/2003* November (2005) A1-3.

3.5.2. Compliance with Environmental Laws

It is most crucial to point out that at the foundation of DBM's mining activities a very thorough Environmental Impact Assessment (EIA) was carried out in respect of the application for mining rights in the southern African sea areas operated by De Beers. The preparation of the EIA involved a lengthy process commencing in 1991 where De Beers Marine commissioned the University of Cape Town's Environmental Evaluation unit comprising of thirteen experts to undertake an EIA to determine the potential effects of deep sea diamond mining activities on the natural systems of the west coast of southern Africa.⁷⁸⁶

The EIA addressed both Namibian and South African concessions and additional assessments were conducted for the ML3 licence application process. This process resulted in the successful mining licence being granted to DBCM making DBM a concession operator for the in the sea area. DBM continues to update and review the existing EIA and Environmental Programme Report in order to ensure that changes in legislation are addressed together with any further environmental concerns.⁷⁸⁷

It is important to note that according to the Environmental Management Programme Report which captures the legal requirements and practices of DBM, international as well as national law is closely and vigorously observed by the company in order to ensure statutory compliance. DBM has an environmental legal register which is audited as part of the company's certification.⁷⁸⁸ The certification and auditing of DBM is essential as it demonstrates compliance with agreed environmental performance standards through the actual implementation of measures defined within the law and the internal strategies adopted by the company to make those legal principles a reality. De Beers itself finds pride in

⁷⁸⁶ DBCM's Environmental Management Programme as compiled by Lesley Roos *Environmental Management Programme Report for South African Sea Areas Mining Licence ML 3/2003* November (2005) A7-2 – A7-3.

⁷⁸⁷ *Ibid.*

⁷⁸⁸ ISO 14001 standard. ISO stands for the International Organization of Standards which develops different kinds of standards. ISO 14001 is a series of documentation that relates directly to the Environment in the form of an Environmental Management System or EMS. Courtesy of Lorn Duquete Co.

that it views itself as having gone beyond compliance with regards to aspects of social responsibility.

The diamond mining operations that relate to the marine environment and are applicable under the licence ML3/2003 include the following Acts together with the regulations under such statutes:⁷⁸⁹

- Constitution of the Republic of South Africa, 1996⁷⁹⁰
- Air Quality Act 39 of 2004
- Atmospheric Pollution Prevention Act 45 of 1965
- Dumping At Sea Control Act 73 of 1980
- Environmental Conservation Act 73 of 1989
- Hazardous Substances Act 15 of 1973
- Marine Living Resources Act 18 of 1998
- Marine Pollution (Control and Civil Liability) Act 6 of 1981
- Marine Pollution (Intervention) Act 64 of 1987
- Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986
- International Convention for the Prevention of Pollution From Ships (MARPOL) 1973/78 as amended
- Marine Traffic Act 2 of 1981
- Maritime Zones Act 15 of 1994⁷⁹¹
- Merchant Shipping Act 57 of 1951
- Mineral and Petroleum Resources development Act 28 of 2002
- National Environmental Management Act 107 of 1998
- National Environmental management: Biodiversity Act 10 of 2004

⁷⁸⁹ DBCM's Environmental Management Programme as compiled by Lesley Roos, List compiled under DBM *Environmental Management Programme Report for South African Sea Areas Mining Licence ML 3/2003* November (2005) C2-6.

⁷⁹⁰ As previously noted, not only is DBCM & DBM concerned with its mining operations and creating equal opportunities for equal access to the meaningful participation of all South Africans in the diamond industry but it is also concerned with the environmental provisions of the Constitution. This is evident in the fact that DBM, for instance, has implemented strategies in place to achieve these Constitutional goals.

⁷⁹¹ Note that South Africa is going through the process of application for the extension of the limits of its continental shelf, in terms of the United Nations Convention On the law Of the Sea or UNCLOS, 1982 outcome of application expected in the earlier parts of 2009. This extension will be extremely important to SASA mining licences.

- National Environmental management: Protected Areas Act 57 of 2003
- National Heritage Resources Act 25 of 1999
- National Road Traffic Act 93 of 1996
- National Water Act 36 of 1998
- Sea Birds and Seals Protection Act 46 of 1973
- Sea Fisheries Act 12 of 1998
- Sea-Shore Act 21 of 1935
- South African Transport and Services Act (specifically Harbour Regulations Applicable under the Act) 65 of 1981
- Wreck and Salvage Act 94 of 1996

The list of environmental laws that DBM adheres to in order to uphold environmental conservation in their diamond mining operations demonstrates that DBM's commercial interests in mining are not contrary to the core Constitutional principles of environmental conservation in South Africa. While this may also seem like an arbitrary list that does not necessarily guarantee that the laws therein are observed, it is submitted that according to De Beers elaborate DBCM's Environmental Management Programme as compiled by Lesley Roos, for De Beers Marine (Pty) there are listed and express practical steps for the management of DBCM vessels, work environment and other measures to ensure that these laws are implemented in practice. For example, in a case of discovering artifacts while exploring for diamonds at sea, the report has a step-by-step process for declaring such an artifact. This is but a small example of how these practicalities are implemented with respect to the law. Each management structure has a plan for ensuring that legal compliance is achieved by DBM employees for example.

Of course every entity involved in the marine industry is expected to adhere to these principles as well. When comparing South Africa as a diamond producing country to other countries where the rule of law is not respected in this manner in diamond production, some of the first warning signs that diamonds are being

produced in an illicit manner involve a lack of respect for human and environmental rights. Usually mine workers or employees in such illicit mining operations are prisoners or slaves forced to work in deplorable conditions, there is also usually no plan to protect, conserve or rehabilitate the mining environment.

South African diamond producers such as DBM lead the pack in showing high concern for the environmental consequences of their operations. De Beers also contribute to the goal of ensuring that South African diamonds are not liable to fall under conditions that lead to illicit diamond dealing and trading activities. De Beers pride themselves to go beyond the basic legal compliance standards in these matters. This is done through practicable and implementable legal compliance company measures enforced and audited on a periodical basis with compliance reports being placed within the public domain for the purposes of attracting investment, creating trust among shareholders and public accountability.

DBM shows exceptional plans to uphold the dignity of its employees, there are strategies included to maintain work-place safety, such as the implementation of the OHSAS 18001 international occupational health and safety management system (A3-13 of EMPR), they have a Corporate Wellness Programme, and other important Employee Assistance and Health Promotion Programs including HIV/Aids, substance abuse and other behavioral management aspects of human dignity. Further, with regard to maritime security DBM vessels meet the International Maritime Organization (IMO) maritime security measures as updated and entered into on 1 July 2004 which adheres to the SOLAS, 1974 and the ISM Code.

The DBM environmental management report records that there are plans in place for dealing with rehabilitation of the deepwater marine environment where mining operations have an impact. Benthic or seabed community surveys have

been conducted and full reports by experts made public to ensure conservation. Further, a full scoping report calling for Interested and Affected parties (IAPs)⁷⁹² to raise their views was completed. In order to mitigate the impact of emitted sound pulses which may affect the hearing sensitivity of mammals an Assessment of Potential Acoustic Impacts on Marine Mammals Report was compiled and measures proposed to manage the situation.⁷⁹³ These reports and assessments are essential background checks upon which sound mining practices can be approved in the South African sea areas.

The report also provides that part of the prospecting and mining operations conducted by DBM may involve other marine specific environmental considerations such as a discovery of a shipwreck with possible artifacts. The designated DBM Operations Manager is tasked with keeping a record of such a discovery and they must inform the appropriate authority. If the discovery is declared as a heritage object, this must be done in compliance with the National Heritage Resources Act.⁷⁹⁴ With regard to vessels used at sea DBM's Operations Manager, Environmental Manager and Vessel Masters are tasked with keeping duties that will minimize disruption to other legitimate users of the sea by respecting their rights, effectively managing waste flows and air pollution by using the 'cradle to grave' philosophy⁷⁹⁵ promoting reuse, recycling and being conservative in using natural resources.⁷⁹⁶

⁷⁹² DBM have a very strong communication and information sharing relationship with IAPs. This is in line with the aims of the National Environmental Management Act 107 of 1998 which encourages cooperative governance, see preamble. This shows the extent of their interest in vigorously protecting the environment while respecting the laws of the country. DBM have a database of IAPs whose records are updated regularly to ensure their full participation in environmental management strategies.

⁷⁹³ DBCM's Environmental Management Programme as compiled by Lesley Roos *Environmental Management Programme Report for South African Sea Areas Mining Licence ML3/2003* (2005) C1-5; B1-20 - B1-23.

⁷⁹⁴ 25 of 1999.

⁷⁹⁵ This philosophy refers to the overall maintenance of an asset from its inception to disposal or renewal. By effectively managing an asset in this way, it increases the usefulness of that asset at minimal cost. See www.troy.edu/physicalplant/general/ 20 July 2008.

⁷⁹⁶ DBCM's Environmental Management Programme as compiled by Lesley Roos *Environmental Management Programme Report for South African Sea Areas Mining Licence ML3/2003* (2005) B1-9.

The DBM employees described above must respect the maritime environment in respect of their ships by respecting the presence of other vessels, managing potential fuel spills when vessels are refueled at sea, ensure that air conditioning, refrigerator systems and fire suppression systems are replaced with non-ozone layer depleting products and equipment. The relevant employees/officers are to report and maintain hazards during incidental loss of equipment (obstacles). They must also ensure that no DBM vessel is painted with paint that has toxic compounds that will cause damage to the marine environment. Further, shipboard wastes and emissions must comply with MARPOL⁷⁹⁷ standards. The water used in the vessel must be maintained through desalination units while use of potable water from Port Nolloth is done conservatively. These strategies are some of the practical implements of ensuring that the requirements of legislation applicable in environmental management of DBM are observed.⁷⁹⁸

The strategies exercised by DBM to achieve its legal obligations pertaining to the environment illustrates an involvement of formidable experts in creating strategies that will ultimately ensure that when the mining activities cease, there will certainly be no problem of environmental restoration on either the land or the deep seas area for present and future generations.

It is clear from the practices adopted by De Beers even as illustrated in one of their companies in the form of DBM that they are not just a company that simply mines diamonds and goes home. It is clear from the study above that De Beers take the environment in which they are actively gaining a livelihood very seriously. The depth of the EIA⁷⁹⁹ on the sea areas illustrates the Constitutional mandate of ensuring that mining operations are done with the least amount of damage. Should damage be unavoidable De Beers has in place elaborate

⁷⁹⁷ International Convention for the Prevention of Pollution From Ships (MARPOL) 1973/78 as amended.

⁷⁹⁸ DBCM's Environmental Management Programme as compiled by Lesley Roos *Environmental Management Programme Report for South African Sea Areas Mining Licence ML3/2003* (2005) B1-9.

⁷⁹⁹ Constitution of the Republic of South Africa Act, 1996 section 24. National Environmental Management Act 107 of 1998.

rehabilitation⁸⁰⁰ schemes in place to ensure that the environment is least disturbed.

Further, the diamond mining practices are humane and protective reflecting that they are a company that is committed to social responsibility. Mining personnel in the whole company are given necessary information on issues that affect them such as learning business skills and other initiatives such as worker concerned issues. This is effectively done through information and public accountability and the involvement of 'interested and affected persons' in any of their proposed projects.

The strategies explained above to achieve fairness and equity in De Beers companies reflected in the business of De Beers above illustrate Constitutionally sound principles of sustainable development and protection of the environment, fairness and equity. These strategies are subject to available resources however and it is proposed that perhaps during the recession, with diamond sales being affected the most in many instances on the basis of being viewed as luxury items particularly if not being traded for industrial purposes, the implementation of some of these procedures may have been thwarted by lack of turn-over, particularly where certain mining operations have had to be shut down.

3.6 De Beers: The Diamond Trading Company (DTC) and Diamond Trading Company South Africa (DTCSA)

It is important at this instance to focus on De Beers⁸⁰¹ and how they have structured their sales practices to align them with the developments in diamond

⁸⁰⁰ Constitution of the Republic of South Africa Act, 1996 section 24 and enabling mining legislation the Mineral and Petroleum Resources Development Act 28 of 2002 encourages the conservation and rehabilitate the environment after a mining activity is made possible by section 38(1)(d) specifically where it is provided that a holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit must as far as practicable rehabilitate the environment affected by the mining activity. This strategy is also in line with the spirit of the National Environmental Management Act 107 of 1998.

⁸⁰¹ See www.debeersgroup.com 20 January 2006, for correct reference to company legal entities or juristic persons that form part of this large diamond producer. 25 January 2006.

industry regulations. It is important to note that in South African diamond production, there are other significant players in the diamond industry and these include Rio Tinto, Petra Diamonds, Alrosa, BHP Billington and their contribution to the South African and world diamond markets and participation in diamond laws is significant.

Further, to have an understanding of other diamond stakeholders with interest in South Africa one may consult the Department of Minerals and Agency, Directorate: Mineral Economics (Minerals Bureau), Republic of South Africa Directory D13/2004 for complete list of African (Mining Related) Government departments, Mineral/Mining Related Organizations and mining companies with interest in Africa.⁸⁰²

When it comes to diamond sales, particularly diamond jewellery the most striking feature of De Beers's diamonds is the 'Forevermark' brand which is also a company that forms a separately managed division within the De Beers family of companies. The Forevermark branding is an internationally recognizable brand. Every Forever mark diamond comes with a quality assurance and integrity certificate. These diamonds are aesthetically pleasing as diamonds are expected to be as they are crafted by a select group of diamantaires⁸⁰³ and are exclusively available at select jewellers.⁸⁰⁴ On the other hand there is also the sale of unpolished diamonds and industrial diamonds. De Beers sell their diamonds to various Sight holders and it is the market needs of these Sight holders that dictate which diamonds are sold.

The first port of call when it comes to De Beers's diamond sales is to understand the structure of the arm of De Beers known as the Diamond Trading Company (DTC). This company distributes rough diamonds and is the world's largest supplier of rough diamonds. The company handles nearly half of the world's

⁸⁰² Damarupurshad Ashok *A Work in Progress* (2004). www.dme.gov.za 15 September 2007.

⁸⁰³ De Beers Diamond Jewellers (DBDJ).

⁸⁰⁴ www.Forevermark.com 14 July 2009.

diamond supply in value. The DTC is active in sorting, valuing and diamond beneficiation and is represented internationally in countries such as the United Kingdom, South Africa⁸⁰⁵ as well as joint venture operations in Botswana and Namibia with the governments of those countries. Most DTC diamonds are sold through the London Sales Office however where the DTC is in a joint venture with a particular country, the diamonds produced there are generally sold to clients for cutting and polishing in those countries.⁸⁰⁶

The DTC was initially formed in 1934 and was established as a standalone company within the De Beers family in July 2004. The main sorting activities of the DTC are broken down into production sorting and aggregation. Production sorting is the classification of diamonds into various sizes, shapes, colours and clarities.⁸⁰⁷ Sorting of diamonds on behalf of the DTC takes place in the five centres namely DTCSA, for South Africa, NDTC, for Namibia, DTCB, for Botswana, DTC, for London and production of diamonds currently purchased from the Russian diamond company, Alrosa DTC London. Aggregation takes place in London at present however there has been a proposal that this process will be moved to Botswana. The valuing of the diamonds is connected with the associated sorting of diamonds and the DTC's sorting categories correspond with the price items in the DTC price book.⁸⁰⁸ The relevance of this brief history of the DTC is to establish its global placement in relation to South African diamond trade.

⁸⁰⁵ www.debeersgroup.com 27 June 2007. In South Africa the DTC is wholly owned by De Beers sells to South African based clientele.

⁸⁰⁶ In South Africa De Beers has been active to assist the government's SDT in conducting diamond trade and there has been evidence of the State and De Beers work together to achieve BEE goals in the industry however the two entities are separate in South Africa such that the relationship between the two entities is governed by the Diamonds Act 56 of 1986.

⁸⁰⁷ www.debeersgroup.com 27 June 2007. There are about 12,000 categories used by the DTC for production classification. Once classification is completed the process of aggregation takes place. Aggregation is concerned with the blending of categories of rough diamonds those that bear a similarity regardless of their country of origin, then spitting these into appropriate types and quantities to be sold to clients.

⁸⁰⁸ *Ibid.*

The DTC's sorting, valuing and sales operations in South Africa have been merged into one company which effectively created a single operation known as DTCSA and falls in line with the South African State policy on diamond trade. DTCSA is based in Kimberley and sorts and values about 13 million carats per annum of rough diamonds produced by DBCM in South Africa and it is this branch also that forms the sales division for the DTC in South Africa. It is very important to note the socio-economic investment made by De Beers in this instance as the decision to locate the company's headquarters in Kimberley was made to assist with the efforts in the Northern Cape Province in order to improve local skills and provide employment in the region.⁸⁰⁹

It is important to mention that where diamond sales are concerned De Beers are bound by their own ethical code of conduct known as the Diamond Best Practice Principles supported by an Assurance Programme and audited by a third party known as the Société Générale de Surveillance (SGS) and a fourth party by United Registrar of Systems Ltd (URS) who further review the quality of work and competencies of SGS. This code is made applicable to the entire De Beers Family of Companies, all DTC Sight holders or clients and certain third parties and covers company conduct in three main areas, that being, business responsibilities, social responsibilities and environmental responsibilities.⁸¹⁰

3.6.1 De Beers Operating and Financial Review 2007/2008: Industry Report

De Beers Group have taken initiatives to make industry reports available to the public. The aspect diamond sales will be considered under the 2007/2008 report. The management of De Beers has chosen to subscribe to the Global Reporting Initiative (GRI) G3 Sustainability Reporting Guidelines which also forms part of De Beers's Communication on Progress to the UN Global Compact. These

⁸⁰⁹ *Ibid.* This endeavor is a classic example of socio-economic empowerment which can be achieved when the public and private sector work together to achieve common statutory goals in the exploitation of the country's resources.

⁸¹⁰ www.debeersgroup.com 20 January 2006. These internal business systems adopted by De Beers are an example of the strategies that can be adopted by diamond producers to ensure the utmost integrity of the diamonds on the markets and these strategies give various clients the confidence they require where diamond sales are involved.

accountability reporting procedures undertaken by De Beers allow significant public empowerment through the provision of knowledge and research on the industry activities. Further such reporting causes peace of mind for De Beers's national and worldwide clientele. With an awareness of the company's cogent purpose, vision, values and principles through reporting of this nature, it is not a wonder that De Beers has been successful in adding significant value to diamond sales law.⁸¹¹

One of the values is articulated as follows in the De Beers Report 'being united in purpose and action, we will turn the diversity of our people, skills and experience into an unparalleled source of strength'. This quotation is in line with South African common law values such as *ubuntu*. The report is also a very honest look at the challenges that are a threat to the sustainability of the industry in Southern Africa. These challenges are being acknowledged and dealt with through various company efforts. For example increases in fuel costs which exert pressure on production and the prevalence of HIV/AIDS among staff and families which pose significant challenges.⁸¹²

With regard to diamond sales it is reported that the DTC achieved sales of US\$5.92 billion in 2007 and US\$6.15 billion in 2006. The demand for rough diamonds remained healthy throughout 2007. The DTC increased prices in the second half of 2007 in order to accommodate the rise in polished diamond price growths. With regard to jewellery sales, retail growth in countries such as China, India and the Gulf States continued to experience exponential growth in jewellery sales⁸¹³ in 2007, the US sales underperformed in light of the expectations of analysts and retailers. This is due to uncertain economic conditions which have lowered sales.

⁸¹¹ De Beers *Living Up to Diamonds from Natural Resources to Shared National Wealth: Operating and Financial Review (2007)* Preface. www.debeersgroup.com 16 January 2008.

⁸¹² *Ibid.*

⁸¹³ *Ibid.* De Beers having had significant growth in sales in 2006 De Beers Diamond Jewellers (DBDJ) opened 8 new stores in 2007 and now has 23 locations globally.

It emerged from various studies that 2008 was a difficult year for all industry because of the global economic crisis. De Beers reports that in spite of those concerns reports total sales to the tune of USD 6.89 billion. These were from Operating Company 2008 sales DTC, DTC Botswana, Namibia DTC, DTC South Africa and Diamdel. The total sales for De Beers in 2008 were despite the economic crisis up by 16.4 per cent the sales in 2007.⁸¹⁴

3.6.2 De Beers and the Russian Diamond Company Alrosa

With regard to the purchase of rough diamonds De Beers has not been left untouched by legal controversy both in their US and Russian commercial activities. With various class action suits in the US alone, De Beers was challenged, while not accepting the allegations in those actions have undertaken to settle these suits in order to protect their clientele, shareholders and consumers.

It is submitted that the willingness to accept a settlement so quickly points to a lack of desire to continue with a particular case on principle which in itself creates an uncertainty as to whether or not that action is concerned about a breach in principle of law or making generous compensation with the least effort. Further, a company's reputation is an important asset and therefore paying to protect the same is a natural reaction in business. However, whenever moneys are passed around or 'pay offs' are made to deter people from approaching the courts, suspicions will always be raised as such willingness to settle matters so rapidly may also indicate a form of admission of guilt.

It is important to analyze how these legal controversies affect De Beers's diamond sales as will become clear in the consideration of the involvement of De Beers's in the purchasing of rough diamonds from the Russian company

⁸¹⁴ De Beers *Living Up to Diamonds from Natural Resources to Shared National Wealth: Operating and Financial Review* (2008) 4. www.debeersgroup.com 20 October 2009.

Alrosa.⁸¹⁵ This case has been selected as it deals with the international trade context and pairs the same aspect with international law on preventing anti-competitive behavior which De Beers has been associated with on many occasions in diamond sales.

On 5 March 2002 De Beers notified its Trade Agreement with Alrosa to the European Commission who then raised concerns on the grounds of competition regarding the operation of the notified trade agreement. To resolve these concerns De Beers gave certain commitments to the European Commission which involved an undertaking by De Beers to have a staggered phase out of all rough diamond purchases from Alrosa with no purchases to be made from 1 January 2009. These commitments were audited by a Trustee⁸¹⁶ and were accepted by the European Commission on 22 February 2006.⁸¹⁷ However, there was a change in the initial agreement when the Court of First Instance Luxembourg⁸¹⁸ announced in July 2007 that it had annulled the European Commission's decision to accept the commitments offered by De Beers to cease all purchases of rough diamonds from Alrosa from 1 January 2009.⁸¹⁹

An analysis of the annulment of the Commission's decision will be considered below. The annulment came about when the Luxembourg Court of First Instance, in the case of *Alrosa Company Ltd v Commission of the European Communities*⁸²⁰ sat to hear an application by Alrosa for the annulment of the

⁸¹⁵ The commercial implications surrounding dealings between Alrosa and De Beers made much industry news in the period around July 2007. See Matthews Charlotte *Business Day* (South Africa) (12v July 2007) *EU's Reversal of Alrosa Ban Lifts Anglo*, which of course owns a substantial stake in De Beers.

⁸¹⁶ Grant Thornton UK LLP.

⁸¹⁷ Cited as Commission decision 2006/520/EC.

⁸¹⁸ An appellate body for testing decisions of the European Commission.

⁸¹⁹ www.debeersgroup.com 17 September 2008. The relevant documents pertaining to the COMP/B-2/38.381: De Beers/ALROSA Trade Agreement containing Commitments for De Beers and the Trustee Mandate Documents are made available to the public domain via their website. Although the document pertaining to the Trustee's Mandate is marked 'strictly private & confidential contains business secrets' and dated 10 December 2006, these documents have been made accessible to the public domain. This means there is no stealth pertaining to any commercial activities that the two companies have particularly considering the judgment given by the Court of First Instance Luxembourg.

⁸²⁰ T-170/06 the Court of First Instance of the European Communities (Fourth Chamber, Extended Composition) (11 July 2007).

Commission Decision making binding the Commitments made by De Beers to bring an end to the purchasing of Alrosa rough diamonds with effect from 2009 after an implementation of a process of progressive reduction of purchases leading up to that final stoppage of all rough diamond purchases. The application was also for bringing these proceedings to an end.⁸²¹

In this case the applicant Company, Alrosa had taken the decision to challenge the Commission's decision. The decision was based on Articles 54 and 55 of the Agreement on the European Economic Area (EEA Agreement).⁸²² The EEA Agreement which provides that any abuse by one or more undertakings of a dominant position within the territory covered under the Agreement or in a significant part of the area shall be prohibited by the Commission because such abuse is contrary to the aims of the Agreement. The subsections go on to list the examples of abuse envisaged in the Articles however relevant to this case is subsection (c) which provides for dealing with problems that relate to transactions that may place protected parties at a competitive disadvantage. Article 55 allows the EC Commission and the European Free Trade Area (EFTA) Surveillance Authority⁸²³ to give effect to prohibit abuses in terms of Article 54 of the EEA Agreement.

According to Dr. John Temple Lang,⁸²⁴ who has investigated in his writings the role of the courts in the achievement of the aims of the European Community

⁸²¹ This application was essentially based on the EC Regulations, Article 9 in particular of Council Regulations (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] OJ 2003 L 1, p 1. The matter was heard before a Fourth Chamber with an Extended Composition or Panel of decision makers formulated by H. Legal, President, I. Wiszewska-Bialecka, V. Vadapalas, E. Moavero Milanese and N. Wahl as Judges.

⁸²² OJ No L1, 3.1.1994, p 3; and EFTA State's Official Gazettes.

⁸²³ www.etfasurv.int 16 September 2008. Is a term used to refer to three EFTA States presently participating in the EEA Agreement which are Iceland, Liechtenstein, Norway and Switzerland and are set up in terms of Article 108(1) of the EEA, Section 2 which deals with surveillance procedure.

⁸²⁴ Lang J.T. *Fifty Years of European Community Law: Part I: Article: The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC* 31 Fordham International Law Journal (2008) 1483.

Treaty (EC Treaty),⁸²⁵ the Community legal system is fundamental and very different from other legal systems such as the US legal system. The rules of the European Community law now European Union law are primarily enforced and applied by national courts and authorities and not by the Community institutions.⁸²⁶

Dr. Lang continues to explain that although national law and Community law are not separate bodies of law applied by separate institutions and there should be no line of demarcation between the two institutions.⁸²⁷ Dr. Lang's explanation provides important insight as to the balance between EU Community law and national legislation, a very important understanding of the categorizations of the systems of law applicable in this case especially when dealing with Community competition law as national law may have an unfortunate implication of contradicting Community law. This means that whatever legal arguments are made by parties in cases involving Community law, although such legal arguments may be couched in national law, it is imperative that they are interpreted by the Community Institutions in a manner that will not conflict with Treaty aims.

Dr. Lang goes on to explain that when considering Treaties there are two types of States. There are 'dualist' States which regard international law as being quite separate from national law and 'monist' States which regard and accept more readily the idea that treaty obligations once accepted and ratified become part of national law without implementing legislation.⁸²⁸ Having studied the manner in which South Africa implements Treaties it is quite evident that South Africa is a

⁸²⁵ The achievement of the aims of the EC Treaty were the points of focus in the Alrosa and De Beers case considered herein and Dr. Lang provides academic insight on how the national courts interact with Community legal systems to achieve a balance between the two systems while regulating Community interests being protected.

⁸²⁶ Although in the Alrosa and De Beers case the Court of First Instance of Luxembourg can be labeled as a Community Institution because of the nature of its mandate and involvement in the case. Dr. Lang's submissions become important insofar as they show that national law and community law are to be interpreted in a manner that will be consistent with Treaty aims first and foremost.

⁸²⁷ 1483.

⁸²⁸ 1516.

State that reflects both monist and dualist principles. Therefore it is important at all times to have an understanding of international anti-competitive law and its interaction with South African law, for example in the form of the Competition Act⁸²⁹ when considering the Alrosa case. As a sovereign country South Africa has its own legal identity while remaining sensitive to the international legal systems and the achievement of certain Treaty aims of the international community.

When considering international law against municipal law, it is important to consider the Constitutional provisions that set out the requirements for such law becoming part of the municipal law.⁸³⁰ It has been submitted that since the promulgation of the Constitution South Africa has entered into a significant number of international agreements or treaties. In South Africa for an international agreement to be considered part of municipal law for the purposes of section 231 of the Constitution, it must be such that parties are subject to the national law, only central government may bind the Republic.⁸³¹

In the Alrosa case, when taking a decision the Court of First Instance established the following legal and factual scenario. In terms of Article 7(1) of the Regulations⁸³² where the Commission acting on a complaint or on its own initiative finds that there has been an infringement of Article 81 or of Article 82 of the Treaty (Meaning the Treaty Establishing The European Economic Community or EEC Treaty, signed in Rome 25 March 1957⁸³³) in that there is unfair economic competition, it may require the undertakings and associations of

⁸²⁹ 89 of 1998.

⁸³⁰ Constitution of the Republic of South Africa Act, 1996 section 231.

⁸³¹ Olivier M. *Informal International Agreements under the 1996 Constitution* 22 South African Yearbook of International Law (1997) 63.

⁸³² Council Regulations (EC) No 1/2003 of 16 December 2002. See paper III of the regulations which deals with Commission Decisions, headed as 'Finding and termination of infringement.'

⁸³³ Note that this treaty will be amended by the Treaty of Lisbon (amending the Treaty on European Union and the Treaty establishing the European Community) signed at Lisbon 13 December 2007 it is submitted that it will come into force in the middle of the year 2009, part of its objective is to make the EU more democratic with improved standards of openness, transparency and accountability.

such undertakings to bring such infringement to an end. Hence the Commitments taken by De Beers in the case COMP/B-2/38.381: De Beers/Alrosa.⁸³⁴

Article 9 of the Regulations provide that a Commission may adopt a decision requiring that an infringement be brought to an end and the undertakings (or entities) concerned may make commitments to meet these concerns. The Commission may take a decision to make those commitments binding on the entities involved and if those decisions are adopted there will be subsequently no grounds for action by the Commission. The Commission may however upon request or its own initiative reopen proceedings if there is a significant change in the circumstances that brought about the adopted decision.⁸³⁵

The facts of this matter are as follows: Two companies were involved, namely, Alrosa Company Ltd (Alrosa) which is an important diamond entity established in Mirny Russia and is actively involved in the production and supplying of rough diamonds and fine jewellery, and De Beers SA Luxembourg (part of leading diamond producers, the De Beers group). On 5 March 2002 these two companies notified the Commission of an agreement dated 17 December 2001 for Alrosa to supply rough diamonds to De Beers. This agreement was entered into by the two companies (De Beers being represented by two of its subsidiaries).⁸³⁶ The purpose of notifying the Commission of this agreement was

⁸³⁴ These documents are available for public view in the De Beers Website. Further, in terms of Article 7(1) to stop infringement the Commission may impose behavioral or structural remedies (whichever is least burdensome) which are proportionate to the infringement committed...to bring the infringement effectively to an end.

⁸³⁵ Para 3. Article 9(1)(2). These processes are naturally subject to rights of the undertakings to be heard and to have access to relevant information as kept in the file by the Commission. (As per Article 27 and Regulation 773/2004).

⁸³⁶ Para. 12. The agreement provided that Alrosa would supply De Beers with USD 800 million a year of rough diamonds for a period of 5 years, (USD 700million in 5th year) from the date of confirmation by the Commission to the contracting parties that such an agreement did not infringe Articles 81 (or merit an exemption there from) or Article 82. It must be noted that prior to this agreement De Beers and Alrosa already had established a commercial relationship. The provisions of the Treaty are expressly stated as follows: 'The structure of **Article 81**

(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

in order to obtain an exemption⁸³⁷ from the Commission from the consequences of Articles 81 and 82 of the Treaty.⁸³⁸

On 14 January 2003 the Commission sent a statement of objections to the trade agreement of the companies under case cited as COMP/E-3/38.381 in which it was contended that the agreement was capable of being an abuse of a dominant position which is prohibited in terms of Article 82. The two companies sent written submissions in response to the objections on 31 March 2003. On 1 July 2003 the Commission sent a supplementary statement of objections which expressed that the trade agreement of the parties was also capable of constituting an anti-competitive agreement which is prohibited in terms of Article 53(1) of the EEA

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- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Article 81(2) makes prohibited agreements void and thereby unenforceable: (2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void. Article 81(3) provides a possible justification for certain agreements that would otherwise be prohibited: (3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82, providing for the law on abuse of dominant position.

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

⁸³⁷ Regulation No 17 dated 6 February 1962 implementing Articles 81 and 82, dealing with competition, in terms of the EEC Treaty.

⁸³⁸ Para. 8 – 10.

Agreement and could not be exempted under the Article 53(3) and an abuse of dominant position in terms of Article 54 of the EEA Agreement. Parties made oral representations to the Commission on 7 July 2003.⁸³⁹

On 14 December 2004 Alrosa and De Beers jointly submitted commitments designed to meet the concerns raised by the Commission. These commitments provided for a progressive reduction in sales from USD 700 million in 2005 to USD 275 million in 2010 and to be capped at that level. On 3 June 2005 the Commission published a notice in an Official Journal stating that it had received the commitments from the two companies during a Commission investigation on the competition issues raised in the EEC Treaty. The notice also invited interested third parties to submit their comments within a month.⁸⁴⁰

After having considered the outcome of the market test, comments of third parties and subsequent commitments from De Beers, on 22 February 2006 the Commission adopted a Decision 2006/520/EC which as previously mentioned involved De Beers committing to have a staggered phase out of all rough diamond purchases from Alrosa with no purchases to be made from 1 January 2009, this adoption of the decision also brought the matter to an end. However, on 29 June 2006 Alrosa brought an application to the First Court Of Instance, Luxembourg for the annulment of the Commission decision. The Commission lodged a defence and eventually the matter was heard on 19 April 2007.⁸⁴¹

It is interesting to note that the Commission had taken a role of being guardian of the diamond market in this case.⁸⁴² The fact that the two companies had worked

⁸³⁹ Para. 14 – 17.

⁸⁴⁰ Para. 19 – 20. The Commission intended to make these commitments binding subject to the outcome of the market test of the points of the two companies' agreement.

⁸⁴¹ Para. 27 – 35.

⁸⁴² This is confirmed by the Commission's actions of protecting the market in terms of the EEC Treaty and the Regulations there under by virtue of prohibiting the abuse of dominant position and removing unfair competition. It must be noted however that the market dominance factor was only in relation to De Beers's position and not Alrosa in this case. Therefore by virtue of De Beers's willingness to enter into negotiations and make submissions for certain commitments to address the concerns of the Commission illustrates that De Beers were concerned about dealing with anticompetitive concerns in their business dealings in this

hand in hand with the Commission all along to find common ground means that the Commission's work of rooting out abuse of dominant position and rooting out unfair competition was respected until the Alrosa felt that it would not benefit their commercial position to cancel their trade agreement with De Beers. This decision to appeal by Alrosa shows that laws pertaining to the protection of international markets are essential however such laws may have an adverse effect on the parties' freedom of contract. Where such freedom of contract is so affected that it makes no commercial sense it should be open to parties to challenge such decisions as illustrated by Alrosa's conduct in this case.

The enquiry and outcome of the First Court Of Instance, Luxembourg continued as follows, the court was quick to acknowledge that Alrosa was not the company to which the Commission's decision came about therefore the grounds for admissibility of action at the instance of Alrosa had to be established. On this point the court explained that the matter was one involving considerations of public policy to determine the admissibility of the action. The court firstly established that the action was admissible at the instance of Alrosa because it caused Alrosa immediate and direct legal effects in that Alrosa could no longer supply rough diamonds to De Beers and the decision would have an effect on Alrosa's competitive position on the market for the supply and production of rough diamonds.⁸⁴³

Alrosa argued three essential points as a basis for its argument. They firstly argued that their right to be heard was infringed⁸⁴⁴ secondly that the Commission's decision infringed Article 9 of Regulations No 1/2003⁸⁴⁵ and thirdly

case. There is evidence that through the commitments made De Beers were trying to cooperate with the guardian of the market, i.e., the Commission.

⁸⁴³ Para. 38 - 40. Alrosa was not the addressee of the decision therefore other grounds for admissibility of their action had to be considered.

⁸⁴⁴ This point of argument naturally raises eyebrows in law as the right to be heard forms the basis of natural justice in forums of law particularly where adverse decisions have to be taken that will naturally affect a party.

⁸⁴⁵ Para. 42. On this point Alrosa stated that in terms of the Article 9 of the Regulation 1/2003 it is not permitted that an undertaking (in this case Alrosa as an entity) be indefinitely bound by commitments it has not voluntarily subscribed to.

Alrosa argued that the commitments themselves were excessive in nature and thus in breach of principles of freedom of contract and proportionality.⁸⁴⁶ It is important to note that these arguments are cogent in nature, however, on the point of freedom of contract there must be a balance between such freedom and the prevention of over-subscription to a particular market which may in turn create unfair competition. Therefore the guidance provided in this case to balance the interests of undertakings against anti-competitive laws is essential and therefore it will be crucial to look at the rationale of the court in this case in detail.

Alrosa argued that Article 9 of Regulation 1/2003 afforded the Commission and the companies involved with an opportunity to arrive at a mutual decision such that the final binding commitments are not ones offered only by one party. Further, in terms of the regulation decisions taken by the Commission ought not to be for an indefinite period as this infringes on freedom of contract which in this case would have the effect that any supply of rough diamonds to De Beers by Alrosa would be curbed for an indefinite period, thus making it impossible to continue even with the ordinary *ad hoc* contracts to supply rough diamonds which De Beers and Alrosa had done in the past. Alrosa argued that to uphold the Commission's decision solely on the basis that De Beers is in a dominant position on the markets downstream from the market for the supply of rough diamonds amounted to a legal boycott of Alrosa by De Beers with effect from 2009 as per commitments.⁸⁴⁷

Alrosa also argued that the Commission's decision was fundamentally flawed as a result of what Alrosa alleged to be an erroneous preliminary assessment. Alrosa pointed out that the main concern expressed by the Commission in their initial assessment of the trade agreement and the EEA Agreement was that the

⁸⁴⁶ Para. 42.

⁸⁴⁷ Para. 46 – 51. Alrosa argued an error in law in this instance by stating that the effect of the Commission's decision in this case was to the effect that it prohibited perfectly lawful conduct for an indefinite period. They argued that this was directly in conflict with the principle of a free market economy enshrined in the laws of the member States and captured in precedent as well.

exclusive supply commitment laid down in the trade agreement would result in strengthening De Beers' market power by excluding Alrosa from the market for the supply of rough diamonds which would have the consequence of depriving other purchasers of access to the notable diamond source which it represented. Since this was the Commission's main concern Alrosa argued that in terms of precedent it was necessary in this case for the Commission to conduct a detailed assessment of the foreclosure effect of De Beers' conduct in this instance especially since this situation presented a unique legal challenge under EC Article 82 because it involved an exclusive supply commitment or trade agreement with a dominant purchaser.⁸⁴⁸

Alrosa continued to argue that the Commission's decision itself had anti-competitive effects in that it barred the largest buyer on the market from access to Alrosa's rough diamonds and as a consequence reducing its output because there would have been no guaranteed alternate purchasers with the same amount of buying power. Further, De Beers would be barred from accessing Alrosa output therefore other purchasers would have gained greater market advantages in their negotiations with Alrosa and thus be able to impose artificial prices.⁸⁴⁹ The arguments raised by Alrosa seem to be a delayed reaction to the realities of market dynamics as influenced by the Commission's decision and hence the application.

On the argument on proportionality Alrosa argued that the Commission's decision had infringed Article 9 of Regulation 1/2003 in that it had gone beyond what is necessary to achieve the objects of the treaty. They believed that the Commission took a decision that was so stringent that it completely ruled out the possibility previously open to Alrosa of entering into a contractual relationship with De Beers which would disadvantage Alrosa. The Commission responded to

⁸⁴⁸ Para. 53 – 55. This suggests that Alrosa was alleging that the Commission had taken a decision in a draconian manner while at the same time failing to inform itself fully by assessing the market foreclosure effect. It was their argument that had the Commission done that proper assessment they would have amended the notified agreement to deal with such an effect in order to avoid any foreclosure effect.

⁸⁴⁹ Para. 56.

Alrosa's arguments by stating that they were unfounded on the basis that according to their interpretation of the relevant provisions of law relating to abuse of dominant position only De Beers was the undertaking concerned with the proceedings giving rise to the Commission's decision and they were the only ones permitted of offering commitments that could be made binding by the Commission, further the Commission has power to impose such commitments without reference to a specific time period.⁸⁵⁰

On the argument of contractual freedom, the Commission contended that its decision had not infringed on such freedom as it is an error for Alrosa to argue that its decision was equated to a prohibition of lawful conduct. The Commission contended that contractual freedom is limited by the prohibition of anti-competitive practices as contained in the treaty.⁸⁵¹ This argument was taken from the essential application consequence theme of limiting certain freedoms to protect other freedoms. What is interesting to note is that the Commission made out its response against Alrosa mostly by way of what seems mostly as a bare denial of the allegations made by Alrosa⁸⁵² with the obvious conclusion to their defence stating that the Commission's decision was not disproportionate or unduly affecting Alrosa's business interests.

In light of the arguments of the parties the court found that the Commission was well within their rights in terms of Article 9 Regulation 1/2003 to make commitments offered by the undertakings binding where those commitments are sufficient in addressing concerns raised by the preliminary assessment. However the legal effect of the Commission's decision in this case was not a mere acceptance of a proposal by a negotiating undertaking but it was a binding measure implemented by the Commission in the exercise of its prerogatives in terms of Article 81 and 82 of the EC intended to put to an end any infringement of the competition rules. This means that the Commission's decision may have

⁸⁵⁰ Para. 63 – 67.

⁸⁵¹ Para. 68 – 89.

⁸⁵² See Para. 77 – 85.

indirect legal effects on an undertaking to put it in a position that it would not have been able to create on its own.⁸⁵³

The court made it clear that as soon as the commitments were made binding and the Commission had taken a decision *in casu*, the Commission was acting as sole author and assumed responsibility for that decision. In simple language the court was stating the principle that the Commission, when taking a decision it is doing so within its powers and does not have to be dictated to by the undertakings concerned. In this case participation of the undertakings permitted the Commission to take a decision in a more expedient manner as it did not have to prove infringement of competition rules first in terms of Article 85 of EC, however, this did not mean that the undertakings were to decide on best way forward for the Commission.

The point is that the Commission may take decisions to penalize undertakings involved in the infringement of competition rules. Further, in terms of para. 91 and 98 the court found that it is open to the Commission to make the commitments binding for an indefinite period of time if this period achieves the purposes of the Treaty and is applied according to the principles of proportionality as set out in Article 5 of EC and established case law (the proportionality of a measure forms an objective review). Where there is a choice of procedure to be followed in implementing a measure, the Commission must have recourse to the least onerous measure.

On the point of proportionality the court found that the Commission had gone beyond its powers in law by taking a decision prohibiting absolutely any future trading relations between the De Beers and Alrosa (even if those commitments are offered by an undertaking voluntarily). This type of decision would only have been justifiable if it was re-establishing relations which existed prior to the infringement of competition rules. However, the fact that the commitments were

⁸⁵³ Para. 87 – 88.

given voluntarily also did not mean that the court could not review whether the Commission's decision based on those commitments was in fact well founded.⁸⁵⁴

Essentially when testing the proportionality of the measure approved by the Commission, the court defined the nature infringement of competition rules. The court found that in the opinion of the Commission the trade agreement between Alrosa and De Beers constituted an exclusivity of distribution for the benefit of De Beers and this would be an abuse of the dominant position. The Commission believed that De Beers was enhancing or maintaining its dominant position by reducing access to an alternative source of rough diamonds for potential customers and in turn hindering Alrosa from competing with De Beers. However, this decision was not taken with due consideration of a complex economic assessment and therefore the decision was by default subject to judicial review in order to test the proportionality of the measure adopted. The court held that the decision of the Commission was invalidated by an error of assessment as there were other less onerous solutions that could have been adopted instead of permanent prohibition of transactions between DeBeers and Alrosa. In conclusion the court annulled the Commission's decision.⁸⁵⁵

It is interesting to note that the Commission was in essence seeking to prevent in its view some kind of self-imposed commercial 'under dogging' by Alrosa without properly assessing the market effects. The question thus arises as to whether the Commission is entitled to prevent commercial suicides of undertakings in such instances or should the freedom of contract dictate the market? The answer to this question is that the Commission can adopt necessary measures to uphold the spirit of the Treaty subject however to established principles of proportional measures and what is a proportional measure in each situation is determined by a proper assessment of the market effects.

⁸⁵⁴ Para. 103 – 106.

⁸⁵⁵ Para. 113 – 126 and Para. 205.

From the study of the case above an investigation of the position of De Beers in international law pertaining to anti-competitive behavior has been investigated in depth. Therefore is important now to consider the South African court's view of De Beers in South African diamond trade particularly in matters of market dominance.

3.6.3 De Beers Trade and Anti-Competition Law in South Africa

Having studied the De Beers and Alrosa case which deals with international anti-competitive laws in the diamond sales context, it is imperative that national competition legislation be briefly⁸⁵⁶ considered in this chapter insofar as it affects all market related sales. Naturally the competition laws in South Africa are designed to protect a broad spectrum of commercial transactions. This chapter will touch upon the competition aspects of South African legislation and specifically product sales. The understanding of this can then be interpreted and adapted to accommodate diamond sales regulation laws.

Competition is regulated by the Competition Act.⁸⁵⁷ This Act is essentially aimed at preventing anti competitive and restrictive practices and promoting free competition in the public interest and within the limits of the law. The Preamble expressly states that one of the objectives of the Competition Act⁸⁵⁸ is to 'create greater capability and an environment for South Africans to compete effectively in the international markets.' It further expressly provides as one of its objects the establishment of independent institutions to monitor economic competition and give effect to the international law obligations of the Republic.

The overall contribution of the Competition Act⁸⁵⁹ is to facilitate trading and business practices that are simultaneously competitive and in the public interest.

⁸⁵⁶ This is done so as to make an important legal point that affects diamond sales without deviating from the main purpose of this study which is to focus on diamond sales as potential subjects of international sales opposed to a study of competition laws.

⁸⁵⁷ 89 of 1998.

⁸⁵⁸ 89 of 1998.

⁸⁵⁹ 89 of 1998.

Diamond trade and sales transactions must be done within this framework. The Competition Act⁸⁶⁰ specifically is to be interpreted in a manner consistent with the Constitution which itself provides in section 22 for the right to freely choose a trade, profession or occupation. The Competition Act⁸⁶¹ may therefore be seen as giving effect to this Constitutional right. It is also provided that the Competition Act has to be interpreted in compliance with the international law obligations of the Republic. Finally, the Act expressly states that one of the purposes it serve is to promote competition in order to expand opportunities for South African participation in world markets and recognize the role of foreign competition in South Africa.

The case of *South African Raisins (Pty) Ltd and Another v SAD Holdings Ltd and Another*⁸⁶² is an important case will serve to illustrate the extent of competition law in South Africa as heard before the Competition Tribunal of South Africa where an interdict was sought and granted to prevent restrictive practices that promoted anti-competitive behavior contained in a company's articles of association. The claimant company, South African Raisins (Pty) Ltd, was established to compete against the respondent company, SAD Holdings Ltd and its wholly owned subsidiary for the production of grapes for processing into raisins. This judgment is helpful in demonstrating the national law approach to issues of abuse of dominant position in industry related markets.⁸⁶³

The facts of the case illustrate that the whole matter came about when the South African dried fruit market was changing from one being controlled by State and producer regulation (for example, large regulatory boards such as the Dried Fruit Board) to one that is market oriented. Therefore the issue before the court in this

⁸⁶⁰ 89 of 1998.

⁸⁶¹ 89 of 1998.

⁸⁶² 2005 JOL 18309 (CT).

⁸⁶³ When considering this judgment one is able to see the similarity between South African law and international laws particularly those laws contained in the Rome Convention as considered in the *Alrosa Company Ltd v Commission of the European Communities* T-170/06 The Court of First Instance of the European Communities (Fourth Chamber, Extended Composition) (11 July 2007) although the conclusion of each of the cases was vastly different.

case was whether the anti-competitive practices observed by the former State regulated co-operatives order were still being retained in the new market oriented or free-market system.⁸⁶⁴

The co-operatives were responsible for single-channel marketing of agricultural products in terms of Marketing Act⁸⁶⁵ (now repealed by the new order Marketing of Agricultural Products⁸⁶⁶). It is worth mentioning that single market channeling involved as a rule that producers would be criminally liable if they do not sell their entire crop in good and bad years to the relevant co-operative which would commit itself to purchase the entire crop from its members. Although this method is based on a market domineering model it also had its benefits in that the producers were guaranteed purchasers *albeit* without market freedom.⁸⁶⁷

The activities and functions of the co-operatives were so dominant in the market because their activities covered all areas of agricultural output including financing, storage, processing, packaging, distribution, sales and exports. The regulation of this type of market dominance is one of the objectives in the creation of the Competition Act,⁸⁶⁸ as amended and applied together with regulations there under, in order to provide for a Competition Commission and Competition Tribunal that will investigate *inter alia* restrictive practices and abuses of dominant position which have their roots in South Africa specifically in apartheid and discriminatory laws.⁸⁶⁹

The claimant established that the respondent company and its subsidiary which had altered its structure of being a co-operative previously responsible for the packaging and distribution of raisins among other products into a new business

⁸⁶⁴ 1. Introduction as per Lewis DH, Presiding Member, with whole bench concurring.

⁸⁶⁵ 59 of 1986 repealed.

⁸⁶⁶ 47 of 1996 repealed.

⁸⁶⁷ 2005 JOL 18309 (CT) 1 Introduction as per Lewis DH, Presiding Member, with whole bench concurring.

⁸⁶⁸ 89 of 1998.

⁸⁶⁹ 2005 JOL 18309 (CT) 1 Introduction as per Lewis DH, Presiding Member, with whole bench concurring.

structured as a corporation but retaining the same relationship between itself and a large number of producers in the sector. The claimant was also able to prove contravention of the Competition Act⁸⁷⁰ by showing that the practices of the respondents prevented them from participating and competing in the raisin market.⁸⁷¹

This case forms an important contribution to an understanding of laws relating to anti-competitive behavior in South African markets. A reading of the Competition Act⁸⁷² reveals a striking similarity to international European Union legal systems. The South African Competition Tribunal in this case went as far as uprooting anti-competitive behavior contained in the respondent company practices even though retrospective application of the Competition Act⁸⁷³ was in question in this case. The Tribunal took the view that although the Competition Act⁸⁷⁴ was not to be applied retrospectively; it had the power to deal with agreements that at any stage still had the market effect of promoting anti-competitive behavior in the relevant market under consideration.⁸⁷⁵

The Competition Tribunal has also dealt with this concern over anti-competitive behavior in⁸⁷⁶ the case involving De Beers who have a pervasive influence on competition in diamond production and sales as illustrated in the following unreported case of *De Beers Consolidated Mines Ltd v Anglovaal Mining*

⁸⁷⁰ 89 of 1998.

⁸⁷¹ 2005 JOL 18309 (CT) 2. The claimants proved their case by establishing four points. They showed that the horizontal agreement between grapes for raisins producers that constituted a prohibited restrictive horizontal practice was in violation of section 4 of the Competition Act, the vertical agreement between grapes for raisins producers and SAD and its subsidiaries constituted a restrictive practice in violation of section 5 of the Competition Act 89 of 1998, that SAD was abusing its dominant position in the market by denying claimants access to an essential facility in violation of section 8(b). The Tribunal investigated each of these allegations and found in favour of the claimants.

⁸⁷² 89 of 1998.

⁸⁷³ 89 of 1998.

⁸⁷⁴ 89 of 1998.

⁸⁷⁵ 2005 JOL 18309 (CT) 5. This case also draws important parallels between the agricultural and diamond markets in terms of defining what is meant by the relevant market. The Competition Tribunal also considered that when it comes to relevant market it will consider the national as well as international or world market influence of a particular participant.

⁸⁷⁶ The insight provided by the decision of the tribunal being of assistance particularly in this work.

*Limited.*⁸⁷⁷ This case involved the consideration of a large merger between the De Beers Consolidated Mines Ltd (DBCM) and Anglovaal Mining Ltd, parties represented in the case. The Competition Tribunal granted this merger and issued a merger clearance certificate without conditions and the reasons for the decision appear in the discussion of facts and the decision of the tribunal. It is clear in this case how the tribunal undertook to consider the effects of this merger on market competition in order to show accountability to the diamond market and the laws pertaining to the prevention of the creation of monopolies so as to guard against negative effects of such a merger.⁸⁷⁸

The reasons for the tribunal's decision in this case provide an important reflection of considerations and measures that the competition tribunal will take into account to ensure that there is no abuse of dominant position in diamond markets in South Africa. Further, the case will illustrate the unique position of the diamond industry in that if a particular firm already enjoys a position of power because of its success in the industry, such power will not be arbitrarily diminished provided that the firm is not engaging in any market dominance that raises public interest concerns.

The merger transaction involved De Beers as the primary acquiring firm. The primary target firm was Saturn Partnership;⁸⁷⁹ the merger meant that De Beers was to acquire the whole of Anglovaal Mining Limited's interest in Saturn. The tribunal evaluated the merger by setting out the history behind the firms and the interests of De Beers as of 1980. It was shown from this background that in 1980 South African Base Minerals Limited, owned mineral rights to a certain Venetia farm and had subsequently entered into an agreement with De Beers allowing De Beers exclusive prospecting rights for precious stones in the farm with a term

⁸⁷⁷ Case No: 36/LM/Mar00, Competition Tribunal of the Republic of South Africa. The clearance was given by the court on 15 May 2000 prior to some of the amendments expressed in the Diamonds Act 56 of 1986 that have altered the methods of diamond trade in South Africa.

⁸⁷⁸ Part 1, approval.

⁸⁷⁹ Saturn Partnership was a partnership between Anglovaal Mining Limited (which had an 87.5 per cent interest) and Industrial and Commercial Holdings Limited (ICH) which held the 12.5 per cent remainder interest in the partnership.

in the agreement that De Beers would establish a mine if a discovery on the farm was made, in return De Beers would pay royalty to South African Base Minerals Ltd.⁸⁸⁰

De Beers discovered significant diamond deposits on the farm and established the Venetia mine. South African Base Minerals Ltd ceded the mineral rights to Saturn Mining, Prospecting and Development Company (Pty) Ltd. In 1996 Saturn Company sold the mineral rights to De Beers in return for a right to 50 per cent of the share of the pre-tax profits of the Venetia mine and this resulted in the structuring of the Saturn Partnership in question. As per agreement between the parties, Saturn holds a right to a 50 per cent share of the pre-tax profits of the Venetia diamond mine which is wholly owned by De Beers and Saturn is a channel for these profits and it conducts no other business except to collect profits on behalf of its partners.⁸⁸¹

The tribunal determined the impact of competition firstly by establishing the relevant product market which the tribunal stated that it was a market which involved the production and sale of diamonds. The relevant geographic market was also identified clearly by the tribunal to be the production and international sale of diamonds by De Beers and other producers through the Central Selling Organization controlled by De Beers.⁸⁸² With regard to impact on competition De Beers contended that the transaction in question was no more than De Beers acquiring a greater stake in the royalty stream afforded by a mine that they already owned independently from Saturn.⁸⁸³

At the hearing, however, it emerged that the pre-merger control that De Beers alleged to have over the Venetia mine was not as well noted as contended in its submissions to the Commission. The true terms of the agreement between De

⁸⁸⁰ Part 4, background.

⁸⁸¹ *Ibid.*

⁸⁸² Note that the structure of diamond sale bodies has been significantly altered by the legislative amendments pertaining to Diamond Law.

⁸⁸³ Part 6 – 8.

Beers and Saturn obligated De Beers to produce above certain levels for as long as Saturn remained in existence. De Beers had also made an offer to buy out Industrial and Commercial Holdings Limited (ICH) in order to allow De Beers to have 100 per cent interest in Saturn which would result in the dissolution thereof should such an offer be accepted by ICH. The effect of dissolving Saturn is that De Beers would not be limited by a contractual production constraint which means that it would be able to unilaterally decide to reduce production at a large South African Mine.⁸⁸⁴

It was held that in most industries, the fact that a merger gives rise to a dominant firm which has power to reduce production in one of the biggest producers might have a significant impact on the competition since control over production by a dominant producer is a classic manifestation of market power. However the circumstances are unique in the diamond industry. De Beers already had much power in the industry through its control downstream over the marketing of diamonds via the Central Selling organization that it does not need unfettered control over production at the Venetia mine level to influence the market.⁸⁸⁵

It was held therefore in light of these circumstances before the tribunal that in the case of diamond competition, in this instance, removal of the constraining influence on production exercised by Saturn over De Beers had no material influence in the market for the production and sale of diamonds given the market power already enjoyed by De Beers downstream. Further, the merger in this case raised no public interest concerns as there would be no loss of employment to any parties resulting from this merger.⁸⁸⁶ This decision reflects a value judgment in that the impact on the market was seen in light of how the merger would affect not only diamond production and sales but other socio-economic aspects of the merger particularly on the issue of employment of persons.

⁸⁸⁴ Part 9. Impact on Competition.

⁸⁸⁵ *Ibid.*

⁸⁸⁶ Part 10 – 11.

In South African law wrongful competition or unlawful competition is actionable as confirmed in the Constitutional court case of *Phumelela Gaming & Leisure Ltd v Grundlingh & Others*.⁸⁸⁷ It was established by the court in this case that any form of competition will pose a threat to rival business. However, not all competition or inference with property interests will constitute unlawful competition.⁸⁸⁸ The test to be applied in determining actionable competition is whether according to the legal convictions of the community the competition or the infringement on the goodwill is reasonable or fair when observed through the lenses of the spirit, purport and objects of the Bill of Rights. Other factors that will be taken into account include the honesty and fairness of the conduct involved, the morals of the trade sector involved, the protection afforded by existing positive laws, the importance of competition on the South African economic system, the question as to whether parties are competitors in the first place, conventions with other countries and the motive of the actor.⁸⁸⁹

The test established by the court in this case forms an important basis for ensuring that the South African economic system promotes free trade while simultaneously sustains what can be termed an 'athletic competition economy' which has room for all competing parties, that being, the gold medalist, the silver medalist and the bronze medalist and the finalists all forming part of the competition and all being able to perform at their best. Further, the principles established in the court in this case were observed by the undertakings in the *Alrosa Company Ltd v Commission of the European Communities*⁸⁹⁰ as through out the process no malice was detected on the part of the undertakings.⁸⁹¹

⁸⁸⁷ 2007 (6) SA 350 (CC).

⁸⁸⁸ 361 G – H; 362 A. The court further clarified this point by explaining that the role of the common law in the field of unlawful competition is to determine the limits of what constitutes unlawful competition.

⁸⁸⁹ 362 B – D.

⁸⁹⁰ T-170/06. The Court of First Instance of the European Communities (Fourth Chamber, Extended Composition) (11 July 2007).

⁸⁹¹ Further reading on the South African legal position on competition Laws, see Constitution of the Republic of South Africa Act, 1996, *Matthews v Young* 1922 AD 492, *Kruger v Coetzee* 1966 (2) SA 428 (A), *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1978 (4) SA 696 (T), *Schultz v Butt* 1986 (3) SA 667 (A), *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd* 1988 (2) SA 350 (W), *Taylor and Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (A), *Dress Designs (Pty) Ltd v GY Lounge Suite*

It is important to note that similar to market effects and market assessments required of the Commission in the European Union context in competition regulation, South African law also requires that submissions pertaining to the relevant market and convincing evidence of the 'scale of economies' in terms of the Competition Act⁸⁹² before a competition Tribunal is able to take a decision.⁸⁹³ The principles established in this case illustrate important relevance to diamond sales and one of those principles is that diamond producers have an ability to participate freely in the markets subject to general principles of freedom of contract as long as such exercise of freedom in the market does not permit a violation of other participant's rights to freely compete in the naturally competitive sales environment. What the law demonstrates above is that in South Africa there no longer exists a diamond monopoly.

3.7 Conclusion

This chapter forms a crucial market case study aspect of South African diamond regulations and in particular diamond trade. It is respectfully submitted that it is important to discuss laws pertaining to an industry such as diamond mining while making reference to the practical legal contributions made by De Beers. De Beers Group has had a significant impact on the history of diamond trade in South Africa and even in modern times it is still a powerful diamond trading entity that continues to participate meaningfully to the Constitutionally inspired democratically sound diamond laws. This chapter has established the reasons for acknowledging the presence of De Beers in South Africa has been beneficial and critical to the country's diamond mining industry and the economy at large.

Manufacturers (Pty) Ltd & Another 1991 (2) SA 455 (W), *Payen Components SA Ltd v Bovic Gaskets CC & Others* 1994 (2) SA 464, Van Heerden and Neethling P. *Unlawful Competition* 1 ed, Lexis Nexis Butterworths (1995), Van Heerden and Neethling P. *Unlawful Competition* 2 ed, Lexis Nexis Butterworths (2008) 78, Neethling P. and Visser *Law of Delict* 5 ed, Lexis Nexis Butterworths (2006).

⁸⁹² 89 of 1998 section 8(d)(i).

⁸⁹³ Competition Act 89 of 1998 section 8(d)(i). 2007 (6) SA 350 (CC).

What has emerged from this chapter is the practical understanding of past and modern laws of diamond trade as interpreted by the courts both national and foreign. These cases are important to the understating of the peculiarities of the diamond industry. The chapter also outlines the significant contributions of De Beers's structures in the form of the DTC and DTSA who have been instrumental juristic persons in the raising of revenue for the economy of South Africa as publicly accounted for in the group's financial reports and reviews. Further, De Beers are actively involved in wealth sharing through BEE initiatives and other social responsibility programmes.

Though De Beers are only expected to be responsible for their own mines, they have been leaders in many areas of diamond trade and their contribution must not go without notice in a diamond regulations law contribution.

Further, the influence of De Beers on the development of diamond laws must be studied in order to note that though De Beers is a dominant force in socio-economic and socio-legal spheres, through studying their influence on the courts in litigation it becomes evident that South Africa is developing more sound principles for achieving justice in the Republic as noted in the case of *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others*.⁸⁹⁴ For this reason De Beers influence on diamond laws and regulations should be applauded as it has richly expanded the knowledge base of the commercial laws pertaining to diamond mining.

It is important to mention that though the decisions considered herein may pertain to laws that may have subsequently been repealed or amended, the body of precedent remaining for consideration still forms a rich source of knowledge of how courts have applied laws pertaining to diamond regulations in South Africa

⁸⁹⁴ Case Number: 3215/06 in the High Court of South Africa (Orange Free State Provincial Division), judgment delivered on 13 December 2007.

particularly where a monopoly is involved. In terms of the Competition Act⁸⁹⁵ monopolies are highly discouraged in South African law particularly in light of private business as the law is moving toward opening up more equitable access to many of the South African markets. Therefore anti-competitive behavior is the mischief to be curbed in South African law in the Constitutional order. This means that the laws themselves have changes to reflect equitable principles particularly on the point of fair diamond markets.

Further Constitutional and humane diamond trading is evident in the De Beers ethos where principles such as *ubuntu* are at the core of their business strategies for dealing with their working environments. De Beers in the Constitutional dispensation demonstrate a commitment to environmental sustainability in their mining activities by adhering to the rules of law pertaining to environmental safety, conservation and rehabilitation, while also upholding worker's rights by ensuring the safety of their staff. Further, it has also been established in case law that when a mine is to be closed or mining activities are proposed De Beers do effectively engage with the affected and interested communities all to ensure that principles of fairness and human dignity are respected. In conclusion it has emerged that diamond trade daily activities have been significantly altered by the developed Constitutional laws that uphold humane diamond trade in South Africa.

⁸⁹⁵ 89 of 1998.

Chapter 4: Private International Law/Conflict of Laws and Diamond Trade

4.1 Introduction

Having established that diamond sales often have an international trade aspect to them, it is important to determine in such circumstances the law which is likely to be applied to such transactions in case of a legal dispute involving a foreign law element.⁸⁹⁶ States in the Third World group produce and export their diamonds among themselves and/or between each other. These States have looked for markets in First World States on account of the high prices which these First World States are willing to pay for diamonds as a result of their stronger currencies. The other reason is that most diamond mining companies in developing states are owned and operated by multinational companies incorporated in the First World States.⁸⁹⁷ As a result of this regime, international trade in diamonds will constantly have a foreign law element.

This chapter seeks to capture the Constitutional⁸⁹⁸ goal of having due regard to international law and foreign law when interpreting national law.⁸⁹⁹ Free and equitable trade and trade practices,⁹⁰⁰ equality before the law⁹⁰¹ and application of legal principles that uphold such values are important aspects of the law on private international law. This chapter will show how the courts in South Africa have taken decisions that reflect the Constitutional values and these are directly relevant to the diamond industry. This chapter will show the importance of looking to international law for best practices in matters of private international law.

⁸⁹⁶ See cases with foreign law element, for example, the case of *Laurens NO v Von Hone* 1993 (2) SA 104 (W), *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd and Others* 1995 (3) SA 663 (A), *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA).

⁸⁹⁷ The World Bank, Washington DC, USA *World Bank. World Development Indicators* (2001) 396. An example of such a diamond trading multi-national is Anglo-American.

⁸⁹⁸ Constitution of the Republic of South Africa Act, 1996 section 39 and section 233.

⁸⁹⁹ Constitution of the Republic of South Africa Act, 1996 section 233 which provides for the application of international law and states as follows: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

⁹⁰⁰ Constitution of the Republic of South Africa Act, 1996 section 22 and 23.

⁹⁰¹ Constitution of the Republic of South Africa Act, 1996 section 9.

The traditional diamond trading routes and relationships resemble a colonial hangover since most former colonies export to former colonizers. Diamond producing entities have also sought to benefit from advanced financial and transport and communication systems servicing first world trading routes and markets. It would for instance be cheaper and more convenient for Côte D'Ivoire to export diamonds to France, its former colonial master than for the same country to export to Armenia.⁹⁰²

Be that as it may, diamond trade transactions may involve more than one State entity. This means diamond trade transactions may involve more than one legal regulatory framework particularly when considering that various States may be involved. These States may be involved in providing transport systems, banking and financial services, insurance, airports, personnel, markets and storage facilities. The involvement of various legal systems brings into the picture the aspect of conflict of laws in diamond trade transactions.

Conflict of laws essentially refers to the body of rules within a national legal system that local courts would select as appropriate to govern disputes with a foreign element.⁹⁰³ Conflict of laws is therefore not supranational and therefore not similar to public international law, it is not a legal system regulating the relations between States but implies the assessment of a body of rules in a national legal framework in order that the most appropriate rules can be selected to govern and resolve a dispute. Conflict of laws is part of the private law of each country that deals with cases with a foreign element. Unlike public international law, private individuals are involved and not State entities. Three main issues involved in conflict of laws are;

- (i) which court has jurisdiction to resolve the dispute;

⁹⁰² This is because there are already pre-existing trade usages and trends that make it almost natural for such a state to continue to export according to this trend.

⁹⁰³ Forsyth C.F *Private International Law* 4 ed (2003) 3; 5.

- (i) choice of law which that court will apply and that would govern the dispute;
- (ii) recognition and enforcement of the judgment.⁹⁰⁴

Diamond trade transactions constitute a significant part of international trade and commerce. Disputes that arise in this field are replete with foreign elements and questions involving conflict of laws ultimately arise. It is therefore unlikely that a discussion of diamond trade could exclude conflict of laws. This chapter will discuss conflict of laws in relation to international commercial and sales agreements involving diamonds.

4.2 The Nature of Diamond Trade Transactions

Diamond trade transactions are not difficult to regulate when they involve for instance South African citizens resident in South Africa and where the cause of action arose in South Africa and the country is also the place of business for these parties. The South African courts would ordinarily have jurisdiction and South African law such as the Diamonds Act⁹⁰⁵ would be applicable. The judgments would also be enforceable in South Africa. Complications arise where the dispute involves one or both parties who are neither citizens nor permanently resident in South Africa. Further, some difficulties would arise where it is not clear where the cause of action arose and there is no specific legal system selected as the proper law of the contractual agreement.

Since diamond transactions are by nature marked by contractual agreements of commercial nature this part of this chapter will be limited to giving a general overview of conflict of laws in such relevant contractual scenarios where conflict of laws would arise. This means that this chapter will be branded by commercial considerations and scenarios that may commonly characterize diamond trade transactions. It is submitted that this understanding of conflict of laws as related

⁹⁰⁴ O'Brien S. *Smith's Conflict of Laws* Cavendish 2 ed (1988) 315 – 324.

⁹⁰⁵ 56 of 1986.

to the diamond industry can be useful for application in other areas of commerce as well as making an essential academic contribution to other areas of international trade.

4.2.1 International Contractual Relationships

A number of common law rules that govern international contractual agreements. Some of these rules have found way into international conventions that seek to codify common rules to apply when a court is determining choice of law to apply to cases with a foreign element. Important rules that courts refer to when a contractual case with a foreign element has come before them include *lex loci contractus* (law of the place of contracting), *lex loci solutionis* (law of place of performance) *lex monetae* (law in whose currency the debt is expressed).⁹⁰⁶

*Standard Bank of South Africa Ltd v Efroiken & Newman*⁹⁰⁷ is an example of a decision where the appeal court investigated various legal systems as expressed in the forms above. This case illustrates that the choice of law as applied by the forum court is capable of bringing about an outcome that may effectively nullify a contract as a result of a technicality that may be present in one system of law and absent in another system of law.⁹⁰⁸ The courts have had to re-consider the approach to choice of law and the latest guidelines reveal that the choice of law must take into account good relations with other States involved in the matter.

In the context of diamond trade contracts, this would imply the law of the country where the contract was made, or law of the place where the contract was performed. Usually diamond contracts express monetary obligations in the US

⁹⁰⁶ Forsyth C.F. *Private International Law* 4 ed (2003) 4, 5 – 11.

⁹⁰⁷ 1924 AD 171 p 173 where the court stated as follows in its investigation: ‘When a contract is to be performed by an agent in another country it must be interpreted according to the law in force in that other country and the construction of documents. Even if the contract is partly to be performed in one country and partly in another, each part must be performed according to the country of performance.’ See Edwards A.B. as updated by Kahn E. *Conflict of Laws: Contract* Volume 2(2) Law of South Africa (2003) par. 328.

⁹⁰⁸ *Standard Bank of South Africa Ltd v Efroiken & Newman* 1924 AD 171 p 186 - 191. The court considered the law of the place of performance as well as the intention of the parties and found that the proper law to be applied in this case was American law and in terms of that law the contract was not properly performed.

dollar albeit without necessarily intending that the contract be governed by US law. It is important to note that most of these rules apply where the contract does not specify the proper law to govern it.

Notwithstanding these positions, it is submitted that the proper law of the contract is one chosen by the parties or if this is not chosen, the law with which the contract is most closely connected.⁹⁰⁹ Only where the choice of both parties to the contract does not provide any useful guidance as to the proper law to govern the contract will the courts seek to assign to the contract a chosen law in accordance with the above stated maxims and others.⁹¹⁰ The courts would in the main weigh the factual links between the contractual agreement and the various relevant legal systems. The one ordinarily applicable as the proper law would be the legal system with which the contract has the closest and most real connection.⁹¹¹

4.2.2 Passing of Ownership: Movable Property and the *Lex Situs* Principle

As in any ordinary contract of sale, passing of ownership and risk in the commodity subject to the sale contract also arises in international diamond sale agreements. Diamonds are movable property and any case dealing with passing of ownership and risk in South African law of sale is a useful guide as to how local courts are likely to consider disputes in this area.

Conflict of laws regarding ownership of movable property was considered by the court in the case of *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd and Others*.⁹¹² In this case the issue that arose was which system of law governs the

⁹⁰⁹ Forsyth C.F. *Private International Law* 4 ed (2003) 294 - 295.

⁹¹⁰ *Ibid.*

⁹¹¹ Morris J. H. C. *The Conflict of Laws* 3 ed (1984) 234.

⁹¹² 1995 (3) SA 663 (A), See also *Ultisol Transport Contractors Ltd v Bouygues Offshore* 1996 (1) SA 487 (C), *Epol (EDMS) BPK v Sentraal-Oos (KOÖPERATIEF) BPK en Andere* 1997 (1) SA 505 (O), *Nedcor Bank Ltd v ABSA Bank Ltd* 1998 (2) SA 830 (W), *MT Argun Sheriff of Cape Town v MT Argun , her Owners and All the persons Interested in her and Others; Sheriff of Cape Town and Another v MT Argun, her Owners and All persons interested in her and Another* 2001 (3) SA 1230 (SCA), *MV Mega Section Bridge Oil Ltd v Fund Constituting Proceeds of the sale of the MV Mega section (Formerly MV Aksu) and Others* 2007 (3) SA 202 (C). The case of *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd and*

transfer of ownership of a ship. This case is also useful in illustrating the application of the Admiralty Jurisdiction Regulation Act⁹¹³ in a scenario involving conflict of laws.⁹¹⁴ The creditor in this case was a German Bank, Marcard Stein & Co (Marcard Stein). This bank submitted a claim based on a cession to it of the claim of London Steamship. The alternative claim was based on a mortgage bond registered over the vessel in favour of Marcard Stein for US \$ 16, 5 million on 1 June 1992.

Marcard Stein objected to the claims of other creditors on the ground that on 29 May 1992 the then owner of the vessel, Verena Shipping Co (Verena) sold the vessel by bill of sale executed in London to Alvo Shipping Co Ltd (Alvo). The referee unable to deal with the issues arising from the alleged sale and delivery of the vessel sought to obtain a ruling by the court thereon. This resulted in six of the creditors who had proved claims against the fund making an application to the trial court for an order *inter alia*, that the sums claimed by them be paid to them from the fund.⁹¹⁵

The *court a quo* found that the applicants had made out a case for the relief which they sought and granted the order. However, with leave of *court a quo* Marcard Stein appealed to the Appellate Division seeking a reversal of the decision of the *court a quo* citing as respondents the six applicants and the fund. The appeal court stated that the case before it hinged on the basic question of

Others has been discussed in depth in this chapter as it reflects the most current position that reflects the sentiments of most national and international jurisdictions when choosing the most appropriate system of law in cases involving international sales. Therefore this case forms a classic example of guidelines for the selection of proper law particularly in commercial transactions that affect and are most pertinent to diamond trade.

⁹¹³ 105 of 1983 section 6 in particular which is a section dealing with the law to be applied in admiralty matters.

⁹¹⁴ The facts of the case are that a corporation known as London Steamship Owners Mutual Insurance Association Ltd (London Steamship) arrested the vessel *MV Gulf Trader* on 20 May 1992 while she was berthed in the East London Harbour in pursuance to an action in *rem* instituted by the corporation for the payment of a sum of US \$ 870 048, 89 in respect of an unspecified maritime claim. The name of the vessel was subsequently changed to the *MV Vicky*. Again on 23 May 1992 the same vessel was arrested at the instance of another company Gulf & Continental Bunker Fuels Co Ltd (Gulf & Continental) in an action for the recovery of US \$35 625, 00 for the supply of bunkers during April 1992.⁹¹⁴

⁹¹⁵ 666 E - G.

whether in law the execution of a bill of sale by itself (without delivery) resulted in the ownership of the ship *MV Gulf Trader aka MV Vicky* passing from Verena to Alvo.

In dealing with this question the court extensively dealt with the concept of passing of ownership in corporeal movable property and conflict of laws⁹¹⁶ with the result that the application was dismissed with costs as was clearly outlined by Corbett CJ in his judgment with Botha JA, Nestadt JA, Nienaber JA and Marais JA concurring.⁹¹⁷

In his judgment, Corbett CJ declared that it is a fundamental principle of South African common law that ownership in corporeal movable property does not pass by virtue of a contract of sale alone. A proper delivery of the goods of contractual description must be made to the purchaser. However when a South African court exercises its admiralty jurisdiction, as it was in this case, it is required to apply English admiralty law including relevant principles of English private international law. It was agreed by all parties that in terms of English domestic law that 'a ship is regarded as a personal chattel (any tangible movable property) and that a bill of sale, duly sealed, signed and delivered would have caused the property in the vessel to pass to the purchaser and delivery was not necessary.'⁹¹⁸

On the basis of these facts, the court held that the general principle of English private international law to be applied to the transfer of corporeal movable property is the *lex situs*. This means the law to be applied is the law of the place where the property is to be found at the time of the transaction in question (in this case, South African law).⁹¹⁹ The actual *situs* of the vessel was established in this

⁹¹⁶ 667 A.

⁹¹⁷ 673 H.

⁹¹⁸ 667 B - D The court also took notice that the law of the Commonwealth of the Bahamas applied to the same effect.

⁹¹⁹ 667 F.

case as the vessel was not on the high seas but located at the East London harbour for at least nine or ten days at the time of the sale.⁹²⁰

It was held by the court that there are five reasons for choosing the *lex situs* as choice of law in English law this instance, mainly:⁹²¹

- ‘1. That the rule refers the passing of ownership to the system of law pertaining to the jurisdiction which has effective power over the property in question.
2. That the rule is normally simple to apply and makes for certainty in that it does not lead to multiple solutions since the property can only be in one place at a time.
3. That it satisfies the expectations of the reasonable man, for a party to a transfer naturally concludes that the transaction will be subject to the law of the country in which the subject-matter is at present situated.
4. That property passes at the place where the goods themselves are.
5. That commercial convenience imperatively demands that proprietary rights to movables shall generally be determined by the *lex situs*.’

With regard to the question of delivery, the court held that in order to transfer ownership in a *res* or chattel by way of *constitutum possessorium* there should exist an agreement to the effect that the transferor should hold the property in question on behalf of the transferee.⁹²²

⁹²⁰ 672 A.

⁹²¹ 670 B.

⁹²² 673 A.

4.2.3 Diamond Sales and the *Lex Situs*

The principle of passing of ownership in the context of international trade applies in case of any other chattel including diamond sales. However, the location of a diamond at the time of sale cannot *stricti sensu* be compared to that of a ship even though diamonds are also registered for trade purposes. This is because diamonds are personal chattel and more capable of being easily located for the purposes of sale and passing of ownership and therefore they do not require an artificial *situs*. It is submitted that the situation may be different where the diamonds are being sold while *en voyage* and being sold via a negotiable bill of lading. However, the important aspect of diamond sales in the context of international trade is that the *lex situs*⁹²³ is the system of law to be applied when diamonds are being sold.

The concept of *lex situs* was confirmed in *Randfontein Estates Gold Mining Co Ltd v Custodian of Enemy Property*,⁹²⁴ *Boyd v CIR*⁹²⁵ where it was confirmed by the court in both cases that respect of shares (which are incorporeal movable property and are not capable of physical location) that for all purposes in law a bearer share is 'situated' at the place where the company is incorporated. A share which is registered in the name of a member in the register of members is 'situated' at the place where such a register is kept.

4.3 Prescription of Claims and Debts

The prescription of debts is an important area in conflict of laws which affects international trade, whether such trade involves diamonds or any other commodity. A debt created must be brought into the jurisdiction of a court for enforcement within the prescribed period or such a debt prescribes.⁹²⁶ Each jurisdiction has its own unique system of law for determining the period. Diamond

⁹²³ *Utisol Transport Contractors Ltd v Bouygues Offshore and Another* 1996 (1) SA 487 (C) confirmed this position.

⁹²⁴ 1923 AD 576.

⁹²⁵ 1951 (3) SA 525 (A).

⁹²⁶ In South African shipping law, which upholds the Hague-Visby Rules claims based on bills of lading must be enforced within a year to avoid prescription of such claims.

dealers must be aware of the periods of prescription that may affect their commercial transactions in the context of international trade. This international trade law question involving a conflict of law aspect was settled by the Supreme Court of Appeal in two matters heard together referred to as *Society of Lloyd's v Price; Society of Lloyd's v Lee*.⁹²⁷ These two appeals heard together as one case will form an essential in providing guidelines as to the system of law to be applied in matters of determining the prescription period in international trade transactions.

It was heard on appeal that a provisional sentence summons alleged that the English court was a court of competent jurisdiction because the original contract of insurance in question had made English law to be applicable to the agreement.⁹²⁸ The plea was three pronged namely, (1) that Lloyd's claims had become prescribed by virtue of the provisions of the South African Prescription Act,⁹²⁹ (2) that the English court did not have international jurisdiction in terms of South African law to grant judgments and (3) that it would be against public policy as determined by South African courts to recognize and enforce the judgments in South Africa. The *court a quo* judge had taken the view that Lloyd's claims had prescribed and as a result refrained from making any findings on point (2) or (3) above.⁹³⁰

On the issue of prescription it must be noted that the claims (embodied in the provisional sentence summons) were based on default judgments issued by the English court more than three years but less than six years. The defendants were

⁹²⁷ 2006 (5) SA 393 (SCA). This case discussed the *via media* approach to conflict of laws which was earlier considered in *Laurens NO v Von Hone* 1993 (2) SA 104 (W). It is submitted that this approach contributes to the more amicable co-existence of States in commerce in global trade. It works in a manner that can be summarized as follows by commercial men and women, "Yes, all States have their unique way of conducting matters and making decisions but how does one find the best way forward in light of all these legal system conflicts seeing that nations are required by trade laws to co-exist and co-operate?" The *via media* approach then steps in to suggest the best system of law that will be most equitable in the circumstances.

⁹²⁸ 397 B.

⁹²⁹ 68 of 1969.

⁹³⁰ 399 A-C.

served with the summons in South Africa. Lloyds argued that English law ought to apply to determine the issue of prescription in terms of the English Limitation Act,⁹³¹ which provided that an action cannot be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable. It also provided further that no arrears of interest in respect of any judgment debt shall be recoverable after the expiration of six years from the date on which such interest became due.⁹³²

In terms of the South African Prescription Act,⁹³³ which the respondents argued ought to apply, the claims would have prescribed after the lapse of three years unless the judgments of the English courts were deemed to be judgment debts. In such a case the prescriptive period would be thirty years.⁹³⁴ The court of appeal dealt with the special plea of prescription by considering firstly the question of which system of law between the two ought to apply to determine the question of prescription.

According to the appeal judge in this case, Van Heerden JA, the *via media* approach was useful since it was developmental in nature and is acceptable in the area of private international law. He therefore took the view that the South African Prescription Act⁹³⁵ is one which is substantive in nature, and therefore not one to be determined according to the *lex fori*. Further by taking the *via media* approach to this conflict of laws, the appeal court was able to consider all sources of conflict in law (both the *lex fori* and the *lex causae*) and guided by policy to determine the most flexible and sensitive manner as to which law was applicable. In answering this question the court stated that in terms of South African private international law procedural matters are governed by domestic law of the country where the matter is being heard, (the *lex fori*). However, matters of substantive law are governed by the law which applies to the

⁹³¹ 1980 section 24.

⁹³² 399 C - F.

⁹³³ Act 68 of 1969.

⁹³⁴ 399 F - G.

⁹³⁵ 68 of 1969.

underlying transaction or occurrence, also known as proper law or *lex causae*. This principle is the same under English law.⁹³⁶

The court of appeal in making the decision as to the law to be applied warned against the bias in favour of the *lex fori* but advised that a court should follow the *via media* approach which is aimed at serving individual justice, equity, convenience with consideration for international harmony in disputes with an international character.⁹³⁷ With these considerations in mind it was held by the court that harmony of law suggests that claims which are alive and enforceable in terms of the law of the country under which such claims arose (in this case English law) should also be enforceable in South Africa. It was stated that the legal system which has the closest and most real connection with the agreement should be chosen and be applicable.

The court of appeal also denied the application of the *lex fori* on the basis that the provisional sentence summons was not a matter of procedural execution, as argued by defendant's counsel, but a means of obtaining an enforceable judgment on the basis of an English judgment already obtained. In effect the provisional sentence worked as a second judgment.⁹³⁸ Therefore as a result the court found that the *lex causae* was applicable in this case with the result that the English Limitation Act⁹³⁹ was applicable. In terms of the English Limitation Act,⁹⁴⁰ the provisional sentence summonses were not prescribed as they were brought within the six year period contemplated in the Act.⁹⁴¹

It is submitted that the appeal court in this matter correctly applied the *via media* approach. As re-iterated by Van Heerden JA in concurrence with Van Zyl J in a

⁹³⁶ 399 G.

⁹³⁷ 404 F.

⁹³⁸ 406 D.

⁹³⁹ 1980.

⁹⁴⁰ 1980.

⁹⁴¹ 406 F.

similar case of *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*⁹⁴² where the matter dealt with the plea of *res judicata*⁹⁴³ parties have agreed that the law applicable to their respective transactions is English law, this means that they also agreed that the rules relating to procedure would be the *lex fori*. However, the effect of this is that parties may inadvertently in case of prescription rules agree to a situation where their rights continue to exist under the English law but become extinguished when the *lex fori* procedural law is applied. It was stated by the court that this cannot be said to be what the parties intended.⁹⁴⁴

The application of the *lex causae* prescription rule in this case gave rise to an equitable and just conclusion. It was also stated by the appeal court that provisional sentence is an established procedure for enforcing foreign judgments

⁹⁴² 1986 (3) SA 509 (D) 510 C - F. In this case the court stated the following principles: ‘the general rule of South African private international law was that classification was done in terms of the *lex fori* and, as there were no grounds for departing from the rule in the present case, it had to be applied. Further, in regard to the classification of the rules relating to the operation of *res judicata* that the court had to distinguish between rules of procedural law and rules of substantive law, the former being governed by the *lex fori* and the latter by the *lex causae*: it was however generally accepted and logical that the rules relating to *res judicata* were characterised as procedural and therefore governed by the *lex fori*. Further, that the proceedings in the US Court did not involve the same subject-matter as the present proceedings: the US Court was asked to recognise and enforce the award in terms of its legislation whereas the present Court was asked to enforce the arbitration award in terms of its legislation which differed from the US legislation, *inter alia*, in that it had no provision limiting recognition to awards made within three years prior to commencement of the proceedings.’

⁹⁴³ *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) 71 par 27 C where the court stated that a claim which falls within the concurrent jurisdiction of both the High Court and a special court could not be brought in both courts. A litigant who did that would be confronted in one court by either a plea of *lis pendens* (the claim is pending in another court) or by a plea of *res judicata* (the claim has been disposed of by the other court). A claimant who has a claim that is capable of being considered by either of two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court. But where a person has two separate claims, each for enforcement of a different right, the position is altogether different, because then both claims will be capable of being pursued, simultaneously or sequentially, either both in one court, or each in one of those courts. See *Res judicata* is Latin for stating that ‘the matter has been decided’. It refers to the principle that a final judgement of a competent court is conclusive upon the parties in any subsequent litigation involving the same cause of action
<http://www.lectlaw.com/def2/q036.htm> 09 March 2010.

Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd 1986 (3) SA 509 (D) 518 B, 521 B and 521 E where the court held that the plea of *res judicata* is a procedural point which must be decided according to the *lex fori*.

⁹⁴⁴ *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA).407 A - C.

in South Africa. In this case, the foreign judgment is not directly enforceable but constitutes a cause of action that is actionable in South African.⁹⁴⁵

The requirements that have to be met to qualify enforcement of a foreign judgment is that the court which pronounced such a judgment must have had jurisdiction to do so in terms of South African law, that the judgment is final and conclusive in that it must not have been superannuated. It must also not be *contras bonos mores* and it must not be fraudulently obtained. Further, it must not involve the enforcement of a penal or revenue laws of a foreign State, the enforcement of such a judgment must not be precluded in terms of the Protection of Businesses Act,⁹⁴⁶ as amended.⁹⁴⁷ The court investigated each of these requirements in depth and found that the English judgments were sound in law. It was held that the judgments were enforceable by way of provisional sentence and the appeals were upheld with costs.⁹⁴⁸

This case is extremely useful in matters particularly where a gap exists even after an enquiry as to the possible applicable systems of law. The main guidance proposed by this decision is to consider the system of law most real and closely connected to the dispute in question. It is submitted that the closest system of law approach coincides with the rationale behind the *lex situs* approach. On the other hand it is arguable that this is just another technical legal reneging by the courts where they refuse to commit to a system of law in the name of accommodating international harmony. The outcome of this case would have been the same if the *lex causae* was chosen without a long winded debate about procedural or substantive issues of prescription. Ultimately the *lex causae* was the most appropriate law to be applied in this case by any standard.

⁹⁴⁵ 407 G - I.

⁹⁴⁶ 99 of 1978.

⁹⁴⁷ 408 A - C.

⁹⁴⁸ 414 H.

4.3.1 International Conventions

4.3.1.1 The Rome Convention⁹⁴⁹

Unlike other fields in public law such as criminal law or human rights law, conflict of laws falls in the private branch of the law where very little international activity has occurred leading to international instruments or conventions. A notable international instrument is the 1980 Rome Convention on the Law Applicable to Contractual Obligations. This Convention was originally thought to be restricted in application to States in the European Economic Commission only as these are the Contracting States. However, one scholarly view reveals that the Convention is universally applicable and these views are based on interpretation of Article 2 thereof.⁹⁵⁰

The Convention's current structure though makes it impossible for countries in other regions to be Member States thereby precluding them from directly being bound by the Rome Convention. South Africa is accordingly not party to this Convention in as much as it would wish its provisions to be applicable to it. Nevertheless it acknowledges its provisions and may borrow heavily from its text for interpreting conflict of laws situations.

Article 2 of the Rome Convention provides that any law specified by this Convention shall be applied whether or not it is the law of a Contracting State. According to O'Brien, the Rome Convention can be applied to parties who are residents, domiciles or nationals of non Contracting States but involved in a dispute being heard in a Contracting State. The Convention would therefore apply for instance in a dispute between a Japanese corporate entity and a South African company provided the dispute is being heard in any of the Contracting states. The Convention essentially codifies commonly known choice of law rules and these are not different from the Roman-Dutch positions that most countries apply in their legal systems.

⁹⁴⁹ The 1980 Rome Convention on the Law Applicable to Contractual Obligations.

⁹⁵⁰ O'Brien S. *Smith's Conflict of Laws* Cavendish 2 ed (1988) 239.

The Convention therefore makes provision for such important issues such as party autonomy in choosing the proper law of the contract,⁹⁵¹ what should be done where there is a tacit choice of law by the parties,⁹⁵² and where there is no express or tacit choice of law.⁹⁵³ The Convention also provides for the application of 'mandatory rules' with which the law of the country has a close connection and these are applicable after regard is had to their nature, purpose and consequences upon application or non application.⁹⁵⁴ A further core provision of the Convention is that it does not allow for the chosen law to deprive the other party of legal protections afforded him by mandatory rules of the law of the country of his habitual residence.⁹⁵⁵

At this stage it is relevant to consider the implications of the articles explained above. Article 3 as a whole is important to the respect of freedom of contract and equity in contracts as it permits parties to settle conflict of laws by selecting the law to govern the contract in which they are entering into. Article 3(2) provides for even an even more flexible approach by making a provision that parties may select an alternative system of law to govern the contract subject to normal guidelines to protect the validity of the contract for all concerned as provided for within the confines of the Convention.

Article 4(1) is important in resolving the conflict of laws issue in the case where a choice of law has not been made by parties in terms of Article 3. Article 4 provides that the law to be applied in such a situation is that which is closely connected with the contract. This is the same standard for determining applicable law as established in South African law. Article 4(3) provides expressly that if the contract involves immovable property, it is presumed that the contract is most

⁹⁵¹ Article 3 (1), see also C.F. *Private International Law* 4 ed (2003) 298 - 300 for a detailed discussion of this concept.

⁹⁵² Article 4 (1) and (2).

⁹⁵³ *Ibid.*

⁹⁵⁴ Article 7.

⁹⁵⁵ Article 5 (2).

closely connected with the country where the property is situated. Clearly the Convention provides a cogent code for conflict of laws that resembles the approach that has been adopted by South African courts in most cases that relate to the question of conflict of laws.

Article 5 of the Convention deals with contracts whose object is the supply of goods and services to a particular person or consumer for a purpose which can be regarded as being outside his or her trade or profession, or a contract for the provision of credit for that object. This type of transaction is obviously prevalent in international diamond trade, particularly where goods have been purchased by a consumer on credit, as a basic example. The Article 5(2) provide that notwithstanding the provisions pertaining to choice of law in the Convention, this will not be permitted to operate in such a way that it deprives the consumer the protection afforded to him or her by the mandatory rules of the law of the country in which he or she habitually resides. Once again this is an illustration of a code that has respect for equity considerations.

Generally the Rome Convention represents a positive development in the field of international trade law insofar as it marked by international contractual agreements and transactions. It is an attempt to promote uniformity in the law governing contractual agreements and codifies some of the most important rules. The fact that the Convention is not limited to Contracting States is also important since it would increasingly become universally applicable and acceptable to the international community. In itself the Rome Convention facilitates international diamond trading and makes the regulatory framework more clear, predictable and transparent.

4.3.1.2 Convention on the Limitation Period in International Sale of Goods

It is important for any analysis of diamond regulations law to consider prescription in international sales in light of the Convention on the Limitation Period in International Sale of Goods or Limitation Convention (New York, 1974)

as amended by the 1980 Protocol (Vienna, 1980). Both entered into force together on 1 August 1988.⁹⁵⁶

It is important to note at the outset that the Limitation Convention, 1974 does not form part of South African law in that South Africa has neither acceded to nor ratified such Convention. It is nevertheless useful in the context of diamond regulations law as diamonds are subject to international sale transactions involving South African companies or entities. Thus the Convention may be considered by South African courts where matters of prescription or limitation as provided for in the language of the Convention arise.

In a country with active international sales as covered by the Limitation Convention, 1974 it is natural that the international instrument governing such transactions be considered as it may provide guidance on choice of law rules applicable to such issues as prescription. Further, if the Convention proves not to be a red herring in South African law, then it should be made part of South African domestic legislation.

The Limitation Convention, 1974 arose from a belief that an adherence to uniform rules governing the prescriptive period in international sale of goods will contribute to the improvement of world trade that clearly included diamond trade.⁹⁵⁷ The Convention directly applies to situations where the buyer and sellers' claims against one another arising out of an international sale contract cannot be enforced by reason of the expiration of a period of time whether such claims arise out of a breach, termination or invalidity of such contract.⁹⁵⁸

⁹⁵⁶ Yearbook of the United Nations Commission on International Trade Law (UNCITRAL) Vol. X:1979A/CONF.63/17(1974Convention).
http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html 16 January 2009.

⁹⁵⁷ Preamble.

⁹⁵⁸ Part I Article I substantive provisions and sphere of application of the Convention.

Article 3 of the Convention provides that the Limitation Convention, 1974 shall apply only in circumstances where at the time of conclusion of the contract the parties' places of business are situated in Contracting States or if conflicts of laws rules dictate that the law of the Contracting State is applicable.⁹⁵⁹ This would be a typical case where a South African court determining an international sale contract may be compelled to apply the provisions of the Limitation Convention, 1974 as provided by this provision. On the other hand it is open to parties to exclude the application of the Limitation Convention, 1974 if they so wish in terms of article 3(2).⁹⁶⁰

The Limitation Convention, 1974 expressly exclude certain goods and commodities from its ambit and these include goods bought for personal, family or household use, goods sold by execution, shares, investment securities, stocks, money, ships among others.⁹⁶¹ An exception to this rule involves a situation where the seller before the conclusion of the contract did not have knowledge that such goods were being bought for such purposes,⁹⁶² this means that the Convention will apply to a sale involving diamond sales most likely as raw materials, that being rough diamonds for instance for purposes of transnational sales in the context of international trade but not as products strictly for personal use, for example, the Convention may not be relied on for a breach of contract involving a sale of a diamond engagement ring sold by a South African store for a private individual in the United States.

The crucial provision of the Limitations Convention, 1974 is that it provides that the prescription period shall be four years.⁹⁶³ Articles 9 and 10 provide for the determination of the prescription period.⁹⁶⁴ Articles 13 to 21 of the Convention

⁹⁵⁹ Article 3(1)(a)(b).

⁹⁶⁰ Clearly it is the intention of UNCITRAL to respect parties' freedom of contract as created by this provision of the Limitation Convention, 1974.

⁹⁶¹ Article 4(b)

⁹⁶² Article 4(b) – (f).

⁹⁶³ Article 8. The Convention does provide in Articles 22 and 23 for an extension or recommencement of the limitation period subject to the provisions of the Convention.

⁹⁶⁴ Article 9

deal with the cessation and extension of the limitation period while the rest of the Convention deals with other technical matters such as the limit of the prescription period, effect of expiration of the prescriptive period, calculation of the period, international effect of the Convention.

The Limitation Convention, 1974 when compared to South African contract law and the law of prescription is not entirely a red herring in spite of the sophisticated and well developed legal rules already well established in South African law. It is submitted that the Convention has two unique features which may further contribute to the development of South African law, particularly pertaining to international diamond sales and other international sales generally. The first feature is that it settles the issue of application of conflict of laws in South African courts. The adoption of the Convention will result in international harmony with regard to the uniform calculation of time to protect the enforcement of claims and ameliorate the situation where there are vast differences in systems of laws concerning the calculation of time for the enforcement of claims.

The second useful feature of the Limitation Convention, 1974 is that it extends the overall limitation period to ten years maximum from the date of original commencement of the period.⁹⁶⁵ This maximum period of the Convention for a commercial claim is a glaring disparity with South African law on prescription in terms of the Prescription Act.⁹⁶⁶ It is submitted that the prescriptive period

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1. Subject to the provisions of articles 10, 11 and 12 the limitation period shall commence on the date of which the claim accrues.
 2. The commencement of the limitation period shall not be postponed by:
 - (a) a requirement that the party be given notice as described in paragraph 2 of article 1, or
 - (b) a provision in an arbitration agreement that no right shall arise until an arbitration award has been made.

Article 10

1. A claim arising from a breach of contract shall accrue on the date on which such breach occurs.
2. A claim arising from a defect or lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.
3. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance shall accrue on the date on which the fraud was or reasonably could have been discovered.' The Convention is limited to commercial contractual claims.

⁹⁶⁵ Article 23.

⁹⁶⁶ 68 of 1969 section 11. The periods of prescription of debts shall be the following:

provided by the Convention is more accommodating to parties wishing to approach the courts to enforce their claims.

A more extended period of time to enforce those claims is necessary in South African law if regard is had to geographic constraints involved in intercontinental contractual agreements such as those involving diamonds. While it is admitted that the parties wishing to enforce their claims may benefit if the Convention is adopted into South African law this may create a negative effect in the courts by resulting in an overflow of sporadic enforcement of international sales claims that may further burden the already sluggish judicial process.⁹⁶⁷

It is submitted however that the present South African law on prescription is not fundamentally different from that of various other countries in the world. While it is advisable to retain the current three year period before a debt/claim prescribes, it would be prudent to expressly provide for a different prescription regime where international contractual agreements and claims are concerned. This would be perfectly in tandem with the Limitation Convention provisions on prescription. The question that remains is whether or not South Africa should consider acceding to the Limitation Convention, 1974 and join the countries such as Belgium⁹⁶⁸ in the quest to achieve international harmony on the time limits set for enforcement of claims in international sale of goods.

(a) thirty years in respect of-

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a) ;

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b) ;

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

⁹⁶⁷ The court rolls are generally full in practice and the allocation of trial dates particularly in actions is a process that can take years.

⁹⁶⁸ Belgium is one of the countries that have recently acceded to the Limitation Convention, 1974, in its un-amended form. The Convention will be in force in Belgium on 1 March 2009.

It is submitted that there appears to be no bar to South Africa becoming a Contracting State to the Limitation Convention, 1974 in its amended form seeing that the amended form of the Convention is in line with the objectives of other international instruments such as the United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG).⁹⁶⁹

4.3.1.3 The Geneva Code on Bills of Exchange

The Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930), The League of Nations and the 19 March 1931 Convention for the Settlement of Certain Conflicts of Laws in Connection with Cheques are the result of one of several attempts made to harmonize the different national systems of law applicable to bills of exchange. An example of a situation showing a need to settle such conflict is evident in a situation where, for example, a bill of exchange in diamond trade may be drawn in Johannesburg, issued in Paris and endorsed in London and accepted in London payable at a bank in Cologne. The Geneva Convention and the Convention on Conflict of Laws in Connection with Cheques were adopted by most European Countries but not Great Britain, the US or the commonwealth countries.⁹⁷⁰ These codes however may be considered for persuasive authority in the development of rules relating to conflict of laws in South Africa.

4.3.2. Relevant Domestic Legislation

4.3.2.1 Bills of Exchange

Bills of exchange form a large part of international commerce due to recognized financial systems in the world. Many of the diamond trade transactions are evidenced by the use of bills of exchange. Fortunately for South Africa, the laws governing bills of exchange anticipates and makes provision for conflict of law

⁹⁶⁹The South African Legislature has stated in the Convention on Agency in the International Sale of Goods Act 4 of 1986 that the aims of the CISG should be borne in mind; see the Schedule of the Agency Act 1986. www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf 17 March 2010.

⁹⁷⁰ Malan F.R. and J.T. Pretorius *Malan on Bills of Exchange, Cheques and Promissory Notes* 4 ed, Lexis Nexis Butterworths (2002) 269, example as given by authors.

scenarios involving bills of exchange. Conflict of laws concerning bills of exchange is contained in the Bills of Exchange Act.⁹⁷¹ The Bills of Exchange Act⁹⁷² provides for 'Rules if laws conflict'.

The Bills of Exchange Act⁹⁷³ provides that if a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined by the validity of the bill as regards requisites in form is determined by the law of the place of issue.⁹⁷⁴ This means that if **A** prepares a bill and it is issued in Durban, South Africa and negotiates it to **B** who is in Nigeria, any dispute regarding the form of the bill must be determined in accordance with South African law.

With regard to validity of the bill as requisites in form of any supervening (subsequent) contract such as acceptance, indorsement or provision of an aval is determined according to the law where such a supervening contract was made.⁹⁷⁵ Thus in keeping with the illustration above, if **A** and **B** complete the supervening contract regarding the bill of exchange in Nigeria where for instance **B** accepts and indorses the bill in Nigeria, the law to be applied is Nigerian law as that would be the place where the supervening contract is made.

However the Bills of Exchange Act⁹⁷⁶ provides that a bill is not invalid by reason that it is not stamped in accordance with the law of the place of issue. Further a bill issued outside the Republic which conforms in form to the law of the South Africa may for purposes of enforcing payment thereof be treated as valid as between all persons who negotiate, hold or become parties to that bill in the Republic.⁹⁷⁷ This provision is useful to the rapid movement of matters regarding

⁹⁷¹ 34 of 1964.

⁹⁷² 34 of 1964 section 70.

⁹⁷³ 34 of 1964.

⁹⁷⁴ Section 70(a).

⁹⁷⁵ *Ibid.*

⁹⁷⁶ 34 of 1964.

⁹⁷⁷ Section 70(a)(i) – (ii).

such bills of exchange within the Republic's courts. Further the Act favours the validity of a bill of exchange rather than its invalidation.

Section 70 (b) deals with interpretation of the contract and provides that 'the interpretation of the contract of the drawer, indorser, acceptor or signer of an aval of a bill is determined by the law of the place where such contract is made, provided that if a bill is payable in the Republic is endorsed outside the Republic, the indorsement shall as regards the payer be interpreted according to the law of the Republic.' This provision serves to simplify the determination of the substantive laws applicable to the payer of an endorsed bill of exchange regardless of endorser's place of origin. Further this provision captures the rule that the law of the place of contract applies as the applicable law (*lex contractus*) where there is no chosen law and under certain circumstances.

The duties of the holder with regard to presentment for acceptance or payment are determined by the law of the place where the act is done. If a bill is dishonored, a protest or notice of dishonour is determined by the place where the bill is dishonored.⁹⁷⁸ Where a bill is drawn outside the Republic but payable in the Republic and the sum payable is not expressed in currency of the Republic, in the absence of contrary indication the amount shall be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.⁹⁷⁹

With regard to determination of date of payment for a bill drawn in one country and payable in another, such date shall be determined according to the law of the place where the bill is payable.⁹⁸⁰ Clearly the Legislature has resolved the legal *lacunae* regarding essential elements of a bill of exchange.

⁹⁷⁸ Section 70 (c).

⁹⁷⁹ Section 70 (d).

⁹⁸⁰ Section 70 (e).

It is submitted that South African bills of exchange law conforms to international expectations where cases with a foreign element are involved. The bills of exchange statutory framework does not go against the spirit of commonly accepted Roman Dutch rules on conflict of laws. In fact, the Bills of Exchange Act⁹⁸¹ codifies some of the principles and further seeks to incorporate commonly known choice of law rules within the statutory framework.

4.3.2.2 Admiralty Jurisdiction

Maritime Law, especially the carriage of goods by sea is crucial in the context of international trade particularly where the commodities are transported by sea. It should however be stated at the outset that the common mode of transport of diamonds is air transport for reasons of safety, security and low risk. In South Africa carriage of diamonds by ship is limited to circumstances where there is mining of sea areas involved as demonstrated by De Beers Marine (Pty) Ltd a Cape Town based company contracted to De Beers Consolidated Mines Ltd for the purposes of mining the west coast sea area of southern Africa. Therefore, diamond shipment and admiralty law must be understood only in light of those diamond activities. (i.e. the mining of sea areas).

Diamonds may however be subject to shipments within the area of imports and exports.⁹⁸² This can therefore give rise to maritime claims. The Admiralty Jurisdiction Regulation Act⁹⁸³ which states the law to be applied by South African courts may be of assistance in these instances. This provision indirectly makes provision for creating clarity with regard to choice of law rules applicable should such a situation present itself to a South African court in the exercise of its admiralty jurisdiction.

⁹⁸¹ 34 of 1964.

⁹⁸² Carriage of diamonds and other precious stones by sea is still practiced in countries such as India. Only in the case where a South African party has entered into contractual obligations with a party from India for instance for the receipt of diamonds and precious stones transported by sea, then admiralty law will play a role otherwise the general and safest manner for carriage of diamonds is by Air with hand to hand secured delivery.

⁹⁸³ 105 of 1983 section 6(1)(a).

The Jurisdiction Regulation Act⁹⁸⁴ makes it possible for English statutes to be applicable to South African maritime matters as far as it reflects English admiralty law as it stood at the commencement of the Act, (i.e. 1 November 1983). In terms foreign law in the form of English law is applicable to maritime matters in the Republic.

The Admiralty Jurisdiction Regulation Act,⁹⁸⁵ provides that in respect of those heads of jurisdiction, which the colonial court of admiralty derived from the English, Colonial Courts of Admiralty Act, 1890, English law as at 1 November 1983 (the date of commencement of this Act) is applicable. An English decision made after 1 November 1983 is still applicable as a useful precedent in South Africa, provided that it reflects English Admiralty law as at 1 November 1983. The decisions by the English courts made after 1 November must however be examined in order to determine whether or not they are applicable under South African law.⁹⁸⁶

The meaning of section 6 was considered by the court in the *court a quo* as well as appeal case involving the vessel MV Stella Tingas. in *MV Stella Tingas v MV Atlantica and Another (Transnet Ltd t/a Portnet and Another, Third Parties)*⁹⁸⁷ the trial court had to determine whether in terms of the Admiralty Jurisdiction Regulation Act⁹⁸⁸ it is obliged to apply the law which the High Court of Justice of

⁹⁸⁴ 105 of 1983 section 6.

⁹⁸⁵ 105 of 1983 section 6(1)(a).

⁹⁸⁶ 6. 'Law to be Applied and rules of evidence

Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall:

- a. with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
- b. with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.

2. The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.'

⁹⁸⁷ 2002 (1) SA 647 (D).

⁹⁸⁸ 105 of 1983 section 6.

the United Kingdom in the exercise of its admiralty jurisdiction would have applied as at 1 November 1983. Further the court had to determine whether the High Court of Justice would have applied the United Kingdom Pilotage Act.⁹⁸⁹

The maritime matter involved revolved around the issue of liability for loss or damage caused by a ship under compulsory pilotage. It was held that a claim for damage done by a ship was a matter in respect of which a South African Court of Admiralty had jurisdiction immediately before the commencement of the Admiralty Jurisdiction Regulation Act⁹⁹⁰ on 1 November 1983.⁹⁹¹

The Admiralty Jurisdiction Regulation Act⁹⁹² made English law applicable in the form of the provisions of the English statutes. The Pilotage Act,⁹⁹³ was made applicable 'to all ships British and foreign'. However in this case it did not mean that the English Act could be applied outside the geographical territory of the United Kingdom.⁹⁹⁴

The application of an English statute is qualified by the extent to which that law existed and could be applied as of 1 November 1983.⁹⁹⁵ Since, in this case, a South African statute existed there was no need to look to the English statute that was qualifying under the Admiralty Jurisdiction Regulation Act.⁹⁹⁶ The statute to be applied in the matter was the existing South African statute which was in the form of Paragraph 10 of Schedule 1 to Legal Succession to the South African Transport Services Act.⁹⁹⁷ That Act could be applied in terms of section 6(2) of

⁹⁸⁹ 1983.

⁹⁹⁰ 105 of 1983.

⁹⁹¹ *MV Stella Tingas v MV Atlantica and Another (Transnet Ltd t/a Portnet and Another, Third Parties)* 2002 (1) SA 647 (D) 658 H-J.

⁹⁹² 105 of 1983 section 6(1)(a).

⁹⁹³ 1983.

⁹⁹⁴ *MV Stella Tingas v MV Atlantica and Another (Transnet Ltd t/a Portnet and Another, Third Parties)* 2002 (1) SA 647 (D) 659 C-D.

⁹⁹⁵ Admiralty Jurisdiction Regulation Act 105 of 1983 section 6(1)(a). Staniland Hilton *Shipping* Volume 25 par. 115-119 Law of South Africa (year) 66.

⁹⁹⁶ 105 of 1983 section 6(1)(a) that being the English statute in the form of the UK Pilotage Act 1983.

⁹⁹⁷ 9 of 1989 as amended by the National Ports Act 12 of 2005 section 76.

the Admiralty Jurisdiction Regulation Act.⁹⁹⁸ On appeal in *MV Stella Tingas: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and the MV Atlantica*⁹⁹⁹ this point was upheld.

The Admiralty Jurisdiction Regulation Act¹⁰⁰⁰ empowers the court in the exercise of its admiralty jurisdiction to award damages in a foreign currency specifically in instances where the plaintiff has suffered loss in that currency.¹⁰⁰¹ This section addresses conflict of laws in the calculation of currency by providing that such a calculation be done subject to any laws relating to exchange control, with fairness and equity in the decision of the court.

4.3 Conclusion

It is clear that South African conflict of laws branch is in tandem with trends in various parts of the world. The courts have followed choice of law rules that are commonly and almost universally applied and acceptable in various other jurisdictions. South Africa is an important diamond producing and exporting country and it is highly undesirable for its legal system to be fundamentally different from those of its trading partners, clients and markets. Persons and entities from these foreign countries are likely forge contractual and commercial relationships with South African persons and entities and disputes can not be dispelled in these relationships.

It is therefore submitted that it is important that the South African legal system, and in this case the conflict of law regulatory framework, to be internationally acceptable and conform to commonly known principles and positions found in various other jurisdictions. This makes South Africa seem attractive as a diamond trading country thus eventually leading up to allowing greater economic

⁹⁹⁸ 105 of 1983.

⁹⁹⁹ 2003 (2) SA 473 (SCA).

¹⁰⁰⁰ 105 of 1983.

¹⁰⁰¹ Section 5(2)(g) subject to the provisions of any law relating to exchange control, order payment to be made in such currency other than the currency of the Republic as in the circumstances of the case appears appropriate, and make such order as seems just as to the date upon which the calculation of the conversion from any currency to any other currency should be based.

activity in the international markets. It has been shown that conflict of laws in South Africa is remarkably developed to anticipate various scenarios as are likely to arise in international diamond trading and transactions.

Chapter 5: Financing Diamond Sales: Documentary Credit

5.1 Introduction

There are various methods of payment in international trade but the four traditional methods of payment generally known in international trade are cash in advance or repayment, payment on account or open account, documentary collection and documentary credits. Documentary credit has been described as ‘the life blood of international commerce’¹⁰⁰² as it has been in use for over 150 years as a method of payment in international trade. Even with the development of paperless trade and new electronic forms of payment, traditional methods of payment such as documentary credit continue to dominate.¹⁰⁰³

The discussion above leaves no doubt that in diamond trade the extent of the use of documentary credit is essential to the study of diamond trade laws. A more in depth consideration of the guidelines and rules pertaining to the use of documentary credit will follow in the successive parts of this chapter however for practical purposes it is very important to remember that the documentary credit practice requires strict compliance.

¹⁰⁰² *Intraco Ltd v Notis Shipping Corporation of Liberia (“The Bhoja Trader”)* [1981] 2 Ll R 256.

¹⁰⁰³ Laryea Emmanuel T. *Payment for Paperless Trade: Are the Viable Alternatives to the Documentary Credit?* Law and Policy in International Business (2001) <http://www.allbusiness.com/lagal/3589079-1.html>. 24 September 2009. See article published by New York Times, 6 October 1893 *Who Got Mrs. Fiske’s Diamonds: Her Letter of Credit is Restored to Her, but the Jewels Are Gone*. True to the age old tradition of documentary credit, this newspaper article dating back to the 1800s shows the typical and prominent characteristics that are typical in diamond trade. Firstly the use of documentary credit in such transactions and secondly the threat of theft of precious stones. The article states that on 26 August 1893 Mrs. Fiske reported to the police that a leather bag containing \$ 4,000.00 worth of diamonds and a letter of credit for \$ 20, 000.00 were stolen from her state room in the steamship where she had been a passenger. The article states that the leather bag was found without the jewels but the letter of credit was left behind suggesting that the thief had been familiar with banking practices and the character of the negotiable paper. The moral of the story as summarized by the article is that travelers should keep their valuable jewels in purser’s safes rather than in cabin trunks. Of course there is nothing in this article to suggest that the allegedly stolen diamonds were being sold but is an article simply used to place the use of letters of credit in a time frame that reflects the age of the payment and banking practice. Further, it must be noted that bills of exchange are also traditional method of payment in international trade, for further reading on this subject in South African Law, see Malan F.R. and J.T. Pretorius *Malan on Bills of Exchange, Cheques and Promissory Notes* 4 ed, Lexis Nexis Butterworths (2002).

The use of documentary credit operates as a form of financial guarantee for payment for the diamonds ordered.¹⁰⁰⁴ As previously mentioned in preceding chapters international trade in luxury items, in this instance diamonds, forms a segment of the world markets that has been largely affected by the recent economic down.¹⁰⁰⁵ As part of the main theme of this study this chapter will deal with the manner in which the law on documentary credit can be developed and structured in a manner that supports the diamond industry. The analysis made in this chapter is part of the contribution to the ideals of diamond trade legal developments as desired in the values contained in the Constitution of the Republic of South Africa Act.¹⁰⁰⁶

For a diamond producing country such as South Africa, which has been active in international diamond trade through State and private sector ventures, it becomes increasingly important to study market practices of financing diamond sales that will sustain this industry in light of the effects of the recession. Not only should financing strategies be sustainable but they must also take into account the need to continue to support legitimate trade.

This chapter intends to highlight that to continue to sustain international trade, documentary credit finance must be continued through custom usage and banking practices. The diamonds are a form of security, with each case being measured according to individual merits.

¹⁰⁰⁴ Based on Barak D. Richman 'How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York' American Bar Foundation 31 Law and Social Inquiry (2006) 383 - 394.

¹⁰⁰⁵ Bekink B. and Botha C. *The Role of a Modern Central Bank in Managing Consumer Bankruptcies and Corporate Failures: A South African Public-Law Angle of Incidence* South African Mercantile Law Journal Volume 21 (2009) 74. The authors submit that the global economy is showing clear signs of stress as was illustrated during the 2008, 2009 GFC. At p 88 of their article the authors explain the importance of financial stability in the global economy, it is clear that the maintenance of a stable financial system is a core for any economy, particularly the global economy. Chew I.K.H. and Horwitz F.M. *Downsizing the Downside of Downsizing: A Revised Planning Model* South African Journal of Labour Relations (2002) 25. The authors in this paper correctly argue, as was proven in time that in a global economy a world-wide recession and a financial crisis or major economic downturn in one large economy such as the US, may have a worldwide domino effect. Mtyingizana B., Buhlungu S. *The Global Economic Crisis: A Sociological Perspective* Department of Sociology, University of Johannesburg and National Labour and Economic Development Institute (NALEDI) the authors in this paper investigate the social impact of shortages of skills development as a result of lack of sufficient funding arising out of the GFC.

¹⁰⁰⁶ 108 of 1996.

This chapter is not intended to be an analysis of the world's credit systems as that is a point that needs further consideration by economists. From a legal viewpoint the documentary credit method of finance forms a powerful legal tool for sustaining international trade in diamonds. Of course, banks are not expected to finance on credit all sorts of trade. However, when dealing with precious stones as specifically elucidated in this chapter, the documentary credit method of finance will continue to be useful. This consideration is topical and relevant to any diamond producing country that aims to uphold thriving international diamond trade.

It is submitted however that only with sophisticated banking methods and banks as institutions of excellence can this type of finance be efficient. In light of this submission this chapter is going to consider the regulation of documentary credit in the international trade context by making ineluctable reference to the ICC UCP 600.¹⁰⁰⁷ These uniform customs have been developed delicately and laboriously by the international business community in order to support merchants through banking systems.¹⁰⁰⁸

The international nature of diamond trade was demonstrated in the Supreme Court case of *The Commissioner for the South African Revenue Service and Another v TFN Diamond Cutting Works (Pty) Ltd.*¹⁰⁰⁹ TFN Diamond Cutting Works were involved in the purchase of rough diamonds from a variety of sources in South Africa and they would cut and polish the same for resale. Some of these diamonds were sold in New York. The implications of such transnational commercial transactions to international trade in general are significant and a

¹⁰⁰⁷ ICC Uniform Customs and Practice for Documentary Credits (UCP 600) which came into force on 1 July 2007. www.exporthelp.co.za/documentation/ucp600.html 20 April 2010.
www.exporthelp.co.za/.../LCs/UCP_600_Exporters_Guide_ABN.pdf 20 April 2010.

¹⁰⁰⁸ It is stated in the preamble of the UCP 600 that it is a document that contains 39 articles which form a comprehensive and practical working aid aimed at assisting bankers, lawyers, importers, exporters, transport executives, educators and everyone involved in using letters of credit in the international community.

¹⁰⁰⁹ [2005] 2 All SA 455 (SCA).

study of the financing elements of such transactions would necessarily be important as well.

The trading of diamonds in the international context involves various aspects particularly in the sale contracts that are required of parties to the transaction. The purchaser must ensure that he or she is obtaining the diamond from a legitimate source, while at the time being certain about the quality of the purchase. In South Africa certificates from the Jewellery Council of South Africa,¹⁰¹⁰ an internationally recognized certification laboratory,¹⁰¹¹ are used to support the integrity of diamonds sold in South Africa. Further, diamonds sold may also be tested in internationally recognized laboratories such as the International Diamond Certification Laboratory and the European Gemological Laboratory.¹⁰¹²

The fact that international laboratories with international reputation are used demonstrates the commonly international quality control nature of diamond sales transactions and therefore it becomes crucial to understand the financial systems involved in such trading. It is submitted that while the sale of diamonds between local parties is simpler than a situation where parties are completing a diamond sales contract across national borders, methods of finance will also vary according to what is most practical in light of established trade customs.¹⁰¹³

Contracts that require credit may involve larger State entities, for example, it was reported in the Moscow Times business brief in 2009 that Armenia would use a loan received from Russia to buy rough diamonds from Russian Diamond

¹⁰¹⁰ Also referred to as JCSA <http://www.jewellerysa.com/> 19 March 2010. See http://www.moneybiz.co.za/my_business/jewellery_industry.asp 19 March 2010.

¹⁰¹¹ Working together with Jewellers Association of South Africa (JASA) as an active representative body for protecting member interests of retail jewellery stores. Companies who sell this precious cargo to foreign entities have to ensure that it arrives safely and is cleared for insurance and export and many of these aspects of trade must be financed accurately in order to achieve the purpose of the contract of sale. See for instance, www.veritrade.co.za 20 July 2009.

¹⁰¹² www.egl.co.za/ 09 March 2010 www.mynhardts.com/other_services.htm 09 March 2010.

¹⁰¹³ *Ibid.*

Company Alrosa. This is a classic example of financing a diamond deal between countries. Interestingly, in the same viewpoint in comparison with the South African context Armenia¹⁰¹⁴ is interested in purchasing rough diamonds in order to develop its gem cutting industry while South Africa wants to retain some of its rough diamonds for the purpose of developing its local beneficiation strategies.¹⁰¹⁵

The Armenian policy decision above to take a loan to finance the purchase of diamonds from Alrosa does not appear from the media report, however, it does emerge from the report that the Prime Ministers of these two countries met and a \$ 500 million loan was granted by Russia to Armenia on condition that Armenia would buy diamonds from the Russian rough diamond provider for further cutting. The financing of a purchase of diamonds through a loan between States affirms the position that often business transactions that support the economy cannot be done without the granting of credit when necessary.¹⁰¹⁶ Therefore the

¹⁰¹⁴ Thursday, March 12, *The Moscow Times* Issue 4098 Business in Brief (2009).

¹⁰¹⁵ Diamonds Act 56 of 1986 section 5(a), 15 and MPRDA 28 of 2002 section 26.

¹⁰¹⁶ Thursday, March 12, *The Moscow Times* Issue 4098 Business in Brief (2009). See Emmanuel T. *Payment for Paperless Trade: Are the Viable Alternatives to the Documentary Credit?* Law and Policy in International Business (2001), <http://www.allbusiness.com/lagal/3589079-1.html> 20 September 2009. Itzikowitz A.J. and Du Toit S.F. (original text by L.J. Gering) *Banking and Currency: Business of Commercial Banking Documentary Credits* Volume 2(1) Law of South Africa (2003) 379. See also Willis J *Banking in South African Law* Juta (1981). The authors above show in their writings that business transactions involving credit are common in commercial contracts. See further, for example, *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W) where the facts of the case as recorded by the court on 221 A - J of judgment, a typical example of the use of credit in international trade is given. They are described as follows: 'The applicant conducts its business from within the area of jurisdiction of this Court. The applicant's business consists of the importing and distribution to local plastic companies of certain goods. (Imports and exports forming a classic example of an international trade transaction *in casu*). Over the last three years the applicant has built up an extensive business relationship with Finetrade Vermittlungs GMBTT a company conducting its business in Hamburg, Germany. The applicant, apparently acting on behalf of a purchaser, ordered goods from Finetrade and effected payment to Finetrade by way of letters of credit established by the applicant in favour of Finetrade as beneficiary (emphasis).
2. In South Africa, Walon (Pty) Ltd was employed by the applicant to attend to the release of the goods from the docks, to procure the delivery of the goods to the purchaser and to pay import duties and other administrative charges payable to the appropriate authorities in respect of the release of the goods.
3. It was specifically agreed between the applicant and the seller that all of Walon's fees, as per invoice, occasioned in the process of releasing the goods from the docks and having them delivered to the purchaser, would be paid by the seller. Upon advice by the applicant, and until recently, the seller paid the applicant the sums which it had paid, or was obliged to pay, to Walon. Finetrade was obliged to make payment of 'C & F' charges to the applicant on demand. The particular letters of credit bear testimony to the mechanics of the agreement in existence between the applicant and the seller. Appearing on each of the letters of credit are the letters 'C&F', which letters stand for 'carriage and freight'. They indicate that

legal implications arising from such a deal provide for an in depth acknowledgment of the complexities of diamond trade and the applicable financial systems.

As previously mentioned this work is being written at a time when there is a recession and the diamond prices and sales are somewhat being negatively affected. At present, the global credit crisis that is at the centre of the current global economic crisis has stolen international headlines on a daily basis and this article takes note of these reports as sources of non academic common events happening in the world and impacting on international diamond trade in many respects.¹⁰¹⁷ In spite of the recession in 2008 and 2009 documentary credit and

Finetrade would make payment to the applicant of the 'C&F' charges, being all amounts incurred in the complete process of having the goods released from the harbour after arrival and having the goods delivered to the purchaser.

4. Seven letters of credit have been issued to effect payment in respect of the agreements forming the subject of these proceedings and which the applicant concluded with Finetrade in respect of purchases for local buyers. These letters are annexed to the applicant's founding affidavit and details of the particular agreements concluded between the applicant and Finetrade are set out in the letters of credit. It is the failure by Finetrade to pay the applicant's C&F charges arising from these agreements which gives rise to the cause of action between the applicant and Finetrade.

5. Four of the letters of credit have not been paid and it is the claim to the proceeds of these four letters of credit, viz R2 092 000, that the applicant seeks to attach. In respect of each of these letters of credit an account was received from Walon, and immediately upon receipt payment was demanded from Finetrade. All the amounts so I claimed, viz R2 156 234,68, should have been paid by Finetrade to the applicant by 31 August 1993. R1 032 876,60 has been paid by the applicant to Walon, leaving a balance of R1 085 123,60. Only R339 840 has been paid by Finetrade to the applicant.' In this case the court clarified the principle at 224 D - G that 'letters of credit were the most frequent method of payment for goods in the export trade, used because they introduced predictability and security into international sales transactions, in which typical sellers would be reluctant to ship goods to foreign buyers before receiving payment for them, and foreign buyers similarly reluctant to tender payment before inspecting the goods to ensure that they conformed to the contract.'

¹⁰¹⁷ It was reported in the United Nations Intergraded Regional Information Networks, *Job Losses as Diamonds Lose Their Lustre*, Africa News 11 February (2009) www.afrika.no/Detailed/17940.html 16 July 2009 that there were many job losses in Botswana as a result of sales dwindling and the companies retrenching in order to cut costs. It is difficult times for Debswana Diamond Company, which is a joint venture between the South African diamond company, De Beers and Botswana's government. This is most unsettling since Botswana, like South Africa, is one of the African countries that have used its rich mineral resources to fund development. The New York Times also painted a grim picture of the plunging diamond sales and prices. It was reported recently that the famed New York, Tiffany jewellery chain was struggling even after lowering prices. It was also further reported that many a diamond producer throughout the world were also suffering loss of business together with many other luxury businesses at this time. It was stated in this report by Gareth Penny, De Beers CEO, that market research from the US and China revealed that consumers still desired diamonds. He also stated that in 2008 the Diamond Trading Company (DTC) achieved record sales which only slowed in the fourth quarter as a result of the onset of the global economic downturn. Mr. Gareth Penny acknowledged representing De Beers that this downturn has had significant impact on sales of retail diamond jewellery, liquidity and demand for rough diamonds in the

bills of exchange still remain the main methods for payment for international diamond trade. It is thus very important to understand in the diamond sales context. This study is relevant particularly in times of global recession when the availability of liquid assets is an important concern.

On the other hand technological advances which include on-line trading and exchange must also be investigated in order to determine their impact on financing of international trade transactions. A recent report claims that investors are now able to obtain their cut of diamonds more easily with the first online exchange of gems as a result of an initiative by the Dealers Organization for Diamond Automated Quotes (Dodaq) which was launched in Antwerp. This system offers a two-way auction for traders giving a platform for electronic transactions in polished diamonds with real-time pricing.¹⁰¹⁸

Fortunately South Africa seems to be sufficiently prepared to deal with these types of transactions by virtue of its relatively well developed electronic communication systems such as those regulated by the Electronic Communications and Transactions Act.¹⁰¹⁹ A discussion of the impact of these new trading modes is necessary in order to determine their impact on traditional international trade financing mechanisms such as documentary credit.

cutting centres. To accommodate these market challenges De Beers has taken steps to reduce productions levels, costs and capital expenditure across all operations. All these reduced costs and business restructuring initiatives have been adopted in the case of De Beers to deal with the economic crisis. Sadly De Beers have had to cease major production operations with resultant drops in production venture. See Jonathan Clayton, *The Times* (London) *De Beers Stops mining in Botswana* 9 March (2009).

¹⁰¹⁸ Rosamun Urwin *Investment: Investors Take Shine to Diamonds Online* *The Evening Standard* (London) 13 February (2009). It was reported that the market is accepting this online trading auction. The institutional and private investors and people from all parts of the diamond industry are positive about the system because buyers in the past were exposed to heavy sales tax and since the jewels are in this way stored in a tax free zone, it makes it a cheaper method of trading despite of the global downturn Dodaq is optimistic. If online trade provides a tax free zone and a cheaper medium for diamond buyers, how do buyers effect payments, what financial systems are used. These are all pertinent modernistic legal developments that affect diamond trade and must be analyzed as an important aspect of diamond regulations. See Laryea Emmanuel T. *Payment for Paperless Trade: Are the Viable Alternatives to the Documentary Credit?* *Law and Policy in International Business* (2001), <http://www.allbusiness.com/lagal/3589079-1.html> 20 September 2009. Here the author suggests that documentary credit still prevails in spite of paperless trade developments.

¹⁰¹⁹ 25 of 2002.

5.2 A Brief Discussion of the Use of Credit in Diamond Trade Transactions

Diamond trade transactions have been historically carried out on the basis of credit sales through what is generally known as an executory contract. These are contracts where parties agree to exchange valuable items for money but time elapses between the moment the valuable item is passed to the buyer and the time the buyer makes payment. In the diamond credit sale, the buyer of diamonds receives the diamonds and pays the seller at a later date. The contracts are traditionally enforced by private sanctions and mechanisms,¹⁰²⁰ and not State sponsored courts and judicial systems. The reason lies in the traditional practice in diamond transactions; family and community connections drove the traditional diamond industry more than any international practices could do.¹⁰²¹

Traditional diamond trade transactions were essentially premised on mutual trust and reliability between the contracting parties. It is therefore not a surprise that credit sales came to be the domineering method of sale in the national and international diamond markets. These credit sales are also based on mutual trust and reliability of the contracting parties and once these are guaranteed, the contract is concluded.¹⁰²² It is submitted that the very nature of diamond trade revolves around precious luxury items which suggest that the parties involved in such trade will to some degree at least display some affluence. Having said that however it is essential to balance that view with the fact that it is not only oligarchs who purchase diamonds therefore it is prudent that where liquidity is not always guaranteed, giving credit is a good alternative to keep the diamond industry afloat.

¹⁰²⁰ Obviously not referring to unlawful 'private sanctions' including illegal activities such to enforce payments extra judicially although this may have been a root cause of such activity especially when looking at black market diamond trade which of course has nothing to do with legitimate diamond trade transactions.

¹⁰²¹ Based on Barak D. Richman 'How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York' American Bar Foundation 31 Law and Social Inquiry (2006) 383 - 394.

¹⁰²² *Ibid.*

Diamonds move through various stages from the day they are extracted from diamond mines to the time they are sold as jewellery in a jewellery shop. This movement of diamonds is applicable both in South Africa as well as in the international community. The basic path involved movement from a mine to the CSO in London. This subsequently distributes rough diamonds to brokers who then sell the diamonds to groups of specific merchants called 'Sight holders.'¹⁰²³

These Sight holders thereafter would sell the diamonds to various individual dealers who would deliver the diamonds to cutting and polishing houses. Dealers continued to sell the rough and polished diamonds to jewellery manufacturers for commercial sale. Most of the negotiations involved in each stage and transaction are concerned with the selling price, payment schedule, method of payment and credit security. All these processes involved both rich and poor traders and dealers and the speed with which each transaction is concluded and the next stage is reached militates against adopting a cash diamond sales system.¹⁰²⁴

It has been asserted by author Barak D. that the prevalence of the credit sales system in diamond sales was also necessitated by liquidity constraints as most players are not engaged by heavily capitalized corporations; these could be self employed merchants or individuals who work for small family businesses. As a result, many dealers could not afford to transact on a 'cash upfront' basis. Further, dealers could match payments for credit purchases with anticipated income from downstream sales. These dealers could also get significantly better prices for their stones by extending credit to their buyers. This helped in giving prominence to the credit sale method of trading in diamond transactions.¹⁰²⁵

The credit sale method is predominant in the world's diamond markets today and these include New York, Antwerp, Mumbai and Israel. In New York, the field is

¹⁰²³ Barak D. Richman 'How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York' American Bar Foundation 31 Law and Social Inquiry (2006) 383 - 392.

¹⁰²⁴ *Ibid.*

¹⁰²⁵ *Ibid.*

dominated by Jewish merchants who have established intricate diamond trading networks and webs based on family, community and ethnic connections. Multilateral cooperation among various groups drive the diamond trade and transactions in New York and this emphasizes the importance of clean reputation, general notions of fairness and mutual trust. The credit sale method in New York, as in other Jewish dominated diamond trading centres has been described as trust based exchange because of this emphasis on moral rather than legal values and practices. While these values have formed the basis of traditional market sales in New York, it is interesting that the credit sale they introduced remains solid and universally acceptable as a method of trading and payment in the international and diamond trading industry to this day.¹⁰²⁶

Presently, trading firms in Mumbai, Antwerp and Israel are based on traditional values emphasizing on mutual trust, good reputation, honesty and other socio demographic factors that would be absent in modern trade transactions involving other products. However, the pace at which technological developments and innovations are taking place has threatened the traditional role of small scale players in the diamond transactions and trading field. Highly developed machinery for cutting and polishing diamonds have removed diamond cutting and polishing from the hands of small scale, moral values based trading relationships. Highly capitalized and mechanized international corporations have swept most small scale players out of the system. It seems these have brought about the demise of traditional diamond trading and transacting systems and might in that regard bring the end of the credit sale as a method of sale and payment. It is however not yet clear whether there are any emerging trends favouring other modes of payment and sales different from credit sales.¹⁰²⁷

¹⁰²⁶ *Ibid.*

¹⁰²⁷ *Ibid.*

5.2.1 South African Courts on Documentary Credit: General Points

South African law contains a relatively rich source of judicial precedent and legal consideration of principles surrounding the international documentary credit. However, generally it is not a subject that has received much attention in legal writing or statutory enactments or other regulatory codes. Some of the thorough decisions pertaining to documentary credit include cases such as *Philips and Another v Standard Bank of South Africa Ltd and Others*¹⁰²⁸ where the court dealt with the principles pertaining to documentary credit thoroughly. It is a wonder that South African courts have had exposure to dealing with issues of documentary credit as more recently as 1985 when this practice has been in international trade for over a century.

The lack of legislative attention on documentary credit suggests that it is a finance method that supports international trade efficiently with little need to regulate; it may be that it is appropriately self regulated through private rules of business practices, norms and rules.¹⁰²⁹

The whole subject of commercial law is one where the global system has aspired towards uniformity of rules, albeit without the need of an international code or treaty. South African commercial law resembles English law and indeed most of its commercial statutes were almost verbatim to that of English statutes.¹⁰³⁰ Relevant principles are inherited from English courts and therefore it is worth considering English judgments in various instances¹⁰³¹ for the purposes of analyzing the application of these rules. Further, the analysis of judicial

¹⁰²⁸ 1985 (3) SA 301 (W).

¹⁰²⁹ This submission is based on the premise that even the South African courts primarily rely on secondary sources of law and other persuasive international law when hearing a matter that involves documentary credits.

¹⁰³⁰ Malan F R et al *Malan on Bills of Exchange, Cheques and Promissory Note* 4 ed Lexis Nexis Butterworths (2002) 6.

¹⁰³¹ See for instance, *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607 (CA), *Gian Singh and Company Ltd v Banque de l'Indochine* [1974] 2 All ER 754, *Owen (Edward) Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976, this case dealt with performance of a bank with obligations very similar to those assumed by a confirming bank in documentary credit. See also *Sztejn v Henry Schroder Banking Corporation* 31 NYS 2d 631 (1941), a decision referred to with approval in English judgments pertaining to documentary credit.

precedent on this practice provides essential academic insight on the South African legal trends pertaining to law on documentary credit. The understanding of the application of legal principles can be applied directly to diamond trade.

The issue of fraudulent documents as a threat to efficient documentary credit practices was also considered in the case of *Loomcraft Fabrics CC v Nedbank and Another*.¹⁰³² From an academic perspective, this decision has received substantial and justified attention.¹⁰³³ This case does however clarify the legal stance pertaining to when a bank is allowed to escape liability in the exceptional case of fraud. It established that in order for the bank to escape liability on the basis of fraudulent conduct in presenting documents by the seller, such fraud will not be lightly inferred; to succeed on the grounds of fraud it must be shown that the seller for the purpose of drawing credit presented bills (transport documents) knowing that such bills contained material representations of fact upon which the bank would rely and which the seller knew to be untrue, mere error, misunderstanding or oversight, however, unreasonable will not suffice as a ground for proving fraud.¹⁰³⁴

¹⁰³² 1996 (1) SA 812 (A).

¹⁰³³ Itzikowitz A.J. and Du Toit S.F. (original text by L.J. Gering) *Banking and Currency: Business of Commercial Banking Documentary Credits* Volume 2(1) Law of South Africa (2003) 384, De Beer C. *Banking Law* Index to the All South African and South African Law Reports (2009), *Besproeiingsraad en Andere* [2000] 2 All SA 8 (A) 16, *Transcontinental Procurement Services CC v ZVL & ZKL International AS and Another* [2000] JOL 7352 (W) 10, *Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd & Another* [2008] JOL 19699 (D) 13. Schulze W.G. *The UCP 600: A New Law Applicable to Letters of Credit* South African Mercantile Law Journal Volume 21 (2009) 228.

¹⁰³⁴ See summary. This position proving to support the English heard in the House of lords in *United City Merchants (Investments) Ltd and Others v Royal Bank of Canada and Others* [1982] All ER 720. This case was a decision upholding the validity of the international trade agreement financed by documentary credit. Rather than treating such crucial agreements as a nullity, which would probably have the effect of working against merchants if decisions to nullify contracts of international trade nature are taken arbitrarily or interpreted too strictly. This On the other hand these cases and judicial decisions serve as warning to merchants to not prepare documents for such contracts in a lax manner. In *Brimpton (Pvt) Ltd v Commercial Bank of Zimbabwe* [2001] JOL 9111 (ZH) Brimpton (plaintiff in the civil action) was purchasing goods from an Indian supplier and obtained an irrevocable letter of credit from the Commercial Bank of Zimbabwe. It was the condition of the letter of credit that the goods dispatched would conform to the specifications agreed. The bank caused certain payments to be made even though the documents received by it did not conform with the conditions of the letter of credit. Brimpton knew of these discrepancies and waived them. However in respect of some of the goods, Brimpton did not accept the discrepancies. The bank however failed to notify the supplier of the discrepancies in time and the seller insisted on payment. Payment was made and Brimpton's account was credited. The court held that the relationship between Brimpton and the bank was governed by the ordinary laws of contract. The bank had

On the question of whether any other type of financing contract in South Africa may operate as documentary credit, the case of *Rosen v Ekon*¹⁰³⁵ is very useful. In this case the Applicant and Respondent had agreed to enter into a sale agreement whereby the Respondent sold a residential property to the Applicant for an amount of R1, 400 000.00. A further sale agreement for furniture and equipment worth R350 000.00 was also concluded by the parties. The Applicant paid a deposit of R100 000.00 following an agreement that the balance of R1, 300 000.00 would be paid against registration of transfer and secured by means of a bank guarantee in favour of the Respondent, payable on date of transfer. Two guarantees were issued by ABSA bank and delivered to the conveyancers.¹⁰³⁶

The Respondent sought to avoid the contract by citing two reasons. He stated firstly that the right reserved by ABSA bank to cancel the guarantees at any time prior to registration by giving notice to that effect rendered them worthless and therefore unacceptable to him.¹⁰³⁷ Further, the seller was raising complaints about the actual value of the house. The court in making a finding concerning the bank guarantee considered the core function thereof and stated that the property guarantee is a form of documentary credit because its function is to provide for payment and not to serve as security. Therefore as long as the buyer has provided for the delivery of the guarantees, he or she has sufficiently complied with his or her obligations.

failed to observe the rules of documentary credit and debited Brimpton's account in breach of contract. Brimpton had however received the goods and benefited from them and therefore when calculating the quantum for breach of contract *in casu* the benefit to Brimpton was taken into account. See editor's summary of the case. This case also shows that where the commercial transaction is upheld in breach of some obligation, a civil remedy is much more appropriate than a cancellation of the whole transaction.

¹⁰³⁵ [2000] 3 All SA 24 (W).

¹⁰³⁶ See editor's summary of facts and law in this case.

¹⁰³⁷ On the face of it this revocable form of guarantee, from the seller's perspective, seems in fact the contradictory as it seems unfathomable that credit can be 'guaranteed' and yet very possible to withdraw at any stage. However the court stated that these forms of revocable property guarantees were found to be common in property transactions to guard against a situation where parties have breached the sale contract. The purpose of such a guarantee is to provide payment and not function as security and therefore the Respondent could not repudiate the contract based on that point of contention.

In *Schmidt and Another NNO v ABSA Bank Ltd*¹⁰³⁸ the court dealt with the issue of documentary credit in breach of section 341 of the Companies Act.¹⁰³⁹ The facts of the case are that a certain Badenhorst, sole director of Vesime Washing Systems (Pty) Ltd (referred to herein after as “VWS”) in 1995 secured sole distribution rights in South Africa for VWS certain automated motor vehicle washing machines from Auto-Equip Lavaggi SPA, an Italian company. Once VWS had secured an order or orders in South Africa it would import the machine or machines depending on the order. For finance purposes VWS, before placing the order with the Italian company supplier, it would arrange that a bank such as Bankfin, a division of ABSA and the respondent in this matter, to agree to finance the import, usually by entering into a lease or a suspensive sale agreement with the end user meaning the person placing the order with VWS.¹⁰⁴⁰

Payment for the imported equipment by VWS to the Italian supplying company would be made via irrevocable documentary letters of credit in favour of the Italian company issued by the Trust Bank, a division of ABSA bank, the respondent. A machine was ordered and secured by VWS for an entity referred to as Mike Pendock Properties CC. For finance, VWS applied for documentary credit which was duly issued by ABSA, the respondent on 23 January 1998 with the date of payment for value being reflected as 15 April 1998. The relevant invoice from the Italian company dated 26 February 1998 and the machine were shipped from Italy on about that date.¹⁰⁴¹

VWS subsequently brought an *ex parte* application for its own winding up in March 1998 on the basis that it was unable to pay its debts, a month before the date of honour and payment on documentary credit was due. A provisional winding up order was made on 24 March 1998 and the final order on 5 May

¹⁰³⁸ 2002 (6) SA 706 (W).

¹⁰³⁹ 61 of 1973.

¹⁰⁴⁰ 709 A.

¹⁰⁴¹ 709 D – F.

1998. The machine arrived in South Africa and the respondent, ABSA, paid the Italian company on 15 April as per agreement. The amount paid to the Italian company was R404 086,50 in respect of the documentary credit and the respondent was to recover this payment from VWS.¹⁰⁴²

Bankfin, a branch of the respondent upon becoming aware of VWS's liquidation, were no longer prepared to finance the acquisition of the machine and this would put them in a difficult position considering that VWS is not widely represented in South Africa, taking into account that they were a sole distribution agent. In order to salvage the situation the respondent via its Trust bank branch arranged itself to sell the machine to Mike Pendock CC by entering into an agreement with that entity to finance the acquisition, this salvage attempt had the effect that Mike Pendock CC acquired the machine and the respondent paid for it.¹⁰⁴³

It was the result of this perceived ability to dispose of the machine that the credit being challenged by the appellants that payment for that credit was made out to VWS account on 26 June 1998. It was shown in the facts that the first appellant had sent a letter to ABSA, the respondent on 26 August '1999'¹⁰⁴⁴ claiming the machine or proceeds derived from the sale of the machine. ABSA replied by explaining that the purchase price of R404 086,50 had been repaid by Mike Pendock CC and credited to VWS via the branches suspense account. The respondent admitted to sending this reply but stated that the contents of the letter were in fact incorrect and the credit on 26 June 1998 was a mere administrative rectification.¹⁰⁴⁵

The court stated the trite law pertaining to documentary credit and came to the conclusion that there is certain risk that a bank takes on when issuing

¹⁰⁴² 709 G – H.

¹⁰⁴³ 710 A – B.

¹⁰⁴⁴ A typing error in letter acknowledged by the court, it was intended to read 1998.

¹⁰⁴⁵ 710 C – F. This explanation by ABSA was accepted by the court *a quo* which had found that crediting the company's account on 26 June 1998 was a rectification of a series of administrative errors or entries and did not amount to a disposition within the meaning of section 341(2) of the Companies Act 61 of 1973 as challenged within the application.

documentary credit. The bank may protect itself from this risk by retaining the bill of lading, obtaining security from the purchaser (customer) or obtaining payment from the same. In this case whether or not the respondent bank acted properly in debiting VWS's current account at its Trust bank branch after the launching of an application for provisional order of liquidation is irrelevant. Having paid in terms of the credit it is common cause that the respondent bank became a concurrent creditor of VWS which would have been the position whether or not it did debit or did not debit VWS account with the amount.¹⁰⁴⁶

What was important in the matter was that in terms of section 342 of the Companies Act¹⁰⁴⁷ the winding up arose on 19 March 1998 and therefore the respondent bank was at all times prior to the crediting of the account on 26 June 1998 a concurrent creditor of VWS in the amount of R404 086.50. However, once the respondent bank credited this amount on 26 June 1998, for whatever reason, this action had the effect of removing the respondent's claim from the *concursus* in order to settle this claim in full in favour of the respondent bank to the prejudice of the general body of creditors.¹⁰⁴⁸ For this reason the court held that the payment amounted to a prohibited disposition. Granted this judgment is more related to company law than documentary credit it nevertheless provides useful insight on determining the extent of an issuing bank's creditor position in cases where such a bank is due to recover payment made by it under documentary credit.

Further, this case illustrates a typical case where a banking institution must avoid granting credit to finance a 'sinking ship,' it is proposed that though the innocent seller was assisted in receiving payment through the use of documentary credit, banks should ensure the sufficient solvency of clients in documentary credit applications or ensure that at least the commodity being traded upon resale can

¹⁰⁴⁶ 711 G – H. The court also established that the respondent's bank's decision to release the bill of lading to Mike Pendock CC which allowed him to obtain the machine and the respondent's decision to lend Mike Pendock CC the amount necessary to purchase the machine was also completely irrelevant.

¹⁰⁴⁷ 61 of 1973.

¹⁰⁴⁸ 712 B.

provide sufficient profits to close all gaps opened by a credit issue, this is where diamond value becomes a more certain cover in international trade financed by documentary credit.

A question that may arise is whether the rights contained in a documentary credit represent a *res* capable of attachment for the purposes of enforcing an action in *rem*. This issue was dealt with by the South African court in *Ex Parte Sapan Trading (Pty) Ltd*¹⁰⁴⁹ is a case dealing with the question as to whether rights embodied in the irrevocable documentary credit can be attached *ad fundandam* or *ad confirmandam jurisdictionem*. This case was an urgent appeal against the judgment dismissing an *ex parte* application for an order authorizing the attachment *ad fundandam* or alternatively *ad confirmandam jurisdictionem* of the claims of four letters of credit.¹⁰⁵⁰

The appeal court, in a judgment delivered by Streicher J, to which the whole bench concurred, stated that the trial court's decision had been an incorrect conclusion based on wrong reasoning. In coming to a decision on the attachment of documentary credit claims, the appeal court stated that each of the letters of credit formed irrevocable undertakings by the issuing bank to the beneficiary (Finetrade in this case) which gave rise to a contract between the issuing bank and the beneficiary. Since the agreement between the issuing bank and the beneficiary was the result of a contract between the applicant (Sapan Trading (Pty) Ltd) and the beneficiary in terms of which the credit had to be established and of a contract between the applicant and the issuing bank but separate from and independent of such underlying contracts.¹⁰⁵¹ In this case both the applicant and beneficiary had contractual obligations with the issuing bank based on independent terms of agreement.

¹⁰⁴⁹ 1995 (1) SA 218 (W).

¹⁰⁵⁰ 220 H – J. The court considered the allegations contained in the applicants founding affidavit and stated that some of the allegations were highly improbable but would be considered nonetheless, however this attitude reflected by the court creates doubt as to the soundness of the applicant's claims in this case.

¹⁰⁵¹ 223 H – J. 224 A.

In light of these contractual relationships the court clarified that the beneficiary was advised in terms of the letter of credit and not of the terms of application to the issuing bank. It was therefore the documentary credit that embodied the agreement between the issuing bank and beneficiary. On this basis the appeal court highlighted the flaw in the court *a quo* judgment stating that contracts between the beneficiary and the issuing banks had to be determined according to the application for the establishment of letters of credit.¹⁰⁵²

It was established that the rights that existed under the letters of credit were those between beneficiary and issuing bank. Parties are obligated to perform in terms of their undertakings on the letters of credit. Since these rights were assets it was a crucial question for the court to determine whether these rights could be attached. In answering this question the appeal court found that in matters of documentary credits the credit issued and confirmed by the bank must be paid if the documents are in order and therefore any dispute between buyer and seller must be settled between themselves.¹⁰⁵³ The court held that the undertaking of credit must be respected and any implied terms must be in accordance with what was aimed by the purpose of the letter of credit. Further, in this case the court stated that it would be fruitless to enforce the order sought by the applicant since the undertaking was to pay in Germany and not South Africa.¹⁰⁵⁴

In conclusion the court took the view that a term should be implied in law into the agreement between the applicant and beneficiary that the applicant would establish an irrevocable letter of credit and that the applicant would not attach the claims under the credit to found or confirm jurisdiction.¹⁰⁵⁵

¹⁰⁵² 224 A – B. Strangely this reasoning by the court *a quo* would mean that the court would have to get into the banking practice and look at the application for credit before the relationships have even been defined. This is certainly a somewhat flawed process.

¹⁰⁵³ 225 D.

¹⁰⁵⁴ 226 H.

¹⁰⁵⁵ 227 D – E.

This case shows the usual zeal of the South African courts to support international trade transactions to the best of what it deems the intention of the parties. This is the appropriate method of interpretation as it gives business efficacy to the contract as would have been originally intended by the parties. Though that is commendable this judgment somewhat leaves the question of attachment unanswered in principle though there is a substantial attempt to define the nature of the letter of credit in the judgment, it is not so clear on giving sufficient guidance to the main issue at hand, that being, to what extent can rights under a credit be attached.

5.3 Some Core Principles Documentary Credit

The documentary credit has evolved to be the main form of credit sale acceptable and well recognised in the diamond international trading sphere. Documentary credit is also known as a commercial letter of credit or simply credit. This means that there is 'an independent undertaking by a bank, acting as mandatory for its customer (for example, a local buyer), to pay the beneficiary (for example a foreign seller) a stipulated sum of money against the presentation of stipulated documents (for example, bills of lading (used in shipping, for instance), commercial invoices and insurance documents).'¹⁰⁵⁶

The UCP 600 definition of documentary credit or credit as appears in the definitions section is outlined as follows in Article 2:

'Credit means any arrangement, however named or described, that is irrevocable and thereby constitutes a

¹⁰⁵⁶ Itzikowitz A.J. and Du Toit S.F. (original text by L.J. Gering) *Banking and Currency: Business of Commercial Banking Documentary Credits* Volume 2(1) Law of South Africa (2003) 379. See also Willis J *Banking in South African Law* Juta (1981). Schulze W.G. *The UCP 600: A New Law Applicable to Letters of Credit* South African Mercantile Law Journal Volume 21 (2009) 235. Schulze W.G. *Strict Conformity of Documents Under A Performance Guarantee: Does A Signed Copy of A Document Qualify An Original?* *Stefanutti & Bressan (Pty) Ltd v Nedbank Ltd (Unreported Judgment Delivered 30 July 2008) Case Number 5311/2008 D&CLD* Obiter (2009) 411. Schulze W.G. *The UCP 600: A New Law Applicable to Letters of Credit* South African Mercantile Law Journal Volume 21 (2009) 228. Fredericks E.A. and Neels J.L. *The Proper Law of a Documentary Letter of Credit (Part I)* South African Mercantile Law Journal Volume 15 (2003) 63.

definite undertaking of the issuing bank to honour a complying presentation.’

In practice documentary credit is therefore created as follows (a letter which comes into existence by formal written application by the applicant) is to facilitate dealings between merchants in different countries by guaranteeing payment to the seller whilst ensuring delivery to the buyer of the goods of contractual description. Four parties are involved in sale by documentary credit, namely the applicant (usually the importer or buyer), the issuing bank,¹⁰⁵⁷ the notifying bank (which may bind itself as the confirming bank) and the beneficiary (usually the seller/exporter). There is a much involved paper trail in such transactions as the parties deal with documents and not with the goods; services or other performances under the transaction covered by the documents as credits are by their nature separate transactions from sales or other contracts on which they are based.¹⁰⁵⁸

It is important at this juncture to consider the detail of the specific requirements or characteristics of a valid letter of credit.¹⁰⁵⁹ Three of the most important characteristics for a letter of credit are that will be discussed here are as follows. First when a letter of credit is opened there must be autonomy¹⁰⁶⁰ of the letter of credit.¹⁰⁶¹ Secondly the letter operates through the doctrine of strict compliance.¹⁰⁶² Thirdly parties must be aware of the fraud exception.¹⁰⁶³

¹⁰⁵⁷ *Montrod Ltd v Grundkötter Fleischvertriebs GmbH and Another* [2002] 3 All ER 697 para 37, banks deal with the documents and not the goods.

¹⁰⁵⁸ *Ibid.* The banks are not concerned or bound by other contracts underlying the credit agreement even if such contracts are included in the credit. This was confirmed in the following decisions of the court: *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W); *Hamzeh Malas and Sons v British Imex Industries Ltd* [1958] 2 QB 127; *Discount Records Ltd v Barclays Bank Ltd* [1975] 1 Lloyd’s Rep. 444; *United City Merchants (Investments) Ltd and Others v Royal Bank of Canada and Others* [1982] All ER 720. See also *Sirus International Insurance Corp (Publ) v FAI General Insurance Co Ltd and Others* [2004] 1 All ER 308 p 309.

¹⁰⁵⁹ Carr I. *International Trade Law* 3 ed Cavendish Publishing Limited (2005) 471.

¹⁰⁶⁰ Schulze W.G. *The UCP 600: A New Law Applicable to Letters of Credit* South African Mercantile Law Journal Volume 21 (2009) 235.

¹⁰⁶¹ Carr I. *International Trade Law* 3 ed Cavendish Publishing Limited (2005) 471.

¹⁰⁶² Carr I. *International Trade Law* 3 ed Cavendish Publishing Limited (2005) 478. *Montrod Ltd v Grundkötter Fleischvertriebs GmbH and Another* [2002] 3 All ER 697 par 50.

5.3.1 Autonomy

According to the principle of autonomy, the undertaking of the issuing bank or confirming bank to pay against the documents is the primary obligation. This confirms the principle already stated above and well established in South African law and banking practice.¹⁰⁶⁴ This means that any dispute between the seller and buyer over the contract of sale will not affect the credit.¹⁰⁶⁵ What is of importance is that the documents supporting the credit are tendered properly and in order.

The principle of autonomy a core principle in documentary credit law¹⁰⁶⁶ is provided for in Article 5 of the UCP 600 where it is stated specifically that banks deal with documents and not with goods, services or performance to which the documents are related.

5.3.2 Strict Compliance

The principle of strict compliance or conformity of documents has been considered by South African author Schulze¹⁰⁶⁷ who submits that for the South African context, a new case¹⁰⁶⁸ dealing with principles that can be applicable to documentary credit is important to the understanding of the area of law. The author discussed a case which involves the presentation of a signed copy (marked 'copy II') for payment under a guarantee. The court found that signatures on copies did not elevate the documents to some sort of duplicate original.¹⁰⁶⁹ The author discusses sub-article 17(b), (c) and (d) which provide that

¹⁰⁶³ Carr I. *International Trade Law* 3 ed Cavendish Publishing Limited (2005) 502. Connerty A. *Fraud and Documentary Credits: The Approach of the English Courts* antonyconnerty@lambchambers.com.

¹⁰⁶⁴ *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W) 223 H – J. 224 A.

¹⁰⁶⁵ Carr I. *International Trade Law* 3 ed Cavendish Publishing Limited (2005) 478.

¹⁰⁶⁶ *Montrod Ltd v Grundkötter Fleischvertriebs GmbH and Another* [2002] 3 All ER 697 para 37.

¹⁰⁶⁷ Schulze W.G. *Strict Conformity of Documents Under A Performance Guarantee: Does A Signed Copy of A Document Qualify An Original? Stefanutti & Bressan (Pty) Ltd v Nedbank Ltd (Unreported Judgment Delivered 30 July 2008) Case Number 5311/2008 D&CLD* Obiter (2009) 411. See also Schulze W.G. *The UCP 600: A New Law Applicable to Letters of Credit* South African Mercantile Law Journal Volume 21 (2009) 228.

¹⁰⁶⁸ *Ibid.*

¹⁰⁶⁹ Schulze W.G. *Strict Conformity of Documents Under A Performance Guarantee: Does A Signed Copy of A Document Qualify An Original? Stefanutti & Bressan (Pty) Ltd v Nedbank Ltd (Unreported Judgment*

a document will be treated as original under certain circumstances. However the author also cautions that with the modern technological advances that allow for easier duplication, a marked copy will not suffice as sufficient tender of original under sub-article 17(d).¹⁰⁷⁰ Strict compliance is an important protective measure in documentary credit.

Under the doctrine of strict compliance the beneficiary will present the documents to the issuing, advising or confirming bank as required.¹⁰⁷¹ The acceptance or rejection of the tendered documents by the bank is dependant on whether the documents conform *prima facie* to the terms of credit. Therefore on the face of the documents there must be strict compliance with credit terms or the bank will be entitled to reject the documents. Since banks are not imputed with the knowledge of trade but are rather experts on finance this means that such documents must meet the specific requirements of credit no matter how trivial they may seem. This is due to the fact that banks deal with documents not goods.¹⁰⁷²

Articles 14, 15, 16 and 17 of the UCP 600 deal specifically with the standard of documents and the manner in which they may be presented.

5.3.3 Fraud exception

It has been submitted that the bank's obligation to pay on documents that appear to conform on their face is curtailed in the event of fraud. The courts are however reluctant to set aside the credit agreement based on a mere allegation of fraud. Fraud must be proved as will be illustrated in the further deliberations of this chapter. The aim of preserving the trust in compliant documentation is essential

Delivered 30 July 2008) Case Number 5311/2008 D&CLD Obiter (2009) 413. This means that the bank favoured strict compliance.

¹⁰⁷⁰ Schulze W.G. *Strict Conformity of Documents Under A Performance Guarantee: Does A Signed Copy of A Document Qualify An Original? Stefanutti & Bressan (Pty) Ltd v Nedbank Ltd (Unreported Judgment Delivered 30 July 2008) Case Number 5311/2008 D&CLD* Obiter (2009) 418.

¹⁰⁷¹ *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 2 All ER 400 505 H.; *Banque de l'Indochine et de Suez SA v J H Rayner (Mincing Lane) Ltd* [1983] 1 All ER 1137 1145 – 1145.

¹⁰⁷² Carr I. *International Trade Law* 3 ed Cavendish Publishing Limited (2005) 471, 481; 482.

for the purposes of preserving the flourishing of commerce.¹⁰⁷³ It is submitted that the protection of commerce must be at the top of the agenda when methods of financing international trade are at issue.

In *United City merchants (Investments) Ltd and Others v Royal Bank of Canada and Others*¹⁰⁷⁴ the House of Lords in this case dealt with a presentation of fraudulent documents for purposes of enforcing documentary credit. In the judgment of Lord Diplock to which the entire bench concurred it was stated that this judgment is of general importance to all those engaged in the conduct and financing of international trade. The facts of the case were first discussed in the court *a quo* where the sellers and their own merchant bankers to whom they had transferred the credit as security for advances were the plaintiffs. The confirming bank was cited as defendant with the buyers and the issuing bank joined as further parties. There was a further appeal to the Court of Appeal (CA)¹⁰⁷⁵ and finally an appeal to the House of Lords.¹⁰⁷⁶

The issuing bank had initially admitted liability to indemnify the confirming bank for any sums for which it as defendant should have been held liable to the plaintiffs. However, the appeals in this matter were undertaken by counsel for the issuing bank. Lord Diplock subsequently pointed out however that the House of Lords was concerned with the contractual relationship between the buyers and the issuing bank or between the issuing bank and the confirming bank because 'the documentary credit point depends on the contractual relationship between

¹⁰⁷³ Carr I. *International Trade Law* 3 ed Cavendish Publishing Limited (2005) 502; 503.

¹⁰⁷⁴ [1982] 2All ER 720.

¹⁰⁷⁵ Where the Court of Appeal had found that the letter of credit was unenforceable under the Bretton Woods Agreement (the sale agreement) in that it infringed exchange control regulations, this part of the finding was confirmed by the House of Lords. The Court of Appeal also found that the defendant (confirming bank) was entitled to refuse to pay under the letter of credit against the fraudulently completed shipping documents, the House of Lords rejected this finding and allowed the appeal. This case shows that the letter of credit and the ancillary sales contract underlying it are separate issues and it will be important to this chapter to analyze the rationale adopted by the House of Lords in making this finding.

¹⁰⁷⁶ 722 – 723.

the sellers (or their transferee) and the confirming bank.¹⁰⁷⁷ This is an important point because the sellers were contractual benefactors under the documentary credit and it would seem strange that they were unable to claim payment.

The buyer, Vitrorefuerzos SA, a Peruvian company had agreed to buy from the seller goods in the form of plant for the manufacture of glass fibers at a price of \$ 662, 086 FOB¹⁰⁷⁸ London for shipment to Callao. Payment was to be done in London by confirmed irrevocable transferable letter of credit as to 70 per cent of the invoice price and 100 per cent of the freight.¹⁰⁷⁹

The letter of credit was made subject to the International Chamber of Commerce (ICC) Uniform Customs and Practice for Documentary Credits (UCP), 1974 revision. The letter was to be available by sight drafts on the issuing bank against delivery with a full set of among other documents 'on board' bills of lading evidencing receipt for shipment of the goods from London to Callao on or before a date in October 1976 which was extended to 15 December 1976. The initial payment of 20 per cent of the invoice price was duly made by the confirming bank to the seller, after that the seller transferred to its own merchant bankers its interest under the credit as security for advances with the seller continuing as beneficiary of the confirmed credit.¹⁰⁸⁰

The goods were not shipped timeously and when the bills of lading (shipping documents) were presented to the confirming bank on 17 December 1976, the bank refused to pay because the bills of lading did not have a dated 'on board'

¹⁰⁷⁷ 722. The House of Lords in this case also had to determine an ancillary issue in the matter concerning the certain special provisions in an agreement between the sellers and the buyers which was collateral or added confirmation to their sale contract and this was the 'Bretton Woods Agreement point' to be decided in the case.

¹⁰⁷⁸ An Incoterm which stands for 'free on board' as sponsored by the International Chamber of Commerce (ICC) which means stands for 'free on board' where the seller is said to have completed his or her obligations once he or she has delivered the goods over the ship's rail at the port of shipment. The buyer from that point takes responsibility and risk in the goods. For further reading on this issue. See Ndlovu Portia, *South Africa Law of Carriage of Goods by Sea: Common Obligations in Charterparties and Bills of Lading Under English and South African Law*, Law Books Press (2008) 42.

¹⁰⁷⁹ 723 par. 3 – 4.

¹⁰⁸⁰ 723 par. 5.

notation. The bills were returned to the carrier's freight brokers and they issued a fresh set of bills of lading reflecting an untrue notation stating that the goods were on board on 15 December 1976. The amended bills together with the other documents were presented to the confirming bank and it again refused to pay on the basis that it had information in its possession which suggested that shipment was not affected as reflected in the bills and therefore falsified.¹⁰⁸¹ It was established that the misleading conduct of the employee of the loading brokers to the carriers was fraudulent however neither the seller (nor its transferee) were parties to such fraud.¹⁰⁸²

The House of Lords made reference to the principles as to the legal nature of contractual obligations assumed by various parties to a transaction consisting of an international sale of goods to be financed by means of a confirmed irrevocable documentary credit. It opined that it is trite law that there are four autonomous but interconnected contractual relationships of utmost importance and these are:

1. The foundational sale of goods contract between buyer and seller.
2. The contract between the buyer and the issuing bank. In this case the issuing bank agrees to issue credit, either through itself or a confirming bank to notify credit to the seller and to make payments to or to order of the seller, which may also include payment, acceptance or negotiation of bills of exchange drawn by the seller, against presentation of stipulated documents. The buyer

¹⁰⁸¹ 724 par. 1.

¹⁰⁸² 724 par. 2. Therefore, it became important to consider whether it would be fair to punish the beneficiary or the transferee for conduct resulting in falsified shipping documents which they knew nothing of and which formed a separate aspect of the documentary credit in essence since banks do not deal with the goods but documentation.

agrees to reimburse the issuing bank for payments made under the credit.¹⁰⁸³

3. If payment is to be made through a confirming bank, there is a contract between the issuing bank and the confirming bank authorizing and requiring the confirming bank to make such payments and to remit the stipulated documents to the issuing bank when they are received. The issuing bank then agrees to reimburse the confirming bank for payments made under the credit.
4. The contract between the confirming bank and seller. The confirming bank in this case undertakes to pay the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him or her) up to the amount of credit against the presentation of the stipulated documents.¹⁰⁸⁴

With regard to the fourth contract the court further emphasized that it is trite law that the confirming bank deals with documents and not goods as provided in the UCP. Therefore it is expected that if the documents presented to the confirming bank *prima facie* conform to the requirements of credit, that bank is contractually bound to the seller to honour the credit.

The whole commercial purpose of the irrevocable documentary credit system has been developed in international trade to give the seller an assured right to payment before he parts with control of the goods and that does not allow any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment, reduction or deferment of payment.¹⁰⁸⁵

¹⁰⁸³ 725 par. 1. Note that if the stipulated document includes a bill of lading, because the bill of lading is a document of dignity representing the goods, it acts as security available to the issuing bank.

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ 725 par. 2.

The above view suggests that the confirming bank must honour the credit based on the conforming documents notwithstanding that the bank has some knowledge that the seller at the time of presentation is alleged by the buyer to have or in fact already has committed a breach of his contract with the buyer of the sale of goods. This confirms the position that banks are merely concerned with the documents.

The exception to this rule comes only in the case where the seller has been fraudulent in presenting documents for the purpose of obtaining credit and in the instant case the House of Lords found that there was no such fraud because the seller was not privy to the inaccuracy of the statement in the bills of lading concerning the date of shipment.¹⁰⁸⁶

The House of Lords discussed the fraud issue at length and discussed English and American law on what would constitute documents that are fraudulent and the extent required for such false statements to make the documentary credit a nullity. The concluding view taken by the court in this case agreed with Judge Mocatta of the court *a quo* in that he had been correct in upholding the documentary credit and finding in favour of the sellers. The House of Lords on that basis did not agree with the finding that the documentary credit was a nullity as found by the Court of Appeals on this issue.

This case forms an important basis for establishing trite law on documentary credit and illustrates that for commercial parties involved in international trade, documentary credits are used as vehicles to support sellers in receiving payments for goods that they have parted company with. But for this type of security it would be extremely difficult to enter into international trade contracts particularly ones involving diamonds. Further, this case favors the protection of the documentary credit, however, within the limits of ensuring that documents used are procured without forgery and material defects in law.

¹⁰⁸⁶ 725 par. 3 - 4.

In terms of the UCP 600 provisions concerning the fraud exception will be clarified to a greater extent in the subsequent paragraph. However it is important to note that the drafters of the UCP 600 did not elect to use the word fraud as such in the document however Article 16 (a) does make reference to the refusal by the bank to honour discrepant documents.

5.3.1 International Chamber of Commerce (ICC) Uniform Customs and Practice for Documentary Credits (UCP)

Certain specific Articles of the recently updated ICC¹⁰⁸⁷ UCP 600 will now be examined. It is clear that the latest UCP seek to align banking practice with developments in banking, transport and insurance industries. Further, the UCP 600 also sought to address the issue of the use of uniform language and style in the standard documents in order to remove wording that could lead to inconsistent application and interpretation.

In South Africa these rules may apply within the choice of law branch for the parties involved and therefore it is essential to understand the structure and scope of application.¹⁰⁸⁸

The language of the UCP 600 rules is clear. However, it is submitted that it will be important to mention a few aspects of the rules in order to illustrate its alignment or contrast with foreign courts' views and national law on the issue. In South Africa there is a rich source of precedent dealing with documentary letters of credit,¹⁰⁸⁹ however, the rules are not captured in a specific statute dealing with this type of international trade tool. Since South Africa does not have a specific

¹⁰⁸⁷ www.iccwbo.org/ 24 February 2008.

¹⁰⁸⁸ Admiralty Jurisdiction Regulation Act 105 of 1983 section 6(5).

¹⁰⁸⁹ Examples of such precedent include examples of cases such as *Philips and Another v Standard Bank of South Africa Ltd and Others* 1985 (3) SA 301 (W), *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W), *Loomcraft Fabrics CC v Nedbank and Another* 1996 (1) SA 812 (A), *Rosen v Ekon* [2000] 3 All SA 24 (W), *Vereins-Und Wesbank AG v Veren Investments and Others* 2000 (4) SA 238 (W), *Transcontinental Procurement Services CC v ZVL & ZKL International AS and Another* [2000] JOL 7352 (W), *Vereins-Und Wesbank AG v Veren Investments and Others* 2002 (4) SA 421 (SCA), *Schmidt and Another NNO v ABSA Bank Ltd* 2002 (6) SA 706 (W), *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* [2002] JOL 9460 (A).

national statute on documentary credit it may be best to consider the importance of the ICC UCP as they formulate an international code that provides harmony on this international finance tool for international trade as well as certainty on the rules to be adhered to by the international banking fraternity.

In the case of *Ex Parte Sapan Trading (Pty) Ltd*¹⁰⁹⁰ the appeal court seemed very critical of the court *a quo*'s assumption that the 1983 revised UCP as sponsored by the ICC was automatically applicable without question in that case. The 1983 UCP and its provisions were heavily relied on by the judge *a quo* in making his decision to dismiss the application in issue before it.¹⁰⁹¹ The appeal court did not mention much else pertaining to the UCP after that criticism but it would stand to reason that the court was suggesting that a South African court when considering a matter pertaining to documentary credit, UCP as sponsored by the ICC do not form rules that are final and binding to determine matters of documentary credit and trade in a South African court. This means that as useful as it is to consider the UCP, the South African courts will rely mostly on its own judicial precedent rather than the UCP and the UCP is there as an international guide. So the UCP is not the be all and end all in terms of rules to be applied with reference to South African law.¹⁰⁹²

¹⁰⁹⁰ 1995 (1) SA 218 (W).

¹⁰⁹¹ 222 I – J; 223 C – E.

¹⁰⁹² It must be noted that the decision taken by the court in this case was in line with s 231 of the Constitution which provides as follows: It must be noted that ‘(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.’

It is proposed that the UCP can form a useful and unique guide to formulating a South African code or informing the court on the international practice in matters of trade and the use of documentary credit as a financing tool. The structure of the UCP 2007 revision contains 39 articles with an application note and definitions sections contained in the initial articles of the document. It is stated in Article 1 of the UCP that the rules contained therein are applicable to any documentary credit when the text of the credit expressly indicates that it is subject to these rules. It is also contained within the same article that all parties are bound by the rules in the same manner unless they have expressly modified this position by agreement or excluded by the credit. Therefore, a court or party seeking to enforce these rules must prove applicability thereof from the standard trading conditions of the documentary credit stating expressly that such rules are applicable. It cannot just be assumed.

Article 2 provides for the definition of the parties involved and the meaning of credit. Article 3 deals with important language uses and expressly provides how these are to be interpreted. Article 4 is an important provision which by its nature confirms the law concerning the parallel role of documentary credit alongside the sale or commercial contract on which it is based. The article provides that the credit is a separate transaction to the sale or other contract and banks are in no way concerned with or bound by such a contract even if reference to such a contract has been included in the credit. The article further states that an undertaking by a bank to honour, negotiate or fulfill any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

The article goes as far as to state clearly that the beneficiary cannot in any circumstances avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank. In fact the article provides further in sub-section (b) of Article 4 that the issuing bank must discourage any attempt

by the applicant to include as an essential part of the credit copies of the underlying contract including proforma invoices and documents of that nature.

Since diamonds are commonly carried by air, the provisions relating to air transport in UCP 600 Article 23 becomes particularly relevant to such transactions for consideration. Even though it is clearly stated in Article 5 of the UCP that banks deal with documents and not goods, services or performance to which the document may relate, it is essential that all documents comply with the banking practice techniques expected in order to effect a valid documentary credit transaction.

Since Article 23 is important to diamond carriage because of general air transport use, there are certain technical aspects that must be contained in the air transport document. The air transport document must indicate the name of the carrier and be signed by such carrier or its agent while showing in the same document that such goods were in fact received and accepted for carriage, indicating the date of issue and that date will be the date deemed as date of shipment unless the air transport document contains a specific notation of the actual date of shipment. Other important information relating to the air transport (also referred to as 'shipment') can be determined by reference to this article.

Other important articles pertaining to diamond shipments relate to Article 25 which deals with use of courier receipt as diamonds are generally delivered by hand to hand type of service for extra caution although Article 25 also covers the use of the post. The documents used in this type of service must reflect post receipts or certificates of posting which must bear the necessary stamps or signatures in order to determine date of shipment. Article 28 deals with the insurance of the goods in question. All the necessary information pertaining to underwriters must appear clearly on the duly issued insurance certificate or a declaration under an open cover. This aspect of insurance is most crucial to diamond trade. The documents listed above are essential to enable the bank to

view the transaction as acceptable within banking hours and subject to exclusionary clauses pertaining to *fortuitous* events.¹⁰⁹³

It is important to note that one of the concerns in documentary credit finance as raised in case law involves the liability of the bank in instances of forgery in documents. Article 34 deals with this issue very clearly under the heading 'disclaimer on effectiveness of documents'. In terms of this provision a bank does not assume responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon. The bank further does not assume liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for the good faith or acts of omission, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person.

Professor Levit commented that the UCP is a thick technical document which may prove too complicated to those who do not have trade-finance expertise.¹⁰⁹⁴ Professor Levit further argues that while the UCP is clear on the standards to be employed by banks when examining the documents in order to determine whether they are going to honour or dishonor them or waive their rights to dishonor the credit through the employment of the preclusion principle. The unpacking of all these provisions in the UCP, it is submitted, allows parties to the documentary credit to reference these rules in wholesale fashion and thereby making them to be the preferred law of the documentary contract.¹⁰⁹⁵

¹⁰⁹³ Articles 33 and 36.

¹⁰⁹⁴ This is part of the reason for elucidating some core aspects of the UCP in this chapter.

¹⁰⁹⁵ Janet Koven Levit *Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit* Emory Law Journal 57 Emory L.J. (2008) 1147 p. 1172. The submissions above are of value to parties who wish to be at harmony in terms of ensuring maximum compliance with uniform customs and banking practice in international trade documentary credit transactions and documents. It is submitted that if a particular law works well and has been tried and tested through time there ought to be nothing precluding such uniform rules becoming preferred law instead of local legislation or common law.

With regard to the debate on the law to be applied in light of documentary credit and the application of the ICC UCP in South Africa submissions by Professor Basedow provides some advice. He argues that uniform rules on international trade place the world in a mixed jurisdiction with legal pluralism.¹⁰⁹⁶

Professor Basedow further submits that private law results from two competing sources, namely, organs of State and organizations of private parties. The State and non-State systems sometimes complement each other and sometimes compete. The competition occurs in the context generally observed in transnational economic regulation. Although State sovereignty might be presumed to dominate such competitions, experience or practice somehow illustrates that sometimes privately made laws will prevail.¹⁰⁹⁷

Professor Basedow also comments that the ICC UCP rules are a fine example of privately made rules that are at times preferred. The documentary credit and other financial legal instruments have been governed by international customs and these customs have been codified by the ICC. Therefore while documentary credit might be governed by US law, such US law was revised to align it with the provisions of the UCP, particularly with issues pertaining to revocability and preclusion. These two systems publicly and privately made competing law and the privately made law prevailed.¹⁰⁹⁸ It is submitted countries are better served if they adopt such privately made laws in international trade for the sake of developing international compatibility in business and to avoid legal disharmony where it can easily be prevented.

¹⁰⁹⁶ David V. Snyder *Special Symposium Issue: "Beyond the State: Rethinking Private Law": Article: Actors: Contract Regulation, With and Without the State: Ruminations on Rules and their Sources. A Comment on Jurgen Basedow* The American Society of Comparative law, Inc. American Journal of comparative Law 56 Am. Comp. L. 723 (2008) 725 – 726.

¹⁰⁹⁷ *Ibid.* As can be noted by the clarity provided by ICC Uniform Rules on documentary credit.

¹⁰⁹⁸ *Ibid.*

5.4 Practical Aspects of Using the Letter of Credit in Diamond Deals

The consideration of the use of documentary credit in the preceding paragraphs proves that it is a finance method that undoubtedly has stood the test of time in international trade. The use of credit is still a common practice that will continue to support the practical commercial diamond trade throughout the globe. In this portion of the chapter there will be a consideration some of the everyday banking practice aspects of documentary credit in relation to actual diamond deals. It is important to note that these credits are referred to as letters of credit or LCs in banking jargon by customers and bankers, thus making their trade specific jargon very common to merchants.¹⁰⁹⁹

To illustrate practical aspects of the use of documentary credit in diamond trade, two entities will be selected and briefly discussed. The first entity will represent diamond banking practice and the other entity will be in a form of a diamond trading company. These examples can be used as a fair reflection of what occurs in these types of entities throughout the world where diamond trade transactions are likely to take place. It must be noted that due to the protection of client confidentiality the information on the practice of financing diamond sales by documentary credit is limited to very brief information which the banking fraternity and their clients, the diamond houses could reveal. Therefore, it is submitted that the information that appears in this study though limited by nature reveals some useful practical insight nonetheless.

The two examples expressed below showing diamond banking practices are but those aspects of information that are made available to the public domain. The business models that are expressed by these entities may be applied generally to all other entities with regard to legal aspects with obvious differences being expressed by various differing in-house procedures of each company.

¹⁰⁹⁹ See *Schmidt and Another NNO v ABSA Bank Ltd* 2002 (6) SA 706 (W).

5.4.1 Antwerp Diamond Bank (ADB)

It has been a documented fact that 85 per cent of the Antwerp diamond companies have an account with the Antwerp Diamond Bank.¹¹⁰⁰ The core activity of ADB is to grant credit to the diamond industry, execution of international and domestic payments and collections, import and export merchandise handling services and advisory services to clients. The bank maintains an excellent reputation and accepts only diamond and jewellery companies as clients and new clients must be introduced by at least two already existing members. They maintain strong compliance with industry regulations and maintain a good understanding of clients' cycles. The credit granting aspect of the ADB banking practice is based on the self-securing, self-liquidating individual transactions. ADB's financial services include letters of credit and other services which are well supported by state of the art software to ensure efficient and expedient service.¹¹⁰¹ The history of the bank post-World War II is explained as follows:

'With the development of the international trade, typical of the post-war period, ADB played an important role in the revival of the Belgian diamond industry and as such in the promotion of Belgian exports of which diamonds represented a considerable share. During that period of virtual 'relocation' of the diamond business from Amsterdam to Antwerp, the Bank also played a decisive role in the financing of rough diamonds at the sights organized by De

¹¹⁰⁰<http://www.theage.com.au/business/another-lost-year-for-diamonds-20091026-hg9p.html> 13 March 2010.
<http://www.thediamond.com/press/businessam.html> 13 March 2010. www.antwerpdiamondbank.com 28 October 2009. It becomes evident from ADB's public relations information that at the beginning of the twentieth century, diamond trade in Belgium was flourishing which led to the establishment of the Comptoir Diamantaire Anversois which was considered a real première in the world of finance, since for the first time a bank (now known to as ADB) decided to devote its activities entirely to the interests of diamond trade. https://www.antwerpdiamondbank.com/index.php/ADB_en/profile/5 13 March 2010.

¹¹⁰¹ www.antwerpdiamondbank.com 28 October 2009. The ADB is constantly dealing with fluctuations in markets and will obviously be affected by the world-wide economic downturn, however, this does not mean that efficient services to clients in the form of documentary credit will die within their banking services to reliable customers.

Beers in London. In view of the increasing importance of Antwerp in the rough market and in the distribution of rough, the Bank was able to expand its activities considerably, first in Antwerp and at a later stage on an international level. In the early 80's, both the Bank and the entire diamond banking community worldwide were faced with serious problems when the international diamond market came under pressure from inside its own industry as well as from the world economy in general. Supported by its shareholders and its customers, the ADB has been able to maintain its position during the crisis, if not to reinforce it.¹¹⁰²

The activities of ADB and some of its operational structures in relation to diamond trade will be considered briefly as it sets out an important practical understanding of the contribution of made by an entity of this nature to diamond trade in the international context. The information explained below is taken from the ADB's electronic brochure which is available as the bank's public relations and marketing tool.¹¹⁰³

Between 1982¹¹⁰⁴ and 2005 a wholly-owned subsidiary of ADB was established in Geneva, the Banque Diamantaire (Suisse) S.A. which was renamed later on in Diamond Bank (Switzerland) S.A. It is apparent from the information that the main activities of this subsidiary are focused on financing international diamond transactions and portfolio management.¹¹⁰⁵ In 1999 ADB opened a representative office in New York. In 2000 it opened another representative office in Hong Kong. In 2002 ADB opened a branch in India's prime diamond centre,

¹¹⁰² https://www.antwerpdiamondbank.com/index.php/ADB_en/profile/5 13 March 2010.

¹¹⁰³ *Ibid.*

¹¹⁰⁴ At this stage diamond trade was particularly strong in South Africa with reference to its contribution to the national GDP. As stated by author Linda Ensor that at present diamond trade largely contributes to the South African GDP, although there has been a decline of this contribution in comparison with the early eighties. Linda Ensor *Business Day (South Africa)* October 13 2005.

¹¹⁰⁵ https://www.antwerpdiamondbank.com/index.php/ADB_en/profile/5 13 March 2010.

Mumbai. In 2005 Diamond Bank (Switzerland) S.A., the wholly-owned subsidiary, opened a representative office in Dubai, United Arab Emirates (UAE).¹¹⁰⁶

It is stated that 85% of the Antwerp Diamond companies have an account with ADB and this includes a strong commercial link with KBC one of the largest banks in Belgium.¹¹⁰⁷ The core business of ADB is granting credit to the diamond industry.¹¹⁰⁸ This core function of ADB is proof that LCs and other forms of credit are necessary and will naturally follow diamond trade transactions. Further, the banks core functions also include the execution of international and domestic payments and collections, import and export merchandise handling services, advice to clients, account management credits and management of customer profile. Only diamond and jewellery companies are accepted as clients and all new clients must be introduced by at least two existing ADB clients and they must be members of one of the four diamond bourses in Antwerp.¹¹⁰⁹

ADB offer expedient import and export services to clients. Once the parcels are received by them for shipment, they are prepared, packaged and all the documentation required for the Diamond Office, Customs, Carriers, Consulate and acknowledgment of receipt are done. Physical presentation of the goods at Diamond Office for valuation and delivery to the carrier are also part of ADB's mandate. This includes documents required for KPCS certification and where necessary storage in the bank's highly secured vaults.¹¹¹⁰ It submitted that the understanding of the practical contribution of a bank to diamond trade as evident in ADB's banking practices above serves as a useful example that creates clarity on how the law pertaining to diamond trade is practically applied by the parties involved in the transaction.

¹¹⁰⁶ *Ibid.*

¹¹⁰⁷ *Ibid.*

¹¹⁰⁸ *Ibid.*

¹¹⁰⁹ *Ibid.* Strict compliance with the Bank's requirements is expected from every client and the bank ensures that it understands each customer's production cycle.

¹¹¹⁰ *Ibid.*

5.4.2 Romance Diamond Company

The selection of this company as an example of the business side of illustrating use of documentary credit in diamond sales is inspired by the fact that this company upholds as part of their business marketing strategy the use of documentary credit.¹¹¹¹ They state in their public marketing documents provide as follows:

‘Romance Diamonds may require the buyer to make payment by irrevocable letter of credit and may defer shipment or cancel any order if buyer does not promptly provide such letter of credit. Such letter of credit shall be issued for Romance Diamond’s benefit by a prime United States bank and shall be subject to and governed by ICC UCP 600.’¹¹¹²

The Romance Diamond Company is an example of a diamond and jewellery trading company with clients that are private people who seek to make their diamond purchases for private use hence the name of the company. The products which they focus on include engagement rings and other articles of jewellery intended for similar private wear.¹¹¹³ Romance Diamond Company ensures the quality of its products by adhering to the standards of premier society for quality and excellence in jewellery design and that is the American Gem Society (AGS).¹¹¹⁴

¹¹¹¹ www.romance-diamonds.com/SalesOnline/ReturnsCreditPolicy.aspx 20 October 2009.

¹¹¹² www.romance-diamonds.com/SalesOnline/ReturnsCreditPolicy.aspx 20 October 2009. In 2010 the documents related to purchases from Romance were closed to the general public and only the clients of Romance could have access to sales information via a special internet pass key.

¹¹¹³ <http://www.thediamond.com/press/businessam.html> 13 March 2010.

¹¹¹⁴ The Romance Diamond Company came from the Brosh family tradition of jewellery making. The Brosh family tradition began in Middletown, Ohio, where a young Charles Brosh got his start in the jewelry business. Through study and apprenticeships, he learned the art of watch making, hand engraving, jewelry repair and stone setting.

5.5 Conclusion

Notwithstanding the current global economic challenges that are impacting negatively on international trade and commerce, trade and business has to go on as usual though with caution particularly if that industry is involved in high value minerals that can be used as security at any stage of the transaction. Therefore if usual business includes the granting of credit by banks to buyers to finance such business transactions in diamond trade, the nature of such credit, the impact of its use in diamond trade and the importance of maintaining such an effective international financing method should be known and learnt.

It is submitted that documentary credit specifically appropriate for international diamond trading as some form of risk is necessary in supporting international trade. The use of credit in diamond trading does not create gaps in domestic economies as the whole processes were generally secured by a valued commodity. To discard this method of finance would impact negatively on international diamond trade and also on trade of commodities based on credit. The use of credit based trading systems has proven to be the best option especially in the financing of global diamond trade. Further, since there are sound international principles that promote the use of documentary credit, such a practice should be upheld and retained as it will contribute positively to South Africa as a diamond producing country.

Chapter 6: Carriage of Diamonds & Underwriting Activities in Diamond Trade

6.1 Introduction

Having discussed some of the practical aspects of the purchase and sale of diamonds, it is essential that the transportation of such diamonds be discussed in order to determine how delivery of the diamond as a highly sensitive product is achieved. Since the removal of apartheid laws in South Africa, air carriage has since been enhanced and global trade through air carriage has become the norm in South African international trade. It is the removal of apartheid¹¹¹⁵ which has allowed South Africa to participate freely with the world¹¹¹⁶ in trade and other trade related exigencies such as rights to overflight¹¹¹⁷ of South African planes.¹¹¹⁸

The purpose of this chapter is to highlight some of the practicalities of diamond trade insofar as it relates to the carriage and insurance of the stones that are

¹¹¹⁵ This was achieved with the efforts of the Government of National Unity which saw to the development of the Interim Constitution, 1993 and the Final Constitution, 1996.

¹¹¹⁶ See Cochran S.E. *The Pivotal State: Post-Apartheid South Africa* Parameters, Volume 30 (2000) available on <http://www.questia.com/googleScholar.qst?docId=5002379437> 25 March 2010, \ in his paper he states that 'Since the end of apartheid South Africa has made significant progress toward overcoming the legacy of this politically and economically fragile race-based system which denied full rights to the majority of its people. Six years after Mandela's election, South Africa is by far the most advanced democracy in Africa. The end of apartheid also has allowed South Africa to end its previous international isolation. The country's new government aspires to both a position of regional political leadership and one of influence in international organizations. South Africa also has emerged as one of Africa's leading trading nations and a key center of foreign, including US, investment in the region. South Africa's economy alone accounts for 40 percent of Sub-Saharan Africa's total gross domestic product (GDP). Excluding oil imports, South Africa accounts for 60 percent of US trade with Africa and one-quarter of US capital investment in the region.' Para 1.

¹¹¹⁷ Pirie G.H. *Aviation, apartheid and sanctions: Air Transport To and From South Africa, 1945 – 1989* (1990) 231. The author argues that that the past geography of air transport to and from South Africa has been shaped by the world map of anti-apartheid.' This position has been altered by the removal of such embargoes.

¹¹¹⁸ The development of South Africa's Aviation standards is partly owed to the Constitutional dispensation, particularly in light of the regrettable past of South African flying. It is documented in history that because of apartheid South African planes were prohibited from flying over certain African and Indian countries. See www.southafrica.to/history/history.html 25 March 2010. 'Due to international condemnation of the apartheid regime during the 1980s...South African's planes were able to fly for the first time over Egypt and Sudan.' www.airliners.net/aviation-forums/general_aviation/.../1177779/ 25 March 2010. South Africa was nicknamed 'slow around Africa' because of anti-apartheid activism by members of other countries.

being traded. For the most part, it is the persons directly involved in international diamond trade who are aware of the assessment of risks of diamond insurance or the lawful and standard packaging methods of diamonds for carriage.

This chapter is not designed to be a consideration of the general law of insurance. It is intended to be a study of the methods of carriage and insurance of diamonds which were alluded to in the chapter dealing with documentary credit. Therefore some international standard practices will be elucidated in light of some legal principles that pertain to the sensitive and risky nature of the business of trading in diamonds. What will emerge from this study is that the Constitutional¹¹¹⁹ mandate of looking into foreign law to develop South African law further has caused air carriage law in South Africa to show world class standards in application. This means that South African transport systems are sophisticated enough to attract the best trading partners in the global context.

Since the study is concerned about Constitutionally sound methods of trade that are being experienced in the diamond trade in modern South Africa, this study will investigate how applicable international law and national law is also created and applied in such a way that it supports the equity considerations in the day to day practices of the diamond trade industry, particularly in the transportation of diamonds.

South Africa having repealed its discriminatory laws has been accepted by the aviation bodies or associations such as the International Civil Aviation Organization (ICAO).¹¹²⁰ ICAO is important to the international development of

¹¹¹⁹ Constitution of the Republic of South Africa Act, 1996 section 39 and section 233.

¹¹²⁰ Aviation Act 74 of 1962 second schedule of the Act as amended by the Aviation Amendment Act 12 of 1965, Expropriation Act 55 of 1965, Aviation Amendment Act 83 of 1969, Civil Aviation Offences Act 10 of 1972, General Law, Amendment Act 62 of 1973, Expropriation Act 63 of 1975, Aviation Amendment Act 63 of 1981, Aviation Amendment Act 4 of 1982, Aviation Amendment Act 1 of 1984, Transfer of Powers and Duties of the State President Act 97 of 1986, Transport Advisory Council Act 58 of 1987, Air Services Licensing Act 115 of 1990, Aviation Amendment Act 16 of 1992, Airports Company Act 44 of 1993 Air Traffic and Navigation Services Company Act 45 of 1993, General Law Sixth Amendment Act 204 of 1993, Transport General Amendment Act 16 of 1995, Aviation Laws Amendment Act 98 of 1996

the highest standards of aviation. It has primary aims of ensuring development principles and techniques of international air navigation and to foster the planning and development of international air transport so as to ensure safe and orderly growth of international civil aviation throughout the world.¹¹²¹

South Africa became a member in 1947, after ratifying the Chicago Convention on 1 March 1947 however there was a suspension in participation because of apartheid laws. On 10 June 1994 South Africa once again became a fully participating ICAO member after an executive decision to remove all restrictions on South Africa. On 31 March 2003 during an Assembly of ICAO, South Africa was elected to the ICAO Council. A permanent representative from South Africa has been appointed by the Minister of Transport to sit on the ICAO on behalf of South Africa and to establish a South African Office at the ICAO headquarters in Montreal, Canada.¹¹²² It is submitted that the Constitutional democracy has brought much benefit to South Africa.

The courts have also heard and decided matters pertaining to the aims of the ICAO as established in legislation. This serves to provide a useful body of precedent and valuable interpretation of the provisions of aviation laws. In *ZS-SVN Syndicate v 43 Air School (Pty) Ltd and Another*¹¹²³ the court found that the ICAO standards are helpful in matters of aviation because their requirements are geared to the such purposes, in this case, the ICAO standards were helpful to

Aviation Laws Amendment Act 82 of 1997, South African Civil Aviation Authority Act 40 of 1998 South African Maritime and Aeronautical Search and Rescue Act 44 of 2002. See further repealed South African Civil Aviation Authority Act 40 of 1998 section 4, as amended by the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Transport Agencies General Laws Amendment Act 42 of 2007. This Act is wholly repealed by s 166(2) of the Civil Aviation Act 13 of 2009 which is not yet promulgated and therefore the Civil Aviation Act 40 of 1998 stays in force until the commencement of the Civil Aviation Act 13 of 2009. Civil Aviation Act 13 of 2009 preamble and sections 2, 3, 4 and 5 soon to be promulgated.

¹¹²¹ *Ibid.* www.dfa.gov.za/foreign/Multilateral/inter/icoa.htm 12 June 2009.

¹¹²² *Ibid.*

¹¹²³ 2007 (6) SA 389 (E).

warn pilots of the dangers of landing on strips that are not serviceable landing strips.¹¹²⁴

In *Welkom Municipality v Masureik and Herman T/A Lotus Corporation and Another*,¹¹²⁵ the court heard a matter pertaining to the application of a regulation where it pertains to the issue of the duty of licensee of aerodrome to maintain an aerodrome in safe condition for flying. The court *a quo* relied on the recommendations in annexure 14 to the Chicago Convention in respect of aerodromes issued by ICAO. It was held on appeal that while the Convention itself is part of domestic law in terms of the Aviation Amendment Act¹¹²⁶ and annexure 14 setting out the international aviation standard contained therein was acceptable, it was also required by s 22A of Aviation Act¹¹²⁷ that such an annexure had to first be incorporated in regulations by ministerial notice in *Government Gazette* in order to be deemed a binding regulation. In the case above there was no evidence given before the court to show that the annexure was so incorporated therefore it was held that the court *a quo* had misdirected itself by relying on annexure 14.¹¹²⁸

6.2 Carriage of Diamonds for International Trade Purposes

For obvious security concerns it is not always easy for researchers to be given access to information as to the exact movements of diamonds. This is particularly true for companies that transport rough diamonds and jewels etc. Therefore when studying the law or regulations for diamond carriage one has to be content with the general consideration of publicly available trade customs of carriage of diamonds. In India for example, they have a public domain policy prepared in

¹¹²⁴ 397 H – J.

¹¹²⁵ 1997 (3) SA 363 (SCA).

¹¹²⁶ 42 of 1947 section 1 repealed.

¹¹²⁷ 74 of 1962.

¹¹²⁸ 1997 (3) SA 363 (SCA) 636 D - F. This is also in line with the Constitution of the Republic of South Africa, 1996 section 231.

2002 on carriage of diamonds and precious stones.¹¹²⁹ The policy does not mention particulars for actual transport carriage but it encourages trade by making reference to certain incentives with reference to the values of import and export duties on precious stones being carried by sea. It must be noted however that carriage of precious stones by sea is a dying practice even in India where such carriage has been traditionally used for the carriage of precious stones.¹¹³⁰

Since diamonds are often carried by air, it is important to consider the international legal framework that has been established to ensure that carriage of goods by air meets certain international standards. The instrument to look to for the relevant legal provisions is the Carriage of Goods by Air: A Guide to the International Legal Framework United Nations Conference on Trade and Development (UNCTAD).¹¹³¹ This guide is of importance to South Africa since it is a contracting party to many of the treaties on carriage of goods by air.

The UNCTAD Secretariat has prepared a comprehensive document outlining the purpose of the creation of the legal framework for the carriage of goods by air. This document makes reference to treaties and other protocols (for example, Warsaw Convention, 1929) that pertain to carriage by air. These are important international contributions and particularly relevant to international diamond trade.

It is important to note that the international framework for the creation of rules pertaining to the carriage of goods was motivated by the growing proportion of high value, time sensitive products traversing national boundaries by air. This created an area for vast economic development. It was established that air transport improves the ability to participate in the global economy especially for

¹¹²⁹ Carriage of Diamonds and Precious Stones in Indian Policy, Circular No. 37/2002-Cus, 28 June 2002, F.NO. 305/22/2002-FTT, Government of India, Ministry of Finance Department of Revenue Central Board of Excise & Customs.

¹¹³⁰ *Ibid.*

¹¹³¹ Report by UNCTAD Secretariat Distr. General UNCTAD/SDTE/TLB/2006/1 27 June 2006.

those countries such as South Africa who export high value goods like diamonds or perishables.¹¹³²

With regard to the actual international rules and standards for carriage South Africa may look to these Conventions. As trade in diamonds is supported by air transport, Africa is desirable diamond trading destination. At present South Africa is a party to the Warsaw Convention, 1929, The Hague Protocol and the Guadalajara Convention 1961. The waybills used to evidence carriage will follow a format generally recognized in these treaties as briefly examined below.

6.2.1 The Warsaw Convention

The Warsaw Convention or Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention: 1929) is relevant to South Africa as a contracting State.

There are other important instruments such as the Convention on International Civil Aviation (Chicago Convention, 1944),¹¹³³ International Air Services Transit Agreement (1944), International Air Transport Agreement (1944), Convention on the International Recognition of Rights in Aircraft (Geneva Convention: 1948), Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention: 1952), Convention, supplementary to the Warsaw Convention, Performed by a person other than the Contracting Carrier (Guadalajara Convention: 1961), Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention: 1970), Convention for the Suspension of Unlawful Seizure of Aircraft (Hague Convention: 1970), Convention for the Suspension of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention: 1971), Convention on the Marking of Plastic Explosives for the Purposes of Detection (MEX Convention: 1991) and

¹¹³² Report by UNCTAD Secretariat Distr. General UNCTAD/SDTE/TLB/2006/1 27 June (2006) 5.

¹¹³³ Aviation Act 74 of 1962. Civil Aviation Act 13 of 2009 preamble and sections 2, 3, 4 and 5 soon to be promulgated

Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999.¹¹³⁴

This chapter will limit its more in depth consideration to the Warsaw Convention as the Convention that has showed the most uniform international applicability to the international trade transport by air. There will also be a discussion of the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (The Montreal Convention).¹¹³⁵

The Warsaw Convention is a clearly written technical document. In terms of Article 1(1) the Convention applies to international carriage of persons, luggage or goods performed by aircraft for reward. It also applies in circumstances where such carriage is done gratuitously by aircraft performed by an air transport undertaking.

It must be noted that in terms of Article 2(2) the Convention does not apply to carriage performed under the terms of any postal Convention. Therefore a diamond trade transaction that requires that the parcel of diamonds be carried by postal service and covered by a postal Convention, there can be no question of international carriage in such a case as envisaged by the Warsaw Convention. Therefore parties who opt for that service are excluding from such a contract all internationally recognized protections afforded by the Warsaw Convention. This may have the implication of increasing the insurance premium for a diamonds being transported by general post, in reality such diamonds are exposed to higher risks of getting lost or stolen.

Article 5 of the Convention is of particular relevance to diamond trade as it provides for the requirements of a valid air consignment note for the carriage of

¹¹³⁴ *Ibid.* www.dfa.gov.za/foreign/Multilateral/inter/icoa.htm 12 June 2009. Carriage by Air Act 17 of 1946 see preamble as amended by the Carriage by Air Amendment Act 5 of 1964, Carriage by Air Amendment Act 81 of 1979 and Carriage by Air Amendment Act 15 of 2006.

¹¹³⁵ Carriage by Air Act 17 of 1946 see preamble.

goods. It is provided in Article 5(1);(2) that every carrier has the right to require from the consignor of the goods a document referred to as a consignment note. The consignor has the right to expect the carrier to accept such a note however any irregularities on the note or the absence or loss of such a consignment note does not invalidate the contract of carriage. There is a general desire within the language of the Convention in this article to uphold the carriage contract rather than invalidate it. The rationale is that equity demands that if a carrier has performed its part of the contract by carrying the goods, such a carrier must be compensated accordingly. An irregular consignment note does not render that service void. Therefore in air carriage the contract of carriage is the actual contract and not the consignment note.

Articles 6 and 8 prescribe format of the consignment note and Article 7 provides that the carrier has the right to require the consignor to make separate consignment notes in an event that there is more than one package to deliver. Article 8 lists the particulars that ought to appear in the consignment note and these details include the weight, marks, description, size, packaging, colour of the goods, if payment is against delivery, the price of the goods, the expected time for the completion of carriage and a paramount statement stating that the carriage of such goods is subject to the Warsaw Convention.

Where diamonds are carried in manner described above, it is obvious that the carrier would have highly ethical employees who will not be tempted to steal when they notice the contents of a transported package. However, it is common practice for the diamonds to be accompanied by a person in order to ensure that there is hand to hand delivery for the purposes of reducing risk. The nature of a consignment note is very similar to that of the bill of lading in carriage of goods by sea. In terms of Article 11 the consignment note serves as *prima facie* evidence of receipt of goods being received on board the aircraft for carriage. Notwithstanding carriage of goods without requesting a consignment note is also acceptable in terms of Article 9, however the carrier in this instance will not be

able to avail himself to the provisions of the Convention that limit or exclude his or her liability. Therefore it benefits the carrier at all times to insist on a consignment note.

Article 16 of the Convention is of particular importance to diamond trade particularly in view of the fact that there is an international understanding for compliance with the KPCS that the diamonds, if rough would have complied with certain legal requirements. Article 16 provides that it is the consignor's duty to meet the formalities of customs or police before the goods can be delivered to the consignee. The consignor who has supplied insufficient information is liable to the carrier for any damages suffered unless it can be proved that the damage was caused by the carrier or his agents. However, as a rule it is not the concern of the carrier to check that the consignor's documents are correct or compliant.

In terms of Article 19 of the Convention, the carrier is liable for damage caused by delay in the carriage of goods unless the carrier can prove, in terms of Article 20 that it took all necessary steps to avoid resultant damage or that such damage was unavoidable due to impossibility in taking preventative measures. If the goods are damaged and the carrier is found to be liable, the carrier's liability will be limited in terms of Article 22(2) to a sum of 250 francs per kilogram.

The calculation based on kilograms course will lead to an absurdity when applied to diamond losses. Therefore the provision in the same article providing an exception to the calculation is applicable to special value items. The exception to the 250 francs per kilogram rule applies if at the time when the package was handed over to the carrier, a special declaration of the value was made. In that case the carrier will be liable to pay the sum not exceeding the declared sum unless he or she proves that the sum is greater than the actual value to the consignor at delivery.

The provisions of the Warsaw Convention are exceptional particularly when considering that they provide simple rules that are precise and internationally uniform which means they represent the standard of what the contracting States view as fair law to regulate international carriage by air. Article 23 is important in ensuring that the rules are respected by providing that any attempt to relieve the carrier of liability or to fix a limitation that is lower than that provided in the Convention is a nullity. Further, Article 25 ensures the utmost good faith or best effort standards on the part of the carrier by making an express provision that a carrier who has committed willful misconduct or default will not be able to use the Convention to exclude or limit his or her liability.

6.2.2 Convention for the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (The Montreal Convention)

The Convention for the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 is applicable in terms of the South African Carriage by Air Act.¹¹³⁶ The Montreal Convention contains a preamble that acknowledges the contribution of the Warsaw Convention. Further, in an effort to create uniformity and equitable international trade practices in the aviation sector, the Montreal Convention provides that it is created for the purpose of seeking orderly development of international air transport operations and the smooth flow of cargo (as the focus of this chapter), passengers and baggage in accordance with principles and objectives of the Montreal Convention on International Civil Aviation.¹¹³⁷ And most importantly the preamble provides specifically for internationally uniform and harmonious laws that will achieve an equitable balance of interests for those concerned.¹¹³⁸

¹¹³⁶ 17 of 1946 preamble ‘to give effect to a Convention (meaning section 1 “the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999, as set out in the Schedule”) for the unification of certain rules relating to international carriage by air; to make provision for applying the rules contained in the said Convention, subject to exceptions, adaptations and modifications, to carriage by air which is not international carriage within the meaning of the Convention; and for matters incidental thereto.’

¹¹³⁷ *Ibid.*

¹¹³⁸ See schedule to Carriage by Air Act 17 of 1946.

The scope of the application as provided for in terms of Article 1(1);(2) of the Montreal Convention in relation to international carriage is very similar to that provided for in the Warsaw Convention. Article 4 of the Montreal Convention provides for the use of the word waybill which will act as a receipt with information pertaining to carriage particulars in relation to cargo. There is prescribed information¹¹³⁹ that must be contained in the waybill however similar to the Warsaw Convention irregular information on the waybill does not invalidate the carriage contract.¹¹⁴⁰

Article 18 provides for the carrier's liability in respect of the cargo and states that the carrier is liable for damage sustained in the event of destruction or loss of the cargo but subject to the damaging condition having taken place during the carriage by air. However if loss or damage to cargo falls within one of the exceptions listed in Article 18(2)(a), (b), (c) and (d), for example, defectively packed cargo, inherent vice in that cargo or an act of war or armed conflict, then the carrier will not be held liable for resultant loss.

The provision relating to delay in Article 19 illustrates the same position as that of the Warsaw Convention. With regards to limitation of liability, Article 22(4) provides that the general calculation for the limitation of the carrier's liability shall only be the total weight of the package or packages concerned. This is a clear modernization of the Warsaw Convention which takes into account issues of limitation of liability while in Article 22(6) allowing a national court freedom to award costs and expenses incurred by a plaintiff in litigation in enforcing his or her rights in terms of the Convention.

Article 27 of the Montreal Convention provides for parties freedom of contract within the acceptable standards of the Convention. Further the Convention provides in Article 34 that parties may seek to resolve matters concerning the

¹¹³⁹ Articles 5 – 7.

¹¹⁴⁰ Article 9.

Convention by way of arbitration, however this must be expressly provided for in writing. It is submitted that this is an important tool in ensuring that carriage by air matters are dealt with in a forum that will provide for expedient resolution to party claims and complaints.

Article 50 of the Montreal Convention provides expressly for a form of public liability insurance on behalf of carriers in pursuance to their obligations under the Convention. This is an equitable requirement that will ensure that if the undesirable happens and liability is incurred by the carrier, at least such a carrier will be adequately prepared to deal with liability. The Convention is a crucial update of the Warsaw Convention and will ensure that South Africa is seen as a worthy international trading partner by adhering to international rules that support best aviation practices and rules for carriage of goods.

6.2.3 South African Law on Carriage of Goods by Air

In South Africa the relevant national law pertaining to the regulation of carriage of goods by air comes in the form of the Carriage by Air Act,¹¹⁴¹ as amended and previously discussed under the provisions of the Montreal Convention. The schedule to the Carriage by Air Act¹¹⁴² contains the Montreal Convention or the Convention for the Unification of Certain Rules for International Carriage by Air, 1999¹¹⁴³ which forms the basis of South African law on Carriage of Goods by Air. The schedule of the Carriage by Air Act¹¹⁴⁴ expressly provides as follows:

‘Schedule

CONVENTION FOR THE UNIFICATION OF CERTAIN
RULES FOR INTERNATIONAL CARRIAGE BY AIR

The States Parties to this Convention

¹¹⁴¹ 17 of 1946.

¹¹⁴² 17 of 1946.

¹¹⁴³ The schedule is duly amended by Proclamation R294 of 1967 and substituted by section 8 of Carriage by Air Amendment Act 15 of 2006.

¹¹⁴⁴ 17 of 1946.

RECOGNISING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the 'Warsaw Convention', and other related instruments to the harmonization of private international air law;

RECOGNISING the need to modernise and consolidate the Warsaw Convention and related instruments;

RECOGNISING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonisation and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests'

The principles contained in the air carriage Conventions (the Warsaw Convention and the Montreal Convention) have been judicially considered by the South African court. An example of such precedent is contained in the decision of *Impala Platinum Ltd v Koninklijke Luchtvaart Maatschappij NV and Another*,¹¹⁴⁵ the court considered the application of the Warsaw Convention and the liability for loss of goods carried by air. This case contributes to the knowledge of the principles and the rationale adopted by the court in its application of the

¹¹⁴⁵ 2008 (6) SA 606 (SCA).

Convention. The principles established in this case can be suitably used to apply to international carriage of diamonds by air.

The facts of the case show that Impala Platinum Ltd (Impala) being a consignor of cargo that was lost during air carriage between South Africa and the US had claimed damages for the loss. Impala was duly indemnified by its insurer for the loss of the goods however Impala continued with an action for loss in the court *a quo* against the airline. The airline excepted Impala's claim on the basis that in terms of air carriage law, if the loss of the consignor is made good by its insurer then Impala had suffered no loss. The *court a quo* accepted this objection by the airline and dismissed the action.¹¹⁴⁶

On appeal to the Supreme Court it was held that the approach to the interpretation of the Convention on air carriage must be done with relevant consideration of foreign decisions as they are very useful in guiding the courts. This also contributed to the modern day international carriage exigencies which are conducive to the promotion of comity and uniformity among nations. The court held that Impala platinum had a right to sue in terms of the Convention as it would offend the need for uniformity to exclude his right to sue which is provided for expressly in Article 30 of the Convention.¹¹⁴⁷ This decision illustrates that principles of carriage of goods by air are dealt with in South Africa in an internationally uniform manner that will ensure the most equitable form of redress for parties involved in litigation with the ultimate purpose of upholding comity among nations.

In *KLM Royal Dutch Airlines v Hamman*¹¹⁴⁸ the court had specifically stated that the dispute in this case occurred between 17 and 19 January 1999 and therefore the Montreal Convention was not applicable in this case because it was only

¹¹⁴⁶ 608 – 610.

¹¹⁴⁷ 619E – F.

¹¹⁴⁸ 2002 (3) SA 818 (W).

signed on 28 May 1999.¹¹⁴⁹ While this case does not give much insight into the interpretation of the Montreal Convention, it does in principle establish a timeline in which the Convention can be considered and applied as part of South African law. With regards to the modern application of the Montreal Convention, there are developments that are proposed in legislation in the form of the Carriage by Air Amendment Bill, 2006.¹¹⁵⁰ These developments seem to show a further legislative step in facilitating the application of the Convention.

6.3 Diamond Insurance

International trade transactions, particularly in the carriage of goods by air involve various risks. To alleviate this situation parties will often enter into insurance contracts to protect themselves.

This chapter is not going to deliberate on insurance laws as a special focus but it will examine some of the intricacies that are involved in diamond trade. Due to client confidentiality protection, this chapter will not dwell on specific in-house diamond insurance processes of various diamond traders but it is submitted that through the understanding of the law and the importance of trade insurance cover some insight will be gained from the study of some specific aspects of diamond insurance as they illustrate the sensitive nature of the business.

It is established that for most business agents whose main vocation is carrying goods by air, their standard trading conditions (STCs) make reference to the applicability of the Warsaw Convention and also provide that insurance is obtainable by purchasing private insurance. A clause to the effect of 'the names

¹¹⁴⁹ 823 C.

¹¹⁵⁰ '1.2 The purpose of the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (the 'Montreal Convention'), is to modernise the Warsaw System of liability for the international carriage of passengers, baggage and cargo. A major feature of the new legal instrument is the concept of unlimited liability. Whereas the Warsaw Convention set a limit of 125 000 Gold Francs (approximately US \$8 300) in case of death or injury to passengers, the Montreal Convention introduces a two-tier system. The first tier includes strict liability up to 100 000 Special Drawing Rights (SDR) (approximately US \$135 000), irrespective of a carrier's fault. The second tier is based on presumption of fault of a carrier and has no limit of liability. The Carriage by Air Amendment Bill, 2006, seeks to give effect to the Montreal Convention.'

of Carriers (meaning those involved in the transportation of goods by air) to such special carriage contracts are available at all ticket offices of such carriers and may be examined on request...insurance obtained is not affected by any limitation of the Carrier's liability under the Warsaw Convention.'¹¹⁵¹ This clause in the Carrier's business practice shows the relationship between the Warsaw Convention and the role of private insurance.

In South Africa, the sources of insurance law are legislation, case law, Roman-Dutch law and English law.¹¹⁵² In South African insurance law the Short-Term Insurance Act,¹¹⁵³ as amended, may be consulted for general guidance relating to assurance matters. See for example, Short-Term Insurance Act,¹¹⁵⁴ deals with misrepresentation, provides that a representation made to the insurer which is not true will not invalidate a policy unless that representation is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof. What is clear from South African insurance law is that it is a protected and upheld policy provided that the underwriter or insurer is aware of all the material risks that will affect the assessment of a particular premium when entering into an insurance contract.

With regard to diamonds as subjects of insurance, the case of *Lapperman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd*¹¹⁵⁵ will be studied in this section as it serves as a very useful judgment for understanding the intricacies of the diamond industry and the insurance aspects applicable to it though the main issue in this case revolved around the specialist insurance broker's duty to inform his or her client any onerous terms that may be contained in an insurance policy.

¹¹⁵¹ See www.fedair.com 15 September 2009.

¹¹⁵² Dillon Clare & JP Van Niekerk *South African Maritime Law and Marine Insurance* (1983) 103.

¹¹⁵³ 23 of 1998 as amended by the Insurance Amendment Act 17 of 2003, National Credit Act 34 of 2005, Financial Services Laws General Amendment Act 22 of 2008, Insurance Laws Amendment Act 27 of 2008.

¹¹⁵⁴ 53 of 1998.

¹¹⁵⁵ [2003] JOL 11680 (SCA); [2003] 4 All SA 317 (SCA).

The facts of the case show that Lapperman Diamond Cutting Works (Pty) Ltd ('Lapperman,' the appellant) was carrying on the business of diamond cutting and polishing in Gauteng. MIB Group (Pty) Ltd ('MIB' and the underwriter, the respondents) were the insurance brokers and insurer respectively¹¹⁵⁶ in this case. The litigation commenced with an action against the underwriter and MIB for payment of a claim to the appellant for the loss of diamonds, during the course of the proceedings however the claim against MIB was withdrawn and the action against the underwriter was dismissed.¹¹⁵⁷

The appellant then instituted a subsequent action against MIB for the payment of US\$ 2 751 936,00 and US\$ 9 51 467,00 being the amounts claimed initially from the underwriter.¹¹⁵⁸ It was alleged by the appellant that these sums were damages sustained by it as a result of MIB's breach of contract or in the alternate damages caused by negligent performance of duty.¹¹⁵⁹ The facts of this case reveal two significant factors about diamond insurance. First it is a type of insurance that involves significant amounts of insurance cover, particularly when the insured is running an entity such as a cutting and polishing facility. Secondly, the specialized type of insurance has necessitated the industry to use specialist brokers for the purpose of procuring diamond insurance as was the case of MIB on behalf of the appellant.

It was stated in the agreement between MIB and the appellant that 'MIB would act with reasonable care and skill such as could be expected of a professional insurance broker.' Of particular importance to this matter, are the provisions of the brokerage agreement provided further that 'MIB would familiarize themselves with the nature and scope of the appellant's business which included ascertaining whether the appellant was able to fulfill the requirements of an

¹¹⁵⁶ For the purposes of this action, the underwriters and the broker assumed joint and several liability.

¹¹⁵⁷ 2 para. 2 – 3; 3 para. 3.

¹¹⁵⁸) [2003] 4 All SA 317 (SCA) 319 C.

¹¹⁵⁹ 3 para. 3.

underwriter in terms of a policy...and draw the attention of the appellant to any promissory warranties applying to the policies.¹¹⁶⁰

The policy also had a critical provision which provided that it would be understood and agreed that the insured shall keep detailed records of all sales, purchases and other transactions and that such records shall be made available for inspection by the underwriters or their representatives in case of a claim being made under the insurance policy. It was common cause that the underwriters sought to avoid the claims by the appellant by relying on the provisions of the policy requiring that records be kept by the appellant.¹¹⁶¹

It must be noted that though it may seem strange and even negligent to an outsider that the appellant was engaged in such a sensitive and rigorously regulated industry¹¹⁶² without keeping such records as described above, it was argued by the appellant that the diamond industry by nature is based on a practice of confidentiality. The appellant argued that MIB being specialist diamond insurers should have been aware of the confidential dealings that were not on record. However be that as it may the point that the appellant was arguing was that this provision was not drawn to his attention by the broker MIB and therefore the appellant felt that that was a breach of duty in terms of the brokerage agreement the parties had entered into.

The court investigated the parties' arguments carefully and on this point the court came to the conclusion that the appellant's claims had to fail. This is because, it was held, a specialist broker is not the assured's keeper and thus cannot control the business of the assured. In this case it was sufficient that the brokers had advised the appellant of the obligations within the policy and this was sufficient compliance with the brokerage agreement. The court held that MIB had not

¹¹⁶⁰ 4 para. 6.

¹¹⁶¹ 5 para. 7.

¹¹⁶² Diamonds Act 56 of 1986 section 57 and 61 together with regulations under GN R680 in GG 10684 of 1 April 1987) illustrate the importance of keeping records when one is engaged in the business of diamond trading.

breached any duty toward the appellant.¹¹⁶³ In fact the whole problem in this case was that the letters from the insurer illustrated that the appellant had not been able to prove loss in any case and this is possible since there were no formal records kept. This case serves as a warning for business to keep accurate records and inventories as they are important in proving losses to which the insurance is applicable.

In a further useful diamond insurance related English judgment of *CZ Cohen SC and IP Green instructed by Webber, Wentzel Bowens, Johannesburg Euro-Diam Ltd v Bathurst*¹¹⁶⁴ there are some further lessons that can be extracted concerning diamond underwriting activities. The facts of the case show that the plaintiffs Euro-Diam Ltd ('ED') were diamond merchants carrying on business in London. They had insurance cover in the form of a Lloyd's slip which had an effect of being a non-marine policy on goods and thus covered diamonds and other precious stones.¹¹⁶⁵

In a diamond sale agreement certain diamonds were sent to Germany by the plaintiffs with an invoice that understated the value of the diamonds in an effort to avoid German customs duty. The diamonds were stolen in Germany and the plaintiffs claimed under the insurance agreement. The insurers rejected the claim on the basis that the insured 'adventure' in terms of the English Marine Insurance Act,¹¹⁶⁶ was not carried out in a lawful manner and therefore the sale agreement was tainted with illegality by engaging in an avoidance of German custom's duty.¹¹⁶⁷

The court held that the diamond insurance policy was not a marine policy intended to insure any 'adventure.' The policy was simply a policy on goods and thus no implication of a warranty in terms of section 41 would arise either in

¹¹⁶³ 26 par. 44.

¹¹⁶⁴ [1988] 2 All ER 23.

¹¹⁶⁵ 22.

¹¹⁶⁶ 1906 section 41.

¹¹⁶⁷ 23; 33.

statute or common law. On this basis the insurer's appeal had to fail.¹¹⁶⁸ This case clearly settles the nature of the insurance policy on diamonds and precious stones. It appears that in international trade such goods are simply insured as goods and do not have to be attached to a type of marine policy which is governed by the English marine insurance statute.

6.4 Conclusion

It is clear that due to the high risk nature of the diamond industry, carriage (through international law and standards) and insurance methods involved in the context of international trade is rigidly guided by trade custom and usage. This is certainly supported by the Constitution of the Republic of South Africa Act, 1996.¹¹⁶⁹ Some of these trade usages and customs clearly show that in the diamond industry it is the safety of the goods and the keeping of contractual conditions first that is of main concern to the underwriter. However, it is also the duty of the underwriter to bring to the attention of the potential insured any contractual terms that may affect his or insurance cover in a negative way.¹¹⁷⁰

This is because a genuine loss of such a valuable commodity causes serious effects on the cash flow of a particular underwriter. Therefore, if it is shown that the diamonds were not kept in safe order at all times such an underwriter may seek to escape liability and rightfully so however this point can be argued before court according to the merits of each case.¹¹⁷¹

On the other hand it is generally acceptable that insurers do not engage in diamond underwriting with cash flow problems therefore it is expected that they

¹¹⁶⁸ *Ibid.*

¹¹⁶⁹ Section 39(1)(c), section 231.

¹¹⁷⁰ This is in line with regulations under the Short-Term Insurance Act 53 of 1998, GN R1128 in GG 26853 of 30 September 2004 which deals with Part VII statutory notice to short-term insurance policy, section 18. Although it is stated in the regulations that this notice does not form part of the insurance contract or any other document it is provided in the regulation that, a short-term insurance policyholder, or prospective policyholder, has the right to specific information which the insurer must inform the insured about.

¹¹⁷¹ See *Starfire Diamond Rings Ltd. v Angel* [1962] 2 Lloyd's Rep. 217; *Price and Another v Incorporated General Insurance* 1983 (1) SA 311.

will be of great assistance to clients who have kept the terms of the insurance contract in an appropriate manner. It is submitted that this chapter has been a useful consideration to the industry or practical aspects of diamond trade as viewed by the courts or contained in international law. It is proposed that though knowledge of these aspects may be expanded by direct interaction with the industry, this study provides a launching pad from which all other information may be built. Further, it is submitted that a study on diamond regulations would not be complete without these considerations.

What has emerged from this chapter most importantly is that when carriage of goods by air and other insurance practices that are relevant to international diamond trade including all the practices show a desire by South Africa to participate in the international laws that promote comity and international uniformity with other nations. This adds to the hypothesis of this study which proves that truly in the Constitutional era diamond laws have been significantly impacted by more equitable systems of law. The most important aspect of this equity is that it reflects both domestic law as well as international law.

Chapter 7: Uniformity of International Sale Laws and South African International Diamond Trade under the United Nations Convention on Contracts for International Sale of Goods, 1980 (The CISG Convention)

7.1 Introduction

As part of this study, the next three chapters, in the form of chapters 7, 8 and 9 will consider certain Conventions which are applicable to the national and international regulation of the diamond industry. It is submitted that through these Conventions the Constitutional ideal of developing South African laws will be achieved.¹¹⁷² The first Convention to be examined on in this chapter is the United Nations Convention on Contracts for International Sale of Goods, 1980 (The CISG Convention) also known as the Vienna Sales Convention.¹¹⁷³ The provisions and effect of this Convention will be studied in order to have a clear understanding of its role, significance and effect on diamond trade is necessary.¹¹⁷⁴

Currently South Africa has not yet ratified or acceded¹¹⁷⁵ to the CISG Convention. However South Africa takes cognizance of and respects the aims and objectives of the CISG Convention. This respect for the CISG Convention in South African law is evident in the provisions of other related international law applicable in South Africa which calls for the CISG Convention aims to be borne in mind¹¹⁷⁶ when a court is dealing with such international trade law. It will be

¹¹⁷² Constitution of the Republic of South Africa Act, 1996 sections 39 and 231.

¹¹⁷³ Sarcevic Petar and Volken Paul *International Sale of Goods Dubrovnik Lectures* Oceana Publications (1986) 1. www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf 17 March 2010.

¹¹⁷⁴ Diamonds Act 56 of 1986 sections 44 – 76 deal with trade and international trade in diamonds and therefore it is essential that international instruments that may affect these transactions are considered in this study.

¹¹⁷⁵ Or assented to the CISG Convention, which means to become a party (as to an agreement), to express approval or give consent give in to a request or demand. <http://www.merriam-webster.com/dictionary/acceded> 16 March 2010. See, Convention on Agency in the International Sale of Goods Act 4 of 1986 where the schedule of the Act provides that the aims of the CISG Convention should be borne in mind in South African law. See Wethmar-Lemmar, M. 'When could a South African court be expected to apply the United Nations Convention on Contracts for the International Sale of Goods (CISG)?' 2008 *De Jure* Volume 2 (2008) 419.

¹¹⁷⁶ The South African Legislature has stated in the Convention on Agency in the International Sale of Goods Act 4 of 1986 that the aims of the CISG Convention should be borne in mind, see the Schedule of

argued in this chapter that the adoption of the CISG Convention can only enhance the Constitutional goals, the provisions of the MPRDA¹¹⁷⁷ and the Diamonds Act¹¹⁷⁸ as it will encourage more trade in diamonds and economically benefit the country.

Extensive analyses have been made on the role, significance and relevance of the CISG Convention in modern international trade and commerce. However few of them have specifically examined the relationship between the CISG Convention and diamond trade. Therefore this chapter seeks to provide an analysis of the impact of the CISG Convention on international diamond sales as particular to South Africa. The fact that South Africa has not ratified the CISG Convention has meant that fewer legal commentaries¹¹⁷⁹ have been made pertaining to the CISG Convention and the South African legal framework. It seems South Africa may in the foreseeable future consider the adoption of the CISG Convention. This on account of the expressions of the legislature.

Some of South Africa's major trading partners for example China have ratified the CISG Convention. Therefore it is obvious that South Africa has to sign the CISG Convention if it deems it fit and necessary to do so for the sake of its own exports industry. It is submitted with respect that South Africa should not blindly follow England which has also not yet ratified the CISG Convention particularly in

the Agency Act 1986 an instrument which can be said is related to the CISG Convention. It has also been submitted that a further sister Act to the CISG Convention is the Convention on the Limitation Period in the International Sale of Goods (New York, 1974). See Sarcevic Petar and Volken Paul *International Sale of Goods Dubrovnik Lectures* Oceana Publications (1986) 2.

www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf 17 March 2010.

¹¹⁷⁷ 28 of 2002.

¹¹⁷⁸ 56 of 1986.

¹¹⁷⁹ Wethmar-Lemmar, M. 'When could a South African court be expected to apply the United Nations Convention on Contracts for the International Sale of Goods (CISG)?' Naudé T. and Lubbe G. *Cancellation for 'Material' or 'Fundamental' Breach: A Comparative Analysis of South African Law, The UN Convention on Contracts for the International Sale of Goods (CISG) and the Unidroit Principles of International Contracts* (2001) 12 Stellenbosch Law Review 371.

view of the fact that England¹¹⁸⁰ can no longer be regarded as South Africa's biggest trading partner.

The ratification of the CISG Convention will assist diamond exports in South Africa, by attracting more CISG Convention contracting merchants. It is important now to focus on a discussion of the provisions of the CISG Convention in light of South Africa's diamond trade. If the implications of ratifying the CISG Convention are positive then a strong recommendation will be made toward encouraging the acceptance of the CISG Convention.

When considering the relationship between the CISG Convention and the South African diamond industry, first an understanding of the socio economic and financial concerns that are unique to South Africa should be addressed.

It needs to be acknowledged that South Africa is a developing State with unique economic needs such as a need to make itself internationally competitive. South Africa is also faced with the challenge of addressing empowerment issues in various sectors including the diamond industry sector.¹¹⁸¹ If it can be showed that

¹¹⁸⁰ It is submitted that it is the EU rather than the UK generally that is the biggest trading partner of South Africa. See http://www.southafrica.info/business/trade/relations/trade_europe.htm 16 March 2010. 'Europe is South Africa's biggest source of investment, accounting for almost half of South Africa's total foreign trade. The recently concluded trade agreement between the European Union and South Africa - the Trade, Development and Co-operation Agreement (TDCA) - removes 90% of all trade barriers over the next decade. The TDCA has been ratified by all fifteen EU members. Since the provisional application of the TDCA in January 2000, South African exports to the EU have gone up by 46%. EU exports to South Africa, after growing by almost 20% in the year 2000 and again in the year 2001, remained at the same level over 2002. South Africa's trade relations and development co-operation with the EU are governed by the TDCA, which was signed in 1999. The TDCA's ratification is still ongoing and the agreement is being provisionally applied. The main objective of the TDCA is to create a free-trade area between South Africa and the EU over a 12-year period. The EU and South Africa will, in terms of the agreement, open their markets to each other at a different pace. The EU remains South Africa's most important economic trading partner, accounting for over 40% of its imports and exports, as well as 70% of foreign direct investment. South Africa's trade surplus with the bloc rose from R6-billion in 1999 to R30-billion at the end of 2001. Against a backdrop of a slowing global economy in 2001, which resulted in a 0.3% drop in EU imports from the rest of the world, South African exports to the EU grew by a further 11%. In May 2002 South Africa had overtaken Algeria, Saudi Arabia, Malaysia and Singapore in overall trade with the EU.'

¹¹⁸¹ MPRDA 28 of 2002 section 100 of the Act makes specific reference to the transformation goals of the industry, which must be in accordance with the socio-economic empowerment Charter. The section provides as follows: '1) The Minister must, within five years from the date on which this Act took effect-

the CISG Convention somewhat contributes to the ideals of policy such as fairness of trade, international uniformity, broad-based socio-economic empowerment, then such an international instrument must be made fully applicable in South African law.

The major themes that are unique to the South African diamond industry include the support of local beneficiation and broad based black economic empowerment. One has to question whether or not the contribution of the CISG Convention on existing diamond law is adding any value to the South African diamond markets in light of those special needs.

One of the obvious concerns about the CISG Convention is that it assumes an economy based on equality or a model that is not tainted by unfair market competition. It is therefore an instrument that apart from a small reference to broad abstract moral terms of good faith and fairness, it seems impervious to issues of poverty, imbalance of power on the basis of race and economic inequity which takes center stage in South African law. This is because it is not an instrument that is concerned with consumers but merchants. The empowerment composition of those merchants in contracting States is not a concern that should naturally be addressed by technical contractual instrument.

The CISG Convention is an international instrument based on the assumption that there is fair economic competition, fair trading frameworks and fair economic

(a) and after consultation with the Minister for Housing, develop a housing and living conditions standard for the minerals industry; and

(b) develop a code of good practice for the minerals industry in the Republic.

(2) (a) To ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.' www.dme.gov.za/pdfs/minerals/scorecard.pdf 16 March 2010.

opportunities in contracting States.¹¹⁸² This neutrality is most significant part of the CISG Convention in South Africa because it is a race neutral law that allows a contracting State to focus on enhancing its economy as a united and diverse society not obsessed with skin colour.

South Africa should also adopt the CISG Convention as it is somewhat broadly sympathetic to the international trade plight of developing countries. This is based on the New International Economic Order (NIEO)¹¹⁸³ ideals which, like the South African Constitution of the Republic of South Africa Act¹¹⁸⁴ are concerned with equity, fairness in trade and State Sovereignty. In practice however, South Africa is moving at snail's pace in the ratification of the CISG Convention. There is doubt that South African merchants are going to jump at the chance of applying the provisions of the CISG Convention. A clear example of this doubt is in Precedent 6 of the Butterworths Forms and Precedents where there is a Form containing an application software licence agreement and a memorandum of agreement.¹¹⁸⁵

Clause 25 of that memorandum provides for the governing law. It is provided in the sample form under this clause that 'for avoidance of doubt, the Parties agree to hereby exclude the operation of the United Nations Convention on Contracts for International Sale of Goods, 1980 should South Africa accede to the CISG Convention during the continuance of this agreement.'¹¹⁸⁶ It is proposed that

¹¹⁸² Preamble of the CISG Convention. www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf 17 March 2010.

¹¹⁸³ Preamble of the CISG Convention which provides that, the Contracting States are adopting the CISG Convention by bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order. This is done by considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States. This is based on the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade. (Preamble paraphrased) www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf 17 March 2010.

¹¹⁸⁴ 108 of 1996.

¹¹⁸⁵ Van Der Merve M.J., De Wet H. and Meiring R. *Forms & Precedents, Intellectual Property 1: Computer Contracts* Butterworths Lexis Nexis (2005) Precedent 6.

¹¹⁸⁶ *Ibid.*

clauses of this nature in South African trade contracts reflect that the ratification and accession to the CISG Convention is almost assured although some other entities can still exclude operation of its provisions although the attitude of this particular precedent seems to be one that expresses a ‘thanks but no thanks’ attitude to the CISG Convention.

Insofar as trading partnerships with England is concerned, traditionally England was one of South Africa’s biggest trading partners¹¹⁸⁷ however by 2009 that position has been altered somewhat in that England is no longer South Africa’s biggest trading partner. The legacy of the traditional relationship between South Africa and England can be seen in the adoption of English commercial law. It would seem like England is that old friend that South Africa wishes to mimic, however, in the best interests of trade, the sovereignty of each State must prevail with the effect that the international laws which best represent State interests must be ratified.

Insofar as England is concerned it has been submitted that the attitude of the English government concerning the CISG Convention has been lukewarm until fairly recently, around the year 1999 to 2000 or so where it was discovered that the English Department of Trade and Industry (DTI) was giving a positive acceptance of the CISG Convention as many of England’s trading partners were ratifying the Convention. It was stated in the English DTI documents that the failure of England to adopt the CISG Convention would lead it to becoming increasingly isolated within the international trading community.¹¹⁸⁸

¹¹⁸⁷ This is evident in the commercial and legal heritage of South Africa. The Admiralty Jurisdiction Regulation Act 105 of 1983 section 6(1)(a) for example shows how English shipping law and practice are inherited and applicable to an extent in South Africa. It is submitted that it is this colonial history of South Africa and England among other historical factors a strong traditional trading partnership between the two countries. This traditional and historical trade relationship between South Africa and England is also captured in various case law in the form of cases such as *Anderson and Coltman Ltd v Universal Trading Co.* 1948 (1) SA 1277 as an example.

¹¹⁸⁸ Bridge Michael *The International Sale of Goods Law and Practice*, Oxford University Press (1999) 39. It seems currently that this concern has not pressured the ratification of the CISG Convention into English law. This could largely be due to the fact that by virtue of the rules of private international law English jurisdictions have had to apply the CISG Convention or have had to entertain its applicability as a result of

7.2 The History of the CISG Convention

The CISG Convention is a product of the efforts of the United Nations Commission on International Trade Law (UNCITRAL). The origins of CISG Convention can be gleaned from the preamble of the Convention itself. The CISG Convention was developed because of the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order. Therefore the CISG Convention is an example of international law that embodies ideals of trade based on equity, fairness and the respect of each State's sovereignty.

The CISG Convention was formulated with the intention to support and develop international trade on the basis of equality and mutual benefit and the need to promote international cooperation and commercial relations among States.¹¹⁸⁹ This co-operation among States is still the object of Conventions in international trade and even more so in modern times through the formulation of a global village which has a global economy. It is important to note that the history of global co-operation in international trade still continues in the form of other UN efforts and structures that continue with the representation of States at international level for the purposes of encouraging friendly relations.¹¹⁹⁰ It is submitted that it is these friendly relations among States will be essential to steering countries out of the global economic challenges.

The international economic policy considerations as determined by UNCITRAL behind the creation of the CISG Convention also allows for the adoption of

choice of law clauses by contracting parties. For example, in arbitration proceedings it is open to parties to make the rules of the CISG Convention applicable.

¹¹⁸⁹ Preamble. www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf 17 March 2010.

¹¹⁹⁰ This was further emphasized in a live broadcast address, 2 April 2009, by American President, Barak Obama in a recent G20, a body representing the richest States of the world. This Summit was concerned with the international economic policy and assistance that would be provided by the US in co-operation with the rest of the world's States during the current world-wide recession. This illustrates that the achievement of economic co-operation in history and the history of the creation of the CISG demonstrates that UN efforts to unite the world in a global economy have been fruitful and sustainable even in modern times.

uniform rules which govern contracts for the international sale of goods as part of an effort to unify the private law of global trading partners. These uniform rules uniquely took into account the different social, economic and legal systems which would contribute to the removal of legal barriers in international trade and promote the development of international trade.¹¹⁹¹ Having established that the main aim of the CISG Convention is to achieve legal uniformity and fairness in sales agreements it goes without saying that there is a reciprocal duty on contracting States to take appropriate actions¹¹⁹² to achieve the aims of the CISG Convention.

The CISG Convention allows parties to have reasonably predictable legal consequences in international sales. For instance, to a dispute over diamond sales contract performed in various States as long as the CISG Convention is applied to that dispute the end result will be uniform in any particular CISG Convention forum.

Prior to the formulation of the CISG Convention, two Hague Conventions adopted in the 1960s formed the basis of international sales and contracts regulation. These prior instruments were the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 ULF Hague Convention) and the Convention Relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (The Hague Sales ULIS Convention).¹¹⁹³ Although the Convention may be read together with the explanatory note as prepared by the Secretariat of the UNCITRAL it has been stated that such a commentary, though

¹¹⁹¹ Preamble. Note that this is an instrument concerned with merchant sales.

¹¹⁹² The obvious first action is for the contracting State to ratify the Convention and ensure that trade practices and other structural bodies that are involved in international trade are able to take cognizance of the newly adopted Convention. Further, the interpretation of the CISG Convention in national law must be done with these considerations in mind.

¹¹⁹³ Article 99.

providing some useful insight on the international policy and structure of the CISG Convention, it is not an official commentary on the CISG Convention.¹¹⁹⁴

The initial international efforts preparation of a uniform law for international sale of goods had commenced as early as 1930 at the instance of the International Institute for the Unification of Private Law (UNIDROIT) in Rome. This effort was interrupted by the eruption of the Second World War, continuing when a draft was submitted to a diplomatic conference in The Hague in 1964 and this subsequently led to the earlier 1964 Conventions mentioned above. The 1964 instruments were widely criticized¹¹⁹⁵ for reflecting legal traditions and economic practice of continental Western Europe. When UNCITRAL undertook the task of unifying the law relating to international sales in 1968 an enquiry was made to States on whether or not they intended to adhere to the 1964 instruments.¹¹⁹⁶

After various submissions by several States, UNCITRAL studied the 1964 ULF and ULIS Hague Conventions to determine what modifications were needed in the instruments to make them more capable of wider acceptance by countries of different legal, social and economic systems. This endeavor resulted in the adoption of the CISG Convention which is essentially a combination of the subject matter of the two prior 1964 Conventions.¹¹⁹⁷ This understanding of the development of the CISG Convention is essential to the understanding of some of the additional provisions of the CISG Convention relating to accession, ratification and adoption (these terms have arguably come to mean the same process). Article 99(3) for instance provides that a State which accepts the CISG Convention shall at the same time denounce the previously adopted 1964 Conventions.

¹¹⁹⁴ UNCITRAL Secretariat.

¹¹⁹⁵ Item 3. UNCITRAL Secretariat commentary. The primary reflection of Western Europe's economic trends in the 1964 instruments was largely due to the fact that it was the region that most actively contributed to the creation of those instruments.

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ *Ibid.*

The participants in the uniformity process who worked together at reaching a consensus on the appropriate international instrument worked diligently to reconcile differences between common law and civil law traditions. This role was largely played by contributions of countries such as the US and by developing nations. It has been stated that while the CISG Convention represented nothing new it did in fact reflect the concerns of developing and socialist nations alike particularly considering that the CISG is intended more for merchants than consumers.¹¹⁹⁸

The CISG Convention then came into force in 1988 after securing the necessary number of ratifications. To date it has been adopted in many countries including countries of the European Union with the exception of other powerful traders such as the United Kingdom. The North American Free Trade Area (NAFTA) along with some South American countries have also welcomed the CISG Convention.¹¹⁹⁹ The status of adoption of the CISG Convention is made freely available to the international community via the United Nations or UNCITRAL website information and other applicable resources.

7.3 The Nature of the International Legal Regulatory Framework

As highlighted above, the regulatory framework for the international sale of goods is dominated by the CISG Convention as well as other regional and multilateral agreements. It is important to note that modern international trade is dominated by the rules of the WTO¹²⁰⁰ which has assumed huge significance in regulating

¹¹⁹⁸ Bridge Michael *The International Sale of Goods Law and Practice*, Oxford University Press (1999) 41; 42.

¹¹⁹⁹ *Ibid.*

¹²⁰⁰ See Eisenberg G.S. *The GATT and the WTO Agreements: Comments on their Legal Applicability to the Republic of South Africa* South African Yearbook of International Law (1993) 127.

http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Agreement 25 March 2010. 'The agreement establishing the WTO calls for a single institutional framework encompassing the GATT, as modified by the Uruguay Round, all agreements and arrangements concluded under its auspices and the complete results of the Uruguay Round. Its structure is headed by a Ministerial Conference meeting at least once every two years. A General Council oversees the operation of the agreement and ministerial decisions on a regular basis. This General Council acts as a Dispute Settlement Body and a Trade Policy Review Mechanism, which concern themselves with the full range of trade issues covered by the WTO, and has also established subsidiary bodies such as a Goods Council, a Services Council and a TRIPs Council.'

global trade. However the WTO regulates international trade and not strictly international sale of goods and for this reason, it is of limited significance in the regulating international sales contracts. The CISG Convention is therefore the main instrument on the regulation of international sales contracts. The CISG Convention is useful in the international trade of diamonds which involves various contractual agreements between different State and non State entities.

The CISG Convention applies to contracts of sale of goods between parties whose places of business are in different States parties.¹²⁰¹ The CISG Convention also applies in terms of the rules of private international law in that the law.¹²⁰² This is significant in that if one party is from a contracting State, but both parties have places of business in other countries not party to the CISG Convention, the CISG Convention may apply.¹²⁰³ This is common in import and exports regulations where international law becomes inwardly or outwardly applicable as a result of the trading relationship and the commercial agreements between parties from different States.

One may take the view that asks the question 'if the CISG will apply anyway because I, the non-CISG Convention merchant am contracting with a CISG Convention merchant in another country, what is the use of ratifying such a Convention in my own country?' The answer to this question is simply that by ratifying the Convention you as the non-CISG Convention merchant are going to make the foreign CISG Convention merchant feel more comfortable in international trade relations to select your business above others because they feel that in law there is no separation which has to be negotiated every time a new trade contract is entered into and the question of choice of law will no longer be an issue thus supporting smoother international trade between countries.

¹²⁰¹ Article 1(a).

¹²⁰² Article 1 (b).

¹²⁰³ Weizuo Chen *The Conflict of Laws in the Context of the CISG: A Chinese Perspective* 20 Pace International Law Review (2008) 115, 118.

In terms of the scope of application the CISG Convention does not apply to sales involving particular goods for instance, personal or household goods, goods being sold by auction or sales in execution, sale of securities, shares or stocks, ships, vessels and aircraft as well as electricity. This means that the CISG Convention contemplates commodities which have been, or have emerged to be subject of international trade¹²⁰⁴ such as diamonds but probably in their unpolished form because most beneficiated diamond products or jewellery fall into the category of goods used for personal reasons.

In structure essentially the CISG Convention is divided into four parts, each part regulating a particular aspect of international contract law. The first part is devoted mainly to general principles of contract that would apply to international contracts. This part is basically a codification of the common law principles of the law of contract. The CISG Convention in this regard does not seek to amend, override or preclude the common law principles and rules governing the law of contract. Instead, the CISG Convention codifies them and makes provision for how these would be applied in the international sale of goods context.

The rules demonstrated above are not distinct from South African law of general application which is applicable to contracts. These rules are also not strange to South Africa's commercial legal system and their application and interpretation by South African courts is not likely to cause problems. Therefore it can be stated firmly that South African contractual principles and rules fit in directly with the international regulatory framework for the sale of goods.

The CISG Convention provisions accordingly make provision for parties to the contract,¹²⁰⁵ formation of the contracts,¹²⁰⁶ formalities,¹²⁰⁷ and issues of offer, intention of the parties and acceptance and communication of the

¹²⁰⁴ Article 2.

¹²⁰⁵ Article 1.

¹²⁰⁶ Article 14.

¹²⁰⁷ Article 11.

acceptance.¹²⁰⁸ It is reiterated that the principles underlying the CISG Convention provisions reflect the common law position, which position informs modern South African law of contract. The CISG Convention has therefore not altered the common law, making it less difficult for South African courts to interpret and apply the law.

The second part of the CISG Convention is devoted to rules for the sale of goods. Again these rules reflect the common law position on the law of sale. Provision is made for obligations of the seller¹²⁰⁹ and the purchaser,¹²¹⁰ delivery of the goods,¹²¹¹ liability for lack of conformity,¹²¹² breach of the contract and remedies by the seller¹²¹³ and the purchaser.¹²¹⁴ Provision is also made for the passing of risk and ownership.¹²¹⁵ In interpreting these rules and principles in the international context, South African courts are free to refer to its own common law background as this provides the source for most of the rules in the CISG Convention. Further, South African traders who would be affected by the CISG Convention would not find it difficult to know what the international legal position will be since the domestic law is not fundamentally different with international law regarding international contracts.

Another branch of law contemplated by the CISG Convention is private international law. The CISG Convention does not amend, alter or change universally accepted choice of law rules and conflict of law principles. Accordingly, if a party has more than one place of business, the official place of business is that which has the closest relationship to the contract and its performance.¹²¹⁶ If a party does not have a place of business, reference is made

¹²⁰⁸ Article 18.

¹²⁰⁹ Chapter II.

¹²¹⁰ Chapter III. Articles 53 – 60.

¹²¹¹ Chapter II. Section 1. Articles 31 - 34.

¹²¹² Chapter II. Section II. Articles 35 – 44.

¹²¹³ Chapter II. Section III. Articles 45 – 52.

¹²¹⁴ Chapter III. Section III. Articles 61 – 65.

¹²¹⁵ Article 66.

¹²¹⁶ Article 10(a).

to its habitual residence.¹²¹⁷ These rules are primarily found in private international law. The CISG Convention therefore adopts the current South African and most jurisdictions legal positions in relation to private international law.

The whole tenor of the CISG Convention is advantageous to local diamond companies involved in the import and export of rough diamonds where issues of harmonious and uniform application of sales law is brought into question between South Africa and its international trading partners. It is submitted that the sophistication of modern trade and commerce requires an understanding of the regulatory framework by those involved in the activity and the CISG Convention serves to provide that understanding. It is highly risky to carry on international transactions without understanding the regulatory framework that governs those transactions. Private and state entities that contract would greatly benefit if the regulatory framework is fundamentally similar to their own legal system. This tends to promote and facilitate trading since the playing field will not be full of uncertainties or surprises for local commercial entities.

7.4 The Structure and Law of the CISG Convention

The CISG Convention can be described as generally a comprehensive, and in some instances technical document that is divided into various articles. A brief discussion of the main divisions of the Convention has already been made above. Only certain salient parts and provisions that are directly relevant to the sale of goods in the form of rough diamonds will be reviewed and how they are applicable in diamond trade.

In terms of the actual legal structure of the CISG Convention it has been described as consisting of statutory rules on the international sale of goods which as a formal source of law are contained in an international treaty. Thus it caters for two different types of legal rules on contract law, the first one being the

¹²¹⁷ Article 10(b).

traditional rules of contract law and the second one the public international rules on the law of treaties. It has been said that one must be aware of the classic distinction between law making treaties and contractual treaties. The CISG belongs to the category of law-making treaties which also have a further distinction between self-executing and non-self-executing treaties.¹²¹⁸

Treaties that are non-self-executing create rights and obligations for the Contracting States only. Individuals living in the Contracting States cannot assert any rights arising directly from the treaty itself. In order to become effective towards individuals, a non-self-executing treaty must be transformed into domestic statutory law, therefore by ratifying or acceding to a non-self-executing treaty, a Contracting State accepts the international duty to provide for the appropriate domestic legislation. As long as such implementing national legislation is missing, the national court will be unable to make the treaty law effective.¹²¹⁹

In the case of a self-executing treaty the legal rules arising from such a treaty are open for immediate application by a national judge. In such a case all persons living in the contracting State are entitled to assert their rights or demand the fulfillment of another person's duty by referring directly to the legal rules of the treaty itself. On the other hand it is quite possible to have a treaty that is partly self-executing and non-self-executing. The CISG Convention is a classic example of a self-executing treaty.¹²²⁰

It seems that the South African legislature's intention in the Convention on Agency in the International Sale of Goods Act,¹²²¹ in an attempt to assent to the CISG Convention, provides that the aims of the CISG Convention should be

¹²¹⁸ Sarcevic Petar and Volken Paul *International Sale of Goods Dubrovnik Lectures* Oceana Publications (1986) 20.

¹²¹⁹ Sarcevic Petar and Volken Paul *International Sale of Goods Dubrovnik Lectures* Oceana Publications (1986) 21.

¹²²⁰ *Ibid.*

¹²²¹ 4 of 1986.

borne in mind when applying the international agency Convention. This provision while it illustrates a serious commitment to the objectives of the CISG Convention in South Africa, it does not serve much purpose as long as the CISG Convention remains un-ratified. On the other hand because of the self-executing nature of the CISG Convention it allows in appropriate circumstances a South African court to apply its provisions.

Accordingly, the treaty nature of the CISG Convention must always be borne in mind. It has been submitted that even where parties have their places of business in different States will be immaterial if this does not appear in the contract, this where necessary may be inferred from the facts of each case. Further, the nationality or commercial character of the parties to the contract will also be immaterial when determining the application of the CISG Convention.¹²²² This suspension of legal debates concerning applicability in light of individual parties' location and local law allows for matters pertaining to the sale of goods to be dealt with swiftly under the CISG Convention, particularly essential to diamond trade where location of a party's business premises and performance of the contract may substantially vary.

Article 3¹²²³ of the CISG Convention is important for the purposes of the diamond industry in that it provides that contracts for the supply of goods to be manufactured or produced, for example, rough diamonds for the purposes of cutting and polishing, or cut and polished diamonds for the purposes of beneficiation are to be considered sales¹²²⁴ unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture and production. This would be a technicality that may exclude many

¹²²² Article I (2); (3). This Article must be read together with Article 10 which deals with party having more than one place of business for the purposes of the Convention.

¹²²³ Article 3 provides as follows: '(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.'

¹²²⁴ This is the intention of the CISG Convention.

of the diamond trade contracts from the ambit of the CISG Convention as it is very common for the party ordering the supply of diamonds as goods has to substantially provide for the manufacturing and beneficiation of such diamonds. Further, Article 3(2) provides clearly that the Convention does not apply to contracts where the main aspect of the obligations of the party who furnishes the goods consists in the supply of labour and other services.

Article 3 provides '(1) Contracts for the supply of goods to be manufactured or produced are to be considered international sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.' It is clear that the first part of Article 3 deals with an exception to the application of the CISG Convention in a case where the buyer has to supply much more services and other items for the product to be created while part 2 of Article 3 makes an exception to the application of the CISG Convention where the seller is required to supply certain services that will result in the creation of that final product. In such cases one is not dealing with pure sales but 'other services' contracts which would be excluded from the ambit of the CISG Convention.

It is clearly established then that exceptions to the CISG Convention sales involve the following circumstances:

1. Buyer cannot be expected to supply materials to create product to be sold.
2. Seller cannot be expected to supply labour and other services.

Rough diamonds sales will always fit into the CISG Convention ambit unless the buyer supplies materials for producing such diamonds or if the seller offers to cut and polish the diamonds as part of 'other services' that accompany that sale. In light of this, it is submitted that South Africa should seek to have a realistic portion of diamond sales covered under the CISG Convention so that all such

sales do not require skills and materials input from outside so that all the revenue that can be generated from trade in national products comes to South Africa, this will build its economy and develop its own skills in producing final products benefited within South Africa by its own workforce. This is also in line with South African State policy in enhancing local beneficiation.¹²²⁵

Practically this means that if A, in China is a Sight holder¹²²⁶ and orders a consignment of rough diamonds from a South African Party B, for the purposes of producing engagement rings for the Chinese market and the latter undertakes to supply all the materials necessary for the production of such engagement rings through the use of South African labour, skill and beneficiation, this transaction by definition falls outside of the CISG Convention.¹²²⁷

Although such a contract forms part of international trade, technically in terms of the CISG Convention, such a contract would be excluded from the application of the CISG Convention.¹²²⁸ Only where A, in China undertakes to purchase such rough diamonds for whatever other international trade purpose including stockpiling other than requiring B, the South African seller to supply a substantial part of the materials necessary for the production of such engagement rings will the CISG Convention be applicable to such a contract.¹²²⁹

Further, the illustration above shows the 'preponderant part test'¹²³⁰ in terms of Article 3(2) of the CISG Convention which provides that the CISG Convention will not apply in the case where the preponderant part for the supply agreement between the Chinese Sight holder and the South African diamond producer requires that the South African supplier as a furnisher of the goods in addition to

¹²²⁵ Diamonds Act 56 of 1986 section 5 and 15 as amended by the Diamonds Amendment Act 29 of 2005 read together with section 2 and 26 of the MPRDA 28 of 2002.

¹²²⁶ In diamond trade, diamond merchants or clients and buyers are commonly referred to as Sight holders.

¹²²⁷ Article 3(1) of the CISG Convention.

¹²²⁸ *Ibid.*

¹²²⁹ Article 3(1) and (2).

¹²³⁰ Philip L. Bruner and Patrick J. O'Connor, Jr. *Risk Management: Identifying, Allocating and Mitigating Construction Risks* Bruner and O'Connor Construction Law BOCL, May (2008) 7:38, 7.

supplying diamonds further supplies labour, in the form of diamond cutting skill and other services connected to that supply.

The provisions of the CISG Convention in Article 3 are crucial in the context of the diamond industry because not every international sale of diamonds necessarily forms a sale within the ambit of the CISG Convention and in such instances applicable law must be considered according to ordinary rules of private international law. The disadvantage of these exclusionary provisions of the CISG Convention is that it still leaves *lacuna* in certain international sales contracts with services such as labour and skill attached to them therefore interpretation will be required to determine application of the CISG Convention if it is not clear enough.

It has been submitted that because the CISG Convention does not define goods but simply provides for excluded goods, it is thus uncertain whether the CISG Convention applies to items such as body parts and software.¹²³¹ It has been accepted that the provision for goods in the CISG Convention is broad enough so that it embraces all tangible corporeal things and where there is doubt it is proposed that the CISG Convention will provide a wide berth to domestic case law dealing with the difference between contracts for the sale of minerals and contracts for the sale of natural produce. It is proposed that since the CISG Convention applied to goods that are produced as contained in Article 3 then it applies to the extraction of minerals (diamonds) and the growth of crops.¹²³² This submission clearly illustrates the CISG Convention applicability to rough diamond international sales however the supply of services to produce the sold product debate is still subject to interpretation when dealing with international diamond trade.

While the CISG Convention provides a relatively verbatim code resembling South African law of contract it is important to international diamond trade on a

¹²³¹ Bridge Michael *The International Sale of Goods Law and Practice*, Oxford University Press (1999) 47; 48.

¹²³² Bridge Michael *The International Sale of Goods Law and Practice*, Oxford University Press (1999) 48.

merchant to merchant type of commercial relationship. With regard to carriage of goods sold, the provisions of Articles 31 and 32 of the CISG Convention are of particular importance to international diamond trade for instance which deals with the delivery of the goods sold it often a very important aspect of international diamond trade. Article 32(2) provides that if¹²³³ the seller is bound to arrange he must conclude such contracts as are necessary for the carriage to the place fixed by means of transportation appropriate in the circumstances, for instance, carriage by air in the case of diamonds as the case may be and according to the usual terms for such transportation, for instance, arranging an insurance certificate covering carriage of diamonds by air.¹²³⁴

Article 35 deals with the conformity of the goods sold. When dealing with diamond sales, expert knowledge of valuers is essential in determining the conformity of the diamonds as goods sold. In terms of the provision a seller must deliver goods which are of the quality, quantity and description required by the contract and which are contained or packaged in the manner required by the contract. To balance this the seller's obligations as required by this provision of the Convention, it must be read together with Article 38 which provides that the buyer must examine the goods, or cause them to be examined within a short period as is practicable in the circumstances and if goods are subject to carriage examination by the buyer may be deferred until after the goods have arrived at their destination.¹²³⁵ It is open to a buyer of the diamonds in such circumstances to employ their own valuator for the purpose of examining the goods.

Article 46(2) provides that in instances where goods do not conform with the contract, it is open to the buyer to require delivery of substitute goods however only if lack of conformity constitutes a fundamental breach of contract and a

¹²³³ The use of the wording 'if' in this instance forms an express acknowledgment of the possible alternative carriage obligations that may arise in the context of international trade. In light of the fact that there are many INCOTERMS as sponsored by the International Chamber of Commerce (ICC) 'if' suggests accurately that it is not always expected in international trade that the seller will be responsible for arranging the carriage of the goods sold.

¹²³⁴ Article 32(3) allows the seller to make necessary arrangements for insurance of goods being carried.

¹²³⁵ Article 38(2).

request for substitute goods is made subject to the notice of lack of conformity as contained in Article 39 or within reasonable time. In the case of diamond sales it would be open to a buyer to prove lack of conformity and this would also be determined by expert knowledge as they are able to guide the court as to when quality of carats in diamonds can be said to be so compromised that it is deemed a fundamental breach of contract.

The risk provisions of the CISG Convention that relate to fitting diamond sales must also be mentioned. In terms of Article 66 which provides that loss or damage to the goods after the risk has passed to the purchaser does not absolve him or her from his or her obligation to pay the price unless the loss or damage is due to an act or omission of the seller. This provision is of particular importance to international diamond sales as loss of diamonds as the subject matter of the contract through theft¹²³⁶ is a very serious and age old concern¹²³⁷ or threat

¹²³⁶ *S v Gaus v Mukete; S v Petrus; S v Teodor* 1980 (3) SA 770 (SWA) 771, 772. In this case the four appellants had, in separate cases, been convicted by a magistrate of theft of diamonds in contravention of s 30 (1) of Proclamation 17 of 1939 (SWA) and each had been sentenced to a fine of R600 or six months' imprisonment plus six months' imprisonment. The value of the diamonds involved in the offences varied from R53 to R357. The appellants were all first offenders and each had dependants. Several warnings had in the past been issued by the courts to diamond offenders that heavier sentences would be imposed in the future. In an appeal against the sentences, it was held that there was sufficient money to pay the fines, that imprisonment was indicated if the offence was to be combated, that the imprisonment had to be firm and appropriate in order to deter would-be offenders who were aware of the gravity of the offence and who ignored warnings and that the magistrate had exercised his discretion properly and that the appeals against the sentences should be dismissed. *National Union of Mineworkers v De Beers Consolidated Mines Ltd* (1997) 18 ILJ 1442 (CCMA) 1455 F. It was stated in this case that diamond theft the mine threatens its profitability and ultimately its existence. A mine often has to operate in an extremely strict security environment which is backed up with severe disciplinary penalties for breaches of that security. Of the numerous witnesses who were asked about mine policy in this regard it is clear that the mine's policy allows no room for any tolerance.

¹²³⁷ See an example of a very early South African case dealing with diamond theft. *Queen v Klaas* (1893-1895) 7 HCG 245, 246. In this very early case, the court dealt with a matter involving an alleged theft of a diamond and the facts clearly illustrate the threat of diamond theft that will always be of concern to the diamond industry. In this case 'a labourer named Klaas, was charged before the Special Justice of the Peace at Windsorton, with contravening sect. 2 of Act 18 of 1873 by unlawfully absenting himself from the place appointed for his work. It appears that Klaas was working for a licensed digger at Klipdam, and was absent from duty at a time when he should have been working in the claims. A search was made for him, and he was found in a disused claim apparently concealing something, and his movements, both then and subsequently, were of a somewhat suspicious character, leading to the surmise that he had swallowed a diamond. The Special Justice convicted him of the offence charged, and sentenced him to pay a fine of ten shillings or undergo eight days' hard labour. At the complainant's request, he made the further order, "in the event of the fine being paid, to be detained for four days in order to see if he should pass a diamond during that time.'"

faced by diamond merchants. These threats will be considered in an in depth in chapter 10 of this study which deals with the prevention of corruption in diamond trade.

In light of the CISG Convention provisions for passing of risk,¹²³⁸ a diamond purchaser who has purchased diamonds that have subsequently become lost due to theft or some other cause, such a purchaser shall have to pay for the lost or stolen diamonds unless he or she can show that such loss can be attributed to the conduct of the seller.¹²³⁹ What constitutes wrongful conduct in such sale cases is a question of fact therefore the court will have to consider normal practice for packaging of diamonds in order to avoid such diamonds being lost or stolen.¹²⁴⁰

Article 67¹²⁴¹ is also crucial to passing of risk in the case where a carrier is used. It is provided under this provision of the CISG Convention that if the contract of sale involves carriage as is common in diamond sales, if the seller is not bound to hand the goods over at a particular place, the risk will pass to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the sale agreement.

Article 67(2) provides provides specifically that risk will not pass to the purchaser until the goods are clearly identified to the contract whether by markings on the goods, by shipping documents, which includes documents used for carriage by

¹²³⁸ Chapter IV of the CISG Convention provisions contained in Articles 66, 67, 68, 69 and 70.

¹²³⁹ Article 66 provides for a qualification based on the passage of risk in this situation. The Article provides that 'loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.'

¹²⁴⁰ *Commissioner for SARS and Another v TFN Diamond Cutting Works (Pty) Ltd* 2005] 2 All SA 455 (SCA) where the court found that the diamonds were stolen while in State custody.

¹²⁴¹ The CISG provides specifically that '(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.'

air or by notice to the buyer or otherwise. Clearly in diamond sales it would be logical to make the required identification of the goods by clear notice to the buyer in order to secure such goods and thwart potential attempts to steal diamonds sold. Obviously each diamond merchant organization also has its own safety measures and intelligence in such diamond carriage for sale purposes.

Chapter 5¹²⁴² of the CISG Convention deals with the general obligations of the seller and buyer in an international sales contract and these are cogent provisions. They cover legal issues pertaining to *inter alia* anticipatory breach, damages, interest, and exemptions based on impossibility, the effects of avoidance of the contract by both parties and the preservation of the goods. In diamond sales preservation of the goods is a provision that has less meaning to diamond sales than any other perishable or consumable as diamonds are by their nature enduring items. However, a seller who has incurred expenses such as safety deposit or storage expenses as a result of the buyer's failure to take delivery of diamonds sold can retain the diamonds until he or she has been reimbursed for his reasonable expenses.¹²⁴³

7.4.1 Good Faith and the CISG Convention

It is important to give due regard to the essence of good faith in the interpretation of the provisions of the CISG Convention as contained in Article 7¹²⁴⁴ of the Convention. It is submitted that good faith essentially holds together the all practical aspects of international trade. Insofar as it relates to diamond sales international merchants must exercise good faith when supplying the correct quantity and quality of diamonds being traded and ensure that risks in such trade are minimized. Without good faith and 'above board' business practices in the interpretation of the CISG Convention the provisions under it will simply be rendered inoperative or be turned into a mockery. Proper interpretation of the

¹²⁴² Articles 71 – 88 of the CISG Convention.

¹²⁴³ Article 85.

¹²⁴⁴ Article 7(1) of the CISG Convention provides that when interpreting the Convention, regard must be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

CISG Convention, it is submitted, will curb much undesirable and endless litigation which would truly create harmony for parties when entering into international sales contracts.

It has been proposed that using good faith in the CISG Convention as a guide for interpretation is less sweeping than the general good faith requirements of some legal systems. Some jurisdictions even have varying degrees of good faith¹²⁴⁵ which may it is submitted be a cause for concern or mirth when one tries to apply such varying degrees of good faith, for example, utmost good faith and good faith. Be that as it may it is proposed that the interpretation of good faith under the CISG Convention may avoid stultification or circumvention of specific provisions of the CISG Convention.¹²⁴⁶ Further, the CISG Convention is unique in that it attempts to legislate a moral value this is in line with the spirit and purport of the Constitution of the Republic of South Africa Act.¹²⁴⁷

7.5 The South African Perspective on the CISG Convention

Since the CISG Convention has not been ratified by South Africa it remains an area that has not received local judicial interpretation and attention. This is in stark contrast to certain foreign jurisdictions that have acceded to the CISG Convention and have widely interpreted it in the context of their domestic laws. It is not clear why South Africa has seemingly delayed ratification of the CISG Convention since it seems to have been assented to in South Africa.

It would seem that the reception of the CISG Convention in South Africa can be likened to a newly appointed Chief Executive Officer (CEO) who is received with much applause and parading however gets totally ignored in the daily running of that particular company. This could be because such an officer is totally redundant or his or her methods are considered unnecessary for the organization

¹²⁴⁵ For example the legal concepts of utmost good faith as opposed to good faith. Is good faith not just good faith, further in what circumstances must good faith not be utmost one may ask?

¹²⁴⁶ Honnold John *Uniform Law for International Sales Under the 1980 United Nations Convention* Kluwer (1982) 20.

¹²⁴⁷ 108 of 1996.

in question. It is nevertheless important to consider the likely impact of acceding to the CISG Convention insofar as it represents a body with universally applicable and uniform international rules governing the sale of goods and for the purposes of this study in international diamond trade.

In 1995 the South African Law Commission was considering the CISG Convention for ratification and accession and this effort was seen as a positive development which South Africa needed in the interests of its international trade law and policy.¹²⁴⁸ It had been proposed that the adoption of the CISG Convention would stimulate confidence in the trade relations between South Africa and its international trading partners and that there was no reason why South Africa should lag behind in such international legal developments.¹²⁴⁹

This recommendation by a South African legal scholar illustrates a positive acceptance that UNCITRAL efforts are welcome developments insofar as they seek to reform existing South African international trade law. One must only caution that this work does not propose an accession by South Africa to the CISG Convention for the sake of acceding or for the reasons that other nations have done so. The recommendation is for South Africa to ratify and accede to the CISG Convention, and other well intentioned international instruments if it is clear that this is in South Africa's best commercial and international trade interests.

The local legal profession would best be served by understanding the CISG Convention application in various instances and scenarios especially since it is clear that the CISG Convention in international trade contracts is an instrument

¹²⁴⁸ Coutsoudis Basil *UNCITRAL Instruments in Southern Africa De Rebus*, November (1999) SA Attorneys Journal 30. In his article, Basil Coutsoudis proposes a reformation of certain aspects of South Africa's law on international trade through various instruments created by UNCITRAL; this includes not only the CISG but other instruments pertaining to international trade such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Cross-Border Insolvency, which at present forms part of South African law. See article also on [http://www.law-online.co.za/IntTradeLaw/23 March 2010. UNCITRAL%20Instruments.htm](http://www.law-online.co.za/IntTradeLaw/23%20March%202010/UNCITRAL%20Instruments.htm) 21 March 2010.

¹²⁴⁹ *Ibid.*

that may be applicable to such contracts in terms of private international law and Article 1 of the Convention.¹²⁵⁰ This is a cogent submission in light of the fact that the CISG Convention is adopted by many of South Africa's trading partners, the only strange aspect of this submission is that it was made in 1999 and it is now ten years and the CISG Convention is yet to be ratified by South Africa. This raises practical questions about urgent need for its adoption for purposes of substantiating South African law on international trade.

7.6 The CISG Convention and Foreign Law

It is prudent to now consider how the CISG Convention has been applied by other jurisdictions whose legal decisions and commercial practices are similar to South Africa's. This analysis will consider these foreign decisions in order to illustrate whether or not ratification of the CISG Convention stimulates or enhances international trade. Further, this analysis will assess the successes and challenges identifiable in foreign international trade law that will consequently encourage South Africa not to vacillate in adopting measures that will enhance and improve its international trade status particularly international diamond trade. The foreign law illustrated below will also confirm that the law as provided by the CISG Convention shows principles of equity and comity all of which are going to contribute to sound international trade in diamonds and thus are justifiable in terms of the Constitutional dispensation of South African diamond law.

The US has ratified the CISG Convention and the treaty is a self-executing treaty with preemptive force of law in that country. This is notwithstanding the fact that key trading partners of the US such as the United Kingdom, Japan and Ireland are not parties to the Convention. In the US the debate as to when a contract can be covered by the CISG Convention, and thus a pure international sale of goods contract, has not been resolved yet. For example, construction contracts are

¹²⁵⁰ *Ibid.* In 2005 South Africa was still termed in academic writings as a future party to the CISG, See Malunga Kevin *International Civil Matters De Rebus*, April (2005) SA Attorneys Journal 27. The question is whether or not another ten years will pass before South Africa actually ratifies the CISG.

generally not covered by the CISG Convention but when determining whether a contract is one for construction or sale of goods, this can be a difficult matter to determine.¹²⁵¹ This is an issue that is also important in diamond trade as each contract must be determined on its merits when seeking to identify whether or not it falls into the ambit of being a pure international sale of goods contract covered by the CISG Convention.

Bruner & O'Connor submit that there are contracts that are contracts for the sale of goods and thus governed by the CISG Convention although such goods are associated with construction. These include, for example, the supply and installation of anti-pollution devices, the supply and installation of producing, delivering and installing machinery. One of the legal concerns pertaining to such contracts is what factors are to be taken into account when determining whether a mixed contract should be characterized as one for construction services or as one for the sale of goods.¹²⁵²

It is proposed by the writers above that when seeking guidance on interpreting the true nature of the contract the CISG Convention concept of the "preponderant part" in Article 3(2) should be the test used. The meaning of preponderant part is not defined in the CISG Convention therefore it has been suggested that one must look at both the monetary values of the services and goods portion of the contract as well as the overall purpose of the contract.¹²⁵³ Thus a contract is an international sale if it is clear from the facts that that was the intended purpose of the contract. It is also respectfully submitted that preponderant should be interpreted to mean the overwhelming or significant portion of the contract, if that portion of the contract is a sale then such a contract should be covered by the CISG Convention.

¹²⁵¹ Philip L. Bruner and Patrick J. O'Connor, Jr. *Risk Management: Identifying, Allocating and Mitigating Construction Risks* Bruner and O'Connor Construction Law BOCL, May (2008) 7:38, 1.

¹²⁵² Philip L. Bruner and Patrick J. O'Connor, Jr. *Risk Management: Identifying, Allocating and Mitigating Construction Risks* Bruner and O'Connor Construction Law BOCL, May (2008) 7:38, 6.

¹²⁵³ Philip L. Bruner and Patrick J. O'Connor, Jr. *Risk Management: Identifying, Allocating and Mitigating Construction Risks* Bruner and O'Connor Construction Law BOCL, May (2008) 7:38, 7.

A further challenge faced by parties determining which transactions are governed by the CISG Convention and which are not can be further impaired by different countries subscribing to different portions of the CISG Convention. This is illustrated, for example, by the US and other States that have elected not to be bound by Article 1(1)(b) which provides 'when the rules of private international law lead to the application of the law of a contracting State.' The effect of this election is that the CISG Convention is only applicable to domestic contracts only if the seller and buyer have their places of business in different countries and both countries have ratified or accepted the Convention.¹²⁵⁴ The election by the US to exclude the application of Article 1(1)(b) may be a useful tool in ensuring that only States that have ratified the CISG are faced with having to endure the effects of the application of the CISG Convention. South Africa may adopt this route to avoid complications when applying the CISG Convention in the future ratification thereof.

In *Delchi Carrier S.p.A. v Rotorex Corp*¹²⁵⁵ the US court heard a matter involving the application of the CISG Convention to a contract between a US seller and Italian buyer. The facts of the case are such that in 1988 the seller agreed to sell 10, 800 compressors to the buyer for use in the buyers portable room air conditioners. The air conditioners were scheduled to go on sale in the spring and summer of 1988 and were due to be delivered in three shipments before 15 May 1988. The first shipment¹²⁵⁶ was sent by sea on 26 March, the second shipment on about 9 May. While the second shipment was en route the buyer discovered that the first shipment of compressors did not conform to the sample model that accompanied the required specifications. On 13 May, the buyer informed the seller that 93 per cent of the compressors were rejected in the quality control

¹²⁵⁴ *Ibid.*

¹²⁵⁵ US Court of Appeals (2nd Circuit) 6 December 1995.

¹²⁵⁶ Note that in international trade carriage by air is also referred to as shipment and thus it becomes important to note mode of transport specifically when using the words shipment.

checks because they had lower cooling capacity and consumed more power than the same model specifications.¹²⁵⁷

After several attempts to cure the defects in the compressors the buyer asked the seller to supply new compressors conforming to the original sample and specifications and the seller refused to comply. On 23 May 1988 the buyer cancelled the contract, declared the contract voided with suitable arrangements to attempt to mitigate his losses. The court of first instance, the District Court held the seller liable for breach of contract and the Circuit Court of Appeals considering the effects of the provisions of the CISG Convention confirmed the ruling. It was stated by the appellate court that the CISG Convention governs sales contracts between parties from different signatory countries; however, the CISG Convention makes it clear that the parties may choose to be bound contractually by a source of law other than the CISG Convention such as the Uniform Commercial Code (UCC),¹²⁵⁸ for example.

Article 6¹²⁵⁹ of the CISG Convention makes it clear that parties may exclude application of the Convention regardless of the signatory status of the State they are in and the parties may not seek to alter that agreement just because they suddenly wish to be protected under some provision of the CISG Convention or seek to escape liability through technical arguments under the CISG Convention.

South African parties who find the CISG Convention onerous and are in a greater position to influence choice of law in a sales agreement may exclude the application of the CISG Convention. Ordinary remedies for breach of contract will then be determined in terms of that choice of law. Therefore parties to a diamond deal would be in the same manner free to agree to choice of law whose effect would be the exclusion of the CISG Convention.

¹²⁵⁷ See facts.

¹²⁵⁸ US State code harmonizing sales law 1952.

¹²⁵⁹ Article 6 provided that parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

In *Forest Guarani, S.A. v Daros International Inc.*¹²⁶⁰ the matter involved an Argentinean corporation, Forestal, whose principal place of business was Argentina. Forestal's business involved the manufacturing, repairs, finishing and sales of lumber products including wooden finger joints and Daros a New Jersey based import-export Corporation whose principal place of business is New Jersey. In 1999 the two corporations entered into a verbal agreement in terms of which Daros undertook to sell Forestal's wooden finger joints to third party buyers in the US. Pursuant to this agreement Forestal shipped USD\$ 1, 857, 766.06 worth of finger joints to Daros and in turn Daros remitted USD\$ 1, 458, 212.35 in payments for the finger joints, however, there was still a question of payment of the outstanding amount of USD\$ 419, 553.71 which included additional charges related to the transaction.¹²⁶¹

On 12 April 2002 a complaint for breach of contract was filed by the Plaintiff, Forestal in the New Jersey, Superior Court but the action was stayed at the instance of Daros and moved to the federal court on the point of jurisdiction pursuant to the application of the CISG Convention. It was argued by the Defendant that proper exercise of jurisdiction over every civil action that rises under a treaty of the United States, as in the case of the CISG Convention, which is ratified by the US senate creates a private right of action in federal court.¹²⁶²

On 5 June 2005 Daros moved for summary judgment on the grounds that as a matter of law Forestal's claims are barred under the CISG Convention, as amended by Argentina, which requires that all sales agreements be made in writing, further, Forestal failed to produce any credible evidence to substantiate a claim for breach of contract.¹²⁶³ It seems that the Argentinean amendment of the CISG Convention in this case had the effect of nullifying the effects of Article

¹²⁶⁰ US District Court For the District of New Jersey, Civil Action No. 03-4821 (JAG). 2008 US Dist. LEXIS 79734; 67 U.C.C. Rep. Serv. 2d (Callaghan) 18.

¹²⁶¹ Para. 2.

¹²⁶² *Ibid.*

¹²⁶³ Para. 4.

11¹²⁶⁴ of the CISG Convention which provides that a contract of sale need not be in writing and is not subject to any other requirement as to form. Further Article 11 provides that a sales contract may be proved by any means, including a witness. Clearly in this case Forestal had shot themselves in the foot by not reducing the contract into writing and it was no wonder they could not make proper discovery using any documents, there simply were no documents to prove the sale. Forestal could not have strengthened their case by focusing on producing oral evidence to prove the sales contract because by not reducing the contract to writing, they had acted outside the protections of Argentinean international trade law.

The federal court was not quick to accept the arguments given by the Defendants and requested parties to file papers addressing the applicability of the CISG Convention to this matter and to give the Plaintiffs an opportunity to argue their case properly. The federal court came to the conclusion that the CISG Convention was applicable to this matter particularly in light of the fact that the parties had not elected to exclude its application. The court considered Article 11 of the Convention and took the view that Argentina, like China had exercised their right in terms of Article 96 which had the effect of opting out of Article 11 of the Convention.¹²⁶⁵

Article 96 provides that a contracting State whose law requires sales contracts to be reduced to writing may at any time make a declaration in accordance with Article 12 that any provision of Article 11, Article 29¹²⁶⁶ or part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or any other indication of intention to be

¹²⁶⁴ Article 11 provides that 'a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.'

¹²⁶⁵ Para. 12.

¹²⁶⁶ Article 29(1) provides that a contract may be modified or terminate by the mere agreement of parties, Article 29(2) provides that a contract in writing which contains a provision requiring any modification or termination by agreement to be made in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his or her conduct from asserting such a provision to the extent that the other party has relied on that conduct.

made in any form other than in writing, does not apply where any party has his or her place of business in that State. In light of this provision if the place of business in China or Argentina, contracts must be in writing.

In the federal court *Forestal* argued that the plain language of the CISG Convention in Argentina's declaration under Article 96 should be disregarded. The court did not accept that contention and explained that it was intended by the drafters of the CISG Convention to remove impediments to international commerce and contracting by allowing a more liberal enforcement of oral agreements. However the same drafters did not wish to dictate conduct of each State in such matters and in Argentina sales contracts are expected to be in writing. In light of these facts the court held that *Forestal's* claim for breach of contract must fail.¹²⁶⁷

An important lesson that can be drawn from this case to assist South African lawmakers is that when ratifying the CISG Convention, there is no need to exercise the option under Article 96. All sale contracts may be brought before the court for consideration without fearing that they may not have been in writing. This submission is of course subject to trade customs and trade usage practicalities. Further, in diamond sales, it is simply prudent for evidentiary purposes to reduce all international trade agreements to writing. However, if this practice offends ordinary trust relationships often expressed among diamond merchants, then the contracts should remain oral agreements but also enforceable in terms of Article 11 of the CISG Convention.

In *Cedar Petrochemicals Inc. v Chemical Co. Ltd.*¹²⁶⁸ the American court decided a matter pertaining to breach of contract under the provisions of the CISG Convention. In this case a New York based corporation, Cedar had entered into

¹²⁶⁷ Para. 13. See also *Zhejiang Shaoxing Yongli Printing and Dyeing Co. Ltd v Microflock Textile Group Corporation* Case No. 06-22608-CIV-O' Sullivan US District Court for the Southern District of Florida 2008 US Dist. LEXIS 40418; 66 U.C.C. Rep. Serv. 2d (Callaghan) 716.

¹²⁶⁸ 06 Civ. 3972 (LTS) (JCF) US Court for the Southern District of New York 2007 US Dist. LEXIS 51802.

a sales agreement with Ertisa, a Spanish corporation in April 2005 in terms of which Cedar would sell Ertisa 4,000 metric tons of liquid phenol for delivery CFR¹²⁶⁹ Rotterdam May. The phenol was to meet certain specifications for colour. Cedar sought to purchase the liquid phenol from third party Dongbu a Korean corporation. The phenol purchased from Dongbu was to be delivered according to contractual specifications FOB Ulsan Anchorage, Korea. It was provided in the contract that inspection would be conducted by an independent surveyor whose findings as to quality and quantity as per shore tank figures at loading port would be final and binding on both parties.¹²⁷⁰

The phenol was loaded on board Cedar's designated vessel at Ulsan Anchorage where samples of it were drawn and some samples removed for immediate testing by SGS Korea Co. Ltd. SGS affirmed that the phenol had met the specifications for colour and payment was made to Dongbu by Cedar under this contract. When the phenol arrived in Rotterdam, more samples were taken for testing and it was found that the colour specifications were not met¹²⁷¹ in that test therefore Ertisa rejected delivery. Cedar managed to mitigate its losses by repurchasing the phenol and sold it to an Indian undertaking then proceeded in an action for recovery of damages in the US federal court.¹²⁷²

This matter had commenced before the court on claims against Dongbu for negligence and fraud, which allegations were deleted and removed from the papers by consent from all parties and confirmed by the court. Cedar also attempted to join Ertisa to the action as an additional Plaintiff who has suffered loss as third party. The court rejected this argument stating that there is no basis for linking Ertisa as additional Plaintiff. The loss that Ertisa had suffered had no juridical link with the loss suffered by Cedar even if those losses occurred

¹²⁶⁹ See International Chamber of Commerce (ICC) INCOTERMS for this shipping term and obligations that arise under it.

¹²⁷⁰ Para 2.

¹²⁷¹ When the Korean samples were also checked they were also subsequently confirmed as being off colour.

¹²⁷² Para. 3 – 4.

simultaneously, they form separate claims. The court held that although it granted that the allegations of fraud and negligence be removed there was still a claim based on the breach of contract in direct violation of the seller's obligations under the CISG Convention. It was confirmed by the court that the provisions of the CISG Convention were applicable in light of the fact that both parties were conducting business in States that are signatories to the CISG Convention.¹²⁷³

This case forms a useful guide to illustrating the limits of the aggrieved party's claim under the CISG Convention in a case of a breach of contract. However, any additional legal questions which may arise out of the same action such as fraud or other criminal charges are subject to alternative application of relevant law. This means that when considering diamond sales only those aspects that the CISG Convention is applicable will be used to resolve contractual matters and those aspects that may relate to other conduct of parties in the contract not related to the CISG Convention will form alternative causes of action arising out of the same contract. Therefore, parties must be aware that the CISG Convention is not all encompassing law in such international trade matters and therefore choosing to be bound by it alone does not mean other applicable domestic law must be ignored particularly where the CISG Convention is silent on those issues.

It must be noted that UNCITRAL keeps a useful account and record of judicial precedent pertaining to the CISG Convention.¹²⁷⁴ This record of decisions provided can be analysed as a measure to determine whether the rules pertaining to the CISG Convention are in fact being uniformly applied by the courts enforcing the treaty. This is an important precedent record considering that the one of the main purposes of the CISG Convention is to unite the global economy's private law in the sale of goods.

¹²⁷³ Para. 11 – 12.

¹²⁷⁴ See UNCITRAL, Case Law on UNCITRAL Texts (CLOUT). See http://www.uncitral.org/uncitral/en/case_law.html 16 March 2010.

What one learns about the Case Law on UNCITRAL texts is that they are recorded as a compilation of abstracts marked with unique user guide numbers. These abstracts are prepared by National Correspondents designated by their States.¹²⁷⁵ Therefore it can be said that it is a method by which the contracting States account for their proper application and interpretation of the CISG Convention. Therefore, there is a co-operative international trade law accountability system that is set in place by the UN for governments to account for their CISG Convention interpretation and application. Therefore any party that is trading with a CISG Convention partner can be assured that any potential dispute that may arise will be dealt with in a predictable or certain manner as new matters are highly unlikely to deviate from established precedent. This is one of the incentives for South Africa to expediently complete the process of ratification of the CISG Convention.

In Canada it has been submitted in a legal opinion that Article 35¹²⁷⁶ is practically the most important provision of the CISG Convention. Article 35 is a provision found in Part 3, Section II of the Convention and provides for conformity of the goods and third party claims. It is submitted that the CISG Convention is silent on remedies for non-contractual misrepresentations, because Article 35(1) requires

¹²⁷⁵ See Introduction to CLOUT. These cases are normally published in the language of the contracting State, however, for the purposes of CLOUT the cases are translated into English or other language abstracts to enable access to any interested parties and users. Obviously the abstracts in themselves may not be sufficient to the understanding of the cases and the rationale applied by the courts therefore the full citations of the cases together with the information of the courts in which those matters are heard are provided for further reading.

¹²⁷⁶ Which provides that '(1) the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

- (a) are fit for the purposes for which goods of the same description would ordinarily be used;
- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
- (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.'

that the seller delivers goods as required by the contract. It has been stated that this leads to the conclusion that the buyer will be remitted to the applicable national law for his remedies. This is seen as a weakness in the provisions of the CISG Convention particularly in the sense that contractual and non-contractual remedies in the sales area should be viewed as part of a single action.¹²⁷⁷ This is a classic practical example where a court would have to consult common law and the CISG Convention to apply to the same contract, perhaps this undesirable effect is one of the reasons ratification of the CISG Convention has delayed in South Africa.

Further, Professor Ziegel submits that Article 35 of the CISG Convention does not distinguish between merchant and non-merchant sellers¹²⁷⁸ and this has been found to be problematic under Canadian law since statutory warranties of merchantability and fitness only apply to a seller who deals with goods of that description where it is within the course of that seller's business to supply such goods.¹²⁷⁹ It is submitted, with respect, that perhaps the answer to this dilemma can be generally assumed that since the CISG Convention is applicable to sales that pertain to international trade in a true sense, then it may be assumed on the whole that it is a CISG Convention applicable to merchants and therefore there is no need to look to common law to distinguish between merchant and non-merchant sales. This would also settle the debate on which diamond sales agreements this Convention would cover in the South African context.

In the case cited as *Oberlandesgericht Hamm*¹²⁸⁰ the German buyer (defendant) offered to buy ten lots of 'wrapped' bacon from an Italian seller (plaintiff). The

¹²⁷⁷ Professor Jacob S. Ziegel *Report to the Uniform Law Conference of Canada on CISG* July, University of Toronto (1981).

¹²⁷⁸ It is submitted that this is a cogent view of the CISG Convention in that while it excludes goods purchased outside of the realm of traditional international trade purposes, see Article 2 for excluded goods, it does not exclude certain sellers therefore a non-merchant seller simply needs to sell CISG Convention compliant goods and that is sufficient to cover him in terms of the Convention even though he is engaging in such a sale as a casual act as opposed to a merchant.

¹²⁷⁹ *Ibid.*

¹²⁸⁰ Case 227 CLOUT CISG: A/CN.9/SER.C/ABSTRACTS/20 (1992); 19U 97/91.

seller replied to the buyer's offer but made reference to 'unwrapped' bacon.¹²⁸¹ In its reply the buyer did not object to the change in terms but after four 'unwrapped' bacon deliveries the buyer refused further deliveries. The seller declared the sale voided and sold the remaining bacon at a loss and claimed damages in the form of the outstanding purchase price and interest.¹²⁸²

Although the facts illustrate that there was a counter offer, the most pertinent question that arose in this case deals with the issue of the buyer's silence to the counter offer. In applying the CISG Convention the court held that the seller's reply to the buyer's offer was a counter offer in terms of Article 19(1) and not a true acceptance in terms of Article 18(1). The buyer's reply to the counter offer because it did not show any objections to the change in terms, the court held, should be treated as an unconditional acceptance in terms of Article 8(2) and because the buyer had refused to take delivery of more than half the goods, this was a fundamental breach of contract in terms of Article 64(1)(a) of the CISG Convention.¹²⁸³

Damages were assessed in terms of the priority provision Article 75¹²⁸⁴ which took into account the seller's attempt to mitigate its loss in terms of Article 77¹²⁸⁵ however since the goods had been sold at a loss *in casu* the method of calculating damages adopted was that provided for in Article 76.¹²⁸⁶ The court

¹²⁸¹ It is trite South African contract law that this is a counter offer which nullifies the original offer.

¹²⁸² Case 227 CLOUT CISG: A/CN.9/SER.C/ABSTRACTS/20 (1992); 19U 97/91.

¹²⁸³ Case 227 CLOUT CISG: A/CN.9/SER.C/ABSTRACTS/20 (1992); 19U 97/91.

¹²⁸⁴ Article 75 provides that 'if the contract is avoided (a term used in case reporting language of the CISG Convention) and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.'

¹²⁸⁵ Article 77 provides that 'party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.'

¹²⁸⁶ Article 76 provides that '(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied

also granted the outstanding purchase price in terms of Article 55 and interest in terms of Article 78 of the CISG Convention.¹²⁸⁷ There is no doubt that the whole dispute would have been avoided if the buyer had objected to the counter offer but since that was water under the bridge in this case the CISG Convention provisions prevailed to protect the aggrieved party. It is submitted that this probably would have been the same stance taken by the South African court however the CISG Convention is crucial as it uniformly synthesized private law on assessment and calculation of damages.

In a further decision cited as *Oberlandesgericht München*¹²⁸⁸ a German buyer (defendant) had ordered cashmere sweaters from an Italian seller (plaintiff). The buyer sought a set-off¹²⁸⁹ on the basis that it had notified the seller that the sweaters were defective. The court held that in terms of the applicable CISG Convention, the seller was entitled to the purchase price in terms of Article 1(1)(a) and Article 53 of the CISG Convention. The claim for set-off was prohibited under the Standard Conditions of the German Textile and Clothing Industry which the parties had made applicable to their contract in terms of Article 18 therefore the issue of set-off had to be determined in terms of German law as provided for in Article 4(a) of the CISG Convention.¹²⁹⁰

With regard to the validity of the contract, the court held that the buyer could not declare the contract voided or reduce the purchase price in terms of Article 50 of the CISG Convention. This is due to the fact that the buyer had lost its ability to rely on the lack of conformity as it should have examined the goods within a short

instead of the current price at the time of avoidance. (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.'

¹²⁸⁷ Case 227 CLOUT CISG: A/CN.9/SER.C/ABSTRACTS/20 (1992); 19U 97/91.

¹²⁸⁸ Case 232 CLOUT CISG: A/CN.9/SER.C/ABSTRACTS/20 (1998); 7 U 4427/97.

¹²⁸⁹ See Michael Greenhalgh *Bridge A Premier on English Law of Set-Off* 24 *Journal of Malaysian and Comparative Law* (1997) 97. Set off has been accepted as an equitable defence for the cancellation of mutual debts between the parties in question. This principle may also be applied in insolvency where mutual debts cancel one another.

¹²⁹⁰ *Ibid.*

period as the circumstances required in terms of Article 38(1) and 39(1) and as agreed between parties in terms of the incorporated Standard Conditions which the buyer had failed to comply with.¹²⁹¹

The court held further that there could not be an exclusion of Article 39(1) of the CISG Convention by operation of Article 40 which would have been applicable had the seller overlooked obvious and serious defects in the goods which could have been detected through the exercise of ordinary care. *In casu* the buyer had distributed the goods to its very own customers and it was evident that the goods were neither unsuitable nor unsaleable. The general disputes considered herein illustrate that the application of the CISG Convention is generally to favour the upholding of the international sale contract having had regard to the rules and what is equitable in the circumstances.

7.7 Conclusion

In this chapter the CISG Convention has been considered carefully and it is submitted that it is a crucial in the international sales, particularly diamond sales. Although this Convention has not been ratified by South Africa, it is clear the ratification of the CISG Convention is welcome in South Africa. In this chapter the implications of ratifying the CISG Convention particularly on the diamond industry have also been elucidated.

It is submitted that a clearer understanding of these implications will promote its much awaited ratification. Comparatives from foreign jurisdictions have been used to demonstrate the extent of these implications. Further elucidated in this chapter are some of the benefits and difficulties that are inherent in the application of the CISG Convention and would manifest upon ratification of the CISG Convention. Having considered these implications, the conclusions expressed below can be drawn.

¹²⁹¹ *Ibid.*

The CISG Convention is useful in harmonizing international law on sales contracts which are particularly prevalent in international diamond trade, bearing in mind that Africa has some strong diamond producing countries such as South Africa, Botswana and the DRC, who would benefit in aligning their diamond sales with the objectives of the CISG Convention. Interestingly the three diamond producing States named herein have not yet ratified the CISG Convention.

One of the issues raised by the CISG Convention in its provisions is the question as to whether it is relevant to international diamond trade, since diamond sales usually have a character of being mixed sales.¹²⁹² This defining of sales contracts is even more important in the context of international trade diamonds. This means that while the CISG Convention clearly applies to sale of rough diamonds as a 'produced' product. What happens in the case where further labour and skills have been applied to such diamonds to the point that the final sold product seems to fit with excluded goods in terms of the CISG Convention? This would make that diamond a mixed sale therefore if diamonds are mixed sales then it has to be clarified in law in terms of the CISG Convention whether or not the provisions of the CISG Convention are even relevant to international diamond trade in such a context in the first place. In such cases it is submitted that the preponderant test¹²⁹³ can be used on a case by case basis to determine whether an international diamond sales contract is one covered by the CISG Convention or not.

On the whole the application of the CISG Convention is desirable in international trade as it promotes the attainment of international legal harmony in sales contracts on a global scale. On the other hand however if state parties take advantage of Article 96, which is the 'opt out' or reservation clause on

¹²⁹² This is because often diamonds require labour and skills such as cutting, polishing and beneficiation to prepare them for sale.

¹²⁹³ Article 3(2) of the CISG Convention will not apply in the case where the preponderant part of the supply agreement between buyer and seller requires that the supplier, as a furnisher of the goods, in addition to supplying the goods has to further supply labour, skill and other services connected to that supply.

enforcement of oral agreements this could prove to be a set back to international uniformity of sales rules as it alters the position on the domestic requirements on form of the contract. Some countries have actually used the escape gap provided by this Article to escape enforcement of contracts that are not reduced to writing; this may be seen as an injustice or a punitive measure to merchants who have not adhered to local requirements for contracts to be in written form.

Nevertheless, it can be safely assumed that the CISG Convention provides more solutions than problems in the context of international sale of commodities such as diamonds and South Africa should expeditiously move to ratify the CISG Convention. It is an example of international law that upholds principles of equity, fairness and promotes comity. All these principles are fundamentally reflective of Constitutional principles in South African law. It is therefore submitted that South African international trade would benefit from the formal adoption of the CISG Convention and this will particularly enhance diamond law.

Chapter 8: South African Law on International Agency and the Diamond Industry

8.1 Introduction

Diamond trade plays a significant role in sustaining domestic economies of diamond rich countries such as South Africa. This makes such countries important contributors to the global economy and therefore it is important to understand the international trade instruments that control these trade activities at international level.¹²⁹⁴ The regulation of diamond trade in these economies tends to reflect international trends in an attempt to achieve the most equitable commercial participation through uniform international regulatory frameworks. Once again principles of equity in economic activity are crucial to the development of laws in the Constitutional dispensation.¹²⁹⁵ The Convention on Agency in the International Sale of Goods adopted by the International Institute of the United Nations Organization for the Unification of Private Law (UNIDROIT), in Geneva on 17 February 1983 (The Convention on Agency)¹²⁹⁶ which is part of South African law will be considered in this chapter to illustrate the broad development nature of diamond regulations in the current dispensation.

The trade regulatory frameworks are inevitably ensconced with various international trade principles and norms commonly found in the commercial and business laws of various modern States.¹²⁹⁷ Most of these principles have been codified by the global community into international instruments regulating the

¹²⁹⁴ South African Diamond and Precious Metals Regulator *Annual Report* (2008) 14 – 17. www.sadpmr.co.za 27 October 2009.

¹²⁹⁵ Constitution of the Republic of South Africa Act, 1996 section 39 and 231.

¹²⁹⁶ Convention on Agency in the International Sale of Goods Act 4 of 1986 set out in the schedule of the Act section 1 definition of the Agency Convention.

¹²⁹⁷ See endeavours by the International Chamber of Commerce as a world business organization which is instrumental in shaping modern business practices in the global community. <http://www.iccwbo.org/> 17 March 2010. The ICC is instrumental in shaping business practices by making policy in anti-corruption, arbitration, banking technique & practice, Commercial Law and practice, competition, corporate responsibility, customs and trade regulations, e-business, IT and telecommunications, environment and energy, financial services and insurance, intellectual property, marketing and advertising, taxation, trade and investment policy and transport and logistics.

conduct of certain transactions and commercial arrangements on the international stage.¹²⁹⁸

The need to harmonize the regulatory framework for international agency eventually culminated into the Convention on Agency in the International Sale of Goods.¹²⁹⁹ The international rules on agency in commercial arrangements and trade in South Africa has been made necessary or perhaps naturally applicable as a result of the adoption of other international rules on the sale of goods,¹³⁰⁰ international contracts, arbitration and other commercial rules which South Africa has adopted or considered adopting as a global economic player with a number of industries and an exporter of diamonds in particular.

In South African law the general principles on the law of agency¹³⁰¹ are clearly well developed and accord with most of the principles, norms and provisions of the Agency Convention. It is however fortunate that there has not been a considerable application and interpretation of the Convention principles on the international scale by South African courts as this illustrates that there is harmony and litigation is minimal. Having said that though it is submitted that the Agency Convention at present seems like an important reform¹³⁰² to South African law, more particularly in international trade matters however currently the Convention really seems dormant in application.

¹²⁹⁸ See www.unidroit.org/ 17 March 2010 endeavours by UNIDROIT.

¹²⁹⁹ This Agency Convention forms part of South African International Law and is contained in the Convention on Agency in the International Sale of Goods Act 4 of 1986.

¹³⁰⁰ Though admittedly the Agency Convention is capable of being applicable in cases where the CISG Convention is not applicable, for example, in a case where parties have an agreement under the Agency Convention but have elected not to be governed by the CISG Convention.

www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf 17 March 2010.

¹³⁰¹ *Turkstra v Kaplan* 1953 (2) SA 300 (T) 301 C. The South African law of agency is a combination of the Roman-Dutch Law of the contract of mandate and the modern principles of commercial agency. *Schachat Cullum (Pty) Ltd and another v McLearie* [1998] JOL 1727 (W) 13, *Francis v East London Board of Executors* 1935 EDL 405 p 427.

¹³⁰² Ailola D.A. and Eiselen G.T.S. (Original Text by Horn J.P.) *Trade and Industry: Agency in International Sale of Goods Law of South Africa* Volume 28 (2002) 824. Edwards A.B. (updated by Ellison Khahn) *Conflict of Laws Law of South Africa* Volume 2(2) 2 ed (2003) 283.

The fact that South African International Law of Agency has not been the subject of legal testing¹³⁰³ before the courts leaves some concern about its actual contribution to the development of national law.¹³⁰⁴ This means that although it is a thorough law that may be accepted as having prevented disputes concerning the conduct of agents in international sales, it may also have simply fallen into inactivity at the election of parties.¹³⁰⁵ In spite of this seemingly inactive state of the Convention, it is still very crucial and developmental to diamond trade regulations even if untested it is useful in providing a legislative code to create certainty in the international law on agency.¹³⁰⁶

Even in the global context, it has emerged from UNCITRAL case law reports (CLOUT)¹³⁰⁷ that the Convention on International Agency in the sale of goods has hardly been a cause of legal disputes. By the same token whether or not there are disputes the true test of an effective law is found in the substantive rules it provides and the clarity of conduct expected in terms of that law. It is submitted that the Agency Convention has those qualities of a law that brings about international clarity in rules of agency and therefore is crucial to international sales particularly diamond sales should agents be employed to complete such contracts.

¹³⁰³ This is in spite of the fact that the jurisdiction of the South African courts is clearly provided for in section 4 of the Convention on Agency in the International Sale of Goods Act 4 of 1986. This section provides that 'any offence contemplated in section 3 (2) shall, for purposes in relation to jurisdiction of a court to try the offence, be deemed also to have been committed at any place where the accused happens to be.'

¹³⁰⁴ To date it appears that in South African precedent the Convention on Agency in the International Sale of Goods Act 4 of 1986 has not been considered. However there are some useful secondary sources of law on the subject and its impact on South African law. These author's contributions are cited as follows: Ailola D.A. and Eiselen G.T.S. (Original Text by Horn J.P.) *Trade and Industry: Agency in International Sale of Goods* Law of South Africa Volume 28 (2002) 824. Edwards A.B. (updated by Ellison Khahn) *Conflict of Laws* Law of South Africa Volume 2(2) 2 ed (2003) 283.

¹³⁰⁵ Article 5 of the Agency Convention provides that 'the principal, or an agent acting in accordance with the express or implied instructions of the principal, may agree with the third party to exclude the application of this Convention or, subject to Article 11, to derogate from or vary the effects of any of its provisions.'

¹³⁰⁶ This is in line with the preamble of the Agency Convention.

¹³⁰⁷ See UNCITRAL, Case Law on UNCITRAL Texts (CLOUT).
http://www.uncitral.org/uncitral/en/case_law.html 16 March 2010.

This chapter will discuss and analyze to an extent the important reform to international trade law as contained in the Agency Convention. Further in this analysis an inclusion of the consideration of the New International Economic Order (NIEO)¹³⁰⁸ which has brought about the Agency Convention's creation will be studied in light of the South African Constitutional¹³⁰⁹ dispensation. Further, this chapter will discuss the relevance of both the Convention and the domestic legislation that domesticated the Convention and its impact on diamond trade as a briefly considered sample industry.

The efforts at formulating the Agency Convention efforts commenced as early as 1935.¹³¹⁰ The exact date account of this period is unclear however it is recorded that the Agency Convention unification project was initiated by UNIDROIT in 1935. These efforts were interrupted during World War II and resumed in 1946.¹³¹¹ The draft initial draft documents showing efforts to unify the law on agency were presented in the periods ranging from 1961 to 1964 where they were initially debated and subjected to scrutiny of both the common law and civil system countries.¹³¹²

The Convention finally came about in 1983 and South Africa ratified it in 1986. This means that by the time the Agency Convention was adopted, the phrase 'new economic order' was already in use and was also a relevant consideration in international trade. That the order was new distinguished it from the international economic order developed after World War II which was mainly inspired by the economic theory of the comparative advantage. The new

¹³⁰⁸ See preamble of the Agency Convention. Schedule to the Convention on Agency in the International Sale of Goods Act 4 of 1986. www.unidroit.org/.../conventions/1983agency/1983agency-e.htm 17 March 2010.

¹³⁰⁹ Constitution of the Republic of South Africa Act, 1996 sections 22, 39 and 231. It is submitted that the incorporation and effect of Conventions such as the Agency Convention support the right, through international instruments, contained in section 22 of the Constitution which provides for the freedom of trade, occupation and profession.

¹³¹⁰ Sarcevic Petar and Volken Paul *International Sale of Goods Dubrovnik Lectures* Oceana Publications (1986) 447.

¹³¹¹ *Ibid.*

¹³¹² *Ibid.*

economic order was providing a more equitable advantage which allowed developing countries to participate fairly in international trade and as equal partners.¹³¹³

8.2 The Relevance of Agency in International Diamond Trade

The need for agency in international diamond sales comes as a natural consequence of the industry needs and nature of modern world trade and commerce. These involve various aspects ranging from formulation of necessary contracts, sale negotiations, the transportation and insurance thereof as well as delivery. A web of relationships that result naturally makes agency necessary and indispensable to facilitate international diamond trade and commerce. These relationships created by contracts of mandate are anticipated in the Agency Convention.

There are various dealings and arrangements in diamond trade that makes agency necessary in the facilitation of negotiations and formation and execution of contracts. An example would be the conduct of 'sighting' in the sale and purchase of rough diamonds.¹³¹⁴ Since most diamond trade takes place through brokerage, for example in the New York Diamond Dealer's Club (DDC) it has been stated that in America's commercial traffic in diamonds has most members acting as middlemen between the diamond producers who mine the stones (Most of which are arranged by De Beers) and diamond retailers who convert them into jewellery.¹³¹⁵

In the practice of diamond sales, the diamond purchasing method involves a process whereby a diamond producer offers their diamonds to a select group of diamond buyers. These buyers would have had to prior to the sighting have filed a shopping list with the diamond producer where the buyer or Sightholder as

¹³¹³ Ioannis Lianos *The Contribution of the United Nations to the Emergence of Global Antitrust Law* Tulane Journal of International and Comparative Law 15 Tul. Int'l & Comp. L. (2007) 415 a 422.

¹³¹⁴ Choi Kwan *Monopoly and Market Demand* (2001) Monopoly Par B. 8.

¹³¹⁵ Richman D. Barak *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal* Virginia Law Review 95 Va. L. Rev. 325 (2009) 332.

commonly known in diamond sales would indicate on the shopping list the amount of diamonds to be purchased and the quality required. The diamond producer then selects the diamonds for the buyer puts them in the relevant buyer's box and attaches a price tag which generally is up to USD\$ 500,000.00. It is open to the buyer to either accept or reject the price of the producer. Sight holders who do not buy often are usually not invited to the diamond sights.

There is a wide scope for the use of intermediaries and a typical contract of mandate may be for the agent to inspect the diamonds and one to but engage the producer in negotiating the best possible price to suit the principal. It is of course open to the principal to ratify such actions of the agents which bring about the agreement. It is perfectly clear that agency in diamond sales is the oil that lubricates commercial arrangements and keeps the whole trading system in.¹³¹⁶

8.3 Convention on Agency in the International Sale of Goods Act 4 of 1986

South Africa has ratified the United Nations Convention on Agency as appears in the Convention on Agency in the International Sale of Goods Act.¹³¹⁷ Most of the substance of this Act appears in this schedule as previously mentioned. The ratification process is provided for in the Convention on Agency in the International Sale of Goods Act¹³¹⁸ which also provides for the ratification of subsequent amendments to the Agency Convention. The adoption of this Convention is an important step towards the harmonization of the South African

¹³¹⁶ One of the Sight holders of De Beers, for example, is Henri Polak Diamond Corporation who are wholesale distributors of natural industrial diamonds including dressers, shapes, elongates, flat elongates, diestones, maccles, sawables and drilling. The company has been operating through a series of agents and is currently in the process of expanding its network of agents and clients covering areas such as the US, Europe, Japan, South Korea, Taiwan, Hong Kong, People's Republic of China, Mexico and Brazil
¹³¹⁷ 4 of 1986.

¹³¹⁸ 4 of 1986 section 2 in line with section 231 of the Constitution of the Republic of South Africa Act, 1996. Section 2 of the Convention on Agency in the International Sale of Goods Act 4 of 1986 which provides as follows: '(1) The Convention shall, subject to the provisions of this Act, apply in the Republic. (2)The State President may do all things necessary to ratify or cause to be ratified on behalf of the Republic any amendments of or additions to the Convention which may be made from time to time, and may by proclamation in the *Gazette* amend the Schedule to give effect to any amendment or addition so ratified. (3) The Minister shall lay a copy of every proclamation issued under subsection (2) upon the Table in the respective Houses of Parliament within 14 days after the date of the publication of the proclamation in the *Gazette*, if Parliament is then in ordinary session, or, if Parliament is not then in ordinary session, within 14 days after the commencement of its next ensuing ordinary session.'

legal system with that of the rest of the modern world. The Convention on Agency in the International Sale of Goods Act¹³¹⁹ was assented to on 4 March 1986 and its commencement date is 1 May 1987.

The State president is entitled to ratify or cause to be ratified amendments and additions to the Convention. The Minister of Trade and Industry will have the responsibility of tabling proclamations as contained in the *Government Gazette* reflecting additions or amendments to the Convention in the respective Houses of Parliament.¹³²⁰ This statutory acceptance of the Convention into South African trade regulations clearly expresses much confidence in the UNIDROIT's efforts in creating international trade rules that enhances South African law of agency in the international sale of goods whether such rules are presently reflected in existing law or to be created in future.

Interestingly the Convention on Agency in the International Sale of Goods Act¹³²¹ makes provision for the criminal sanction under Convention on Agency in the International Sale of Goods Act.¹³²² The responsible Minister is empowered to make regulations in accordance with Parliamentary processes that will give effect to the Convention in a manner that is appropriate and unique to South Africa, as well as prescribe tariffs and recovery of expenditure incurred while applying the Convention. The contravention of the regulations under this Convention on Agency in the International Sale of Goods Act¹³²³ will attract penalties of a fine¹³²⁴ or imprisonment.¹³²⁵

¹³¹⁹ 4 of 1986.

¹³²⁰ Section 2.

¹³²¹ 4 of 1986.

¹³²² 4 of 1986 section 3.

¹³²³ 4 of 1986.

¹³²⁴ Convention on Agency in the International Sale of Goods Act 4 of 1986 section 3(2) prescribes a fine not exceeding R 1000, 00 and imprisonment for up to 12 months or both.

¹³²⁵ Section 3(1), (2), (3) and (4) to repeal the disapproved regulation, this will be achieved in terms of section 12(2) of the Interpretation Act 33 of 1957.

Although this statutory sanction illustrates the extent of enforcement of the regulations such regulations are subject to heavy testing and debate by the Houses of Parliament and may be disapproved and treated as repealed.¹³²⁶ It is not clear from the face of the Convention on Agency in the International Sale of Goods Act¹³²⁷ how the importation of purely criminal sanctions will enhance adherence to a law designed to facilitate purely commercial matters and this is probably there have not been any reported convictions based on the Convention on Agency in the International Sale of Goods Act¹³²⁸ to date.

Perhaps this might be particularly more relevant to diamond trade as the age old problem of illicit diamond trading may lead to a contravention of the Convention on Agency in the International Sale of Goods Act¹³²⁹ by potentially overzealous traders who sadly seek to avoid legal diamond trade at all costs. While the international agency law in South Africa seems to have been received with sufficient zeal as illustrated by deterrent criminal sanctions for breaches of the Convention on Agency in the International Sale of Goods Act,¹³³⁰ the Agency Convention currently remains dormant as there has not been much activity requiring its application from the basis of litigation. This lack of legal testing is not to suggest that it is an unimportant legislative mechanism in international trade.

8.3.1 Understanding the Provisions of the Convention

It is submitted that conducting business in foreign countries through agents has become a common practice that has necessitated the creation of the Agency Convention. This is because agency though present in the systems of all modern States has generally tended to follow two distinct systems of law either in the form of common law or a civil law system. The main differences in these systems is that in common law agency has been defined as the relationship that exists between two people, principal and agent, one of whom expresses implicitly or

¹³²⁶ *Ibid.*

¹³²⁷ 4 of 1986.

¹³²⁸ 4 of 1986.

¹³²⁹ 4 of 1986.

¹³³⁰ 4 of 1986.

impliedly that the other should represent him or her. The civil law countries have tended to make a distinction between direct and indirect agency. Direct agency refers to a legal situation where the agent not only acts on behalf of the principal but in the name of the principal.¹³³¹ Indirect agency refers to a commission agent who concludes a contract¹³³² in his own name but on account of the principal.¹³³³

Both common law and civil elements¹³³⁴ of agency have been noted in internal South African agency law however such internal agency rules are not the focus of this chapter. What is being considered in this chapter is the impact of the legislative endeavor to have a uniform stance in the sale of goods or international trade in South Africa. It is submitted that having due regard to the dualistic elements of internal national agency law South Africa has done well to adopt the Agency Convention and it is therefore important to consider the harmonizing provisions that are contained therein and their impact on diamond trade and other international sales generally.

The Convention on Agency in the International Sale of Goods Act¹³³⁵ explicitly sets out in the preamble that its primary purpose is to establish common provisions concerning agency in the sale of goods bearing in mind the United Nations (UN) objectives and desire to enhance the development of international trade. The UN objectives include the need to develop international trade on the basis of equality and mutual benefit and a desire to promote friendly relations among States in the New International Economic Order.¹³³⁶

This international trade theme directly relates to the philosophy underlying of the CISG, denoting that the two Conventions can be read together. South Africa has

¹³³¹ In this case a contract is concluded between the principal and the third party through an agent.

¹³³² A contractual relationship in this case is formed between the agent and third party.

¹³³³ Sarcevic Petar and Volken Paul *International Sale of Goods Dubrovnik Lectures* Oceana Publications (1986) 443; 444.

¹³³⁴ This can be evidenced by the long standing practice and recognition of commissioned agents.

¹³³⁵ 4 of 1986.

¹³³⁶ See elaboration on the NIEO contained in the latter part of this chapter as part of an analysis of the driving common international purpose behind the creation of the Agency Convention.

however not ratified the Sale of Goods Convention yet and it is proposed that it will not be difficult to conceive of how the two Conventions would be applied in unison and enhance each other. The two Conventions together will serve to homogenize international sales rules while taking into account the diversity of economic and socio-legal aspects of different States in order to remove barriers in international trade in order to promote and enhance international trade.

The Convention on Agency in the International Sale of Goods Act¹³³⁷ basically makes provision in cases where one person (the agent) has authority¹³³⁸ or purports¹³³⁹ to have authority on behalf of another person (the principal) to conclude a contract of sale of goods with a third party. The Act also governs not only the conclusion of a contract by an agent but any other act undertaken by him to for the purposes of concluding that contract in relation to its performance. It also governs the relationship between the principal or agent and the third party. Further, it should be noted that it applies irrespective of whether the agent acts in his own name or that of the principal.¹³⁴⁰

In the context of diamond sales the agency can be concluded where the Sightholder (a diamond buying merchant) appoints an agent to act on his or her behalf in purchasing the said diamonds. There may be other agency contracts such as the appointment of a valuator who is not independent in order to advise the diamond merchants on the fair price of the diamonds. Further, with regard to carriage of the said purchased diamonds the carrier is also the agent of the diamond merchant and all the obligations arising from those agreements will be

¹³³⁷ 4 of 1986.

¹³³⁸ This principle has always formed part of South African law in that an agent must have authority to act on behalf of the principal. An agent is a person who creates, varies or discharges contractual obligations on behalf of another, known as principal. For the purposes of the Convention, agency is limited to the sale of goods in the context of international trade.

¹³³⁹ Purports to have authority applies in the context where the agent has led parties to believe that he has the authority to act on behalf of the principal, in such a case the authority is referred to ostensible authority or agency by estoppel. *Coetzer v Mosenthals Ltd.* 1963 (4) SA 22 (A).

¹³⁴⁰ Article 1.

determined within the context of the Convention on Agency in the International Sale of Goods Act¹³⁴¹ where it applies directly or is necessarily inferred.

On the international scale the Convention applies only where the principal and the third party have their place of business in different countries. This is subject to the agent and its place of business being in a Contracting State or the rules pertaining to private international law leading to the application of the law of the Contracting State. The Convention also applies where at the time of contracting, the third party was not aware of the agency¹³⁴² and such third party's place of business and the agent's business are in different States and such a State is either a Contracting State or the rules pertaining to private international law make the Convention applicable.¹³⁴³

Diamond merchants particularly and other merchants often structure their business entities so that an umbrella company or entity contains representative organs, officers or partners spread across various and different States. Those representatives may enter into contracts on behalf of the parent or holding company and sometimes the constitutive documents of the controlling entity may often determine the power of the representative in such circumstances. The question of whether this scenario can be interpreted as an agency is anticipated by the Convention and can be resolved by reference to the provisions of the Convention.

Article 3 of the Convention makes provision for circumstances where the Convention is specifically excluded. Article 3 provides expressly that the Convention does not apply to the agency of a dealer on a stock, commodity or other exchange, agency of an auctioneers, agency by operation in family law, for

¹³⁴¹ 4 of 1986.

¹³⁴² This would be the case where the agent outwardly presents itself as principal.

¹³⁴³ Article 2 (1)(2). Article 2 (3) further provides that neither the nationality of the parties nor the civil or commercial character of the parties or of the sales contract is to be taken into consideration in determining the application of the Convention. This Article must be read together with Article 5 which provides that parties may by agreement exclude the application of this Convention.

instance, succession and or matrimonial law, agency arising out of a statutory or judicial authorization to act for a person without capacity to act, for instance, a *curator bonis* and an agency that has arisen by virtue of a judicial decision or quasi-judicial authority or subject to control of such authority.¹³⁴⁴

The Convention also makes provision for entities represented by other organs, officers or partners in other jurisdictions within itself or other States for the purposes of concluding contracts. Article 4 provides that, such a representative organ, officer or partnering entity¹³⁴⁵ shall not be regarded as the agent of that entity in so far as in the exercise of his or her functions as such, he or she acts by virtue of an authority conferred by law or by the constitutive documents of that entity. This is an important distinction in the law of agency as it is important to differentiate in all circumstances the legal obligations of a principal acting for its own interests and using certain organs or officers to meet those obligations and those of agent acting within the given mandate.

Most importantly the Convention clearly provides in Article 4 (b) that a trustee is not to be regarded as an agent of a trust, of the person who has created the trust or of the beneficiaries. The exclusionary provisions of the Convention assist in clarifying the fact the main purpose of the Convention is to regulate international commercial sales agency. All other sales of similar nature are excluded from the ambit of the Convention must be decided according to each country's domestic rules or applicable law according to the rules of private international law. This is in accordance with the basic principle in the international regulation of the global economy.¹³⁴⁶

¹³⁴⁴ Article 3(1)(a), (b), (c), (d) and (e).

¹³⁴⁵ For the purposes of the Convention, whether the entity is an organ, officer or partner of a corporation, association, partnership or any other entity, whether or not possessing legal personality.

¹³⁴⁶ Article 6.

Further, Article 7 provides that regard must be had to trade usages and other widely known trade customs.¹³⁴⁷ This was the case in *Santam Insurance Co. Ltd. v SA Stevedores Ltd* 1989 (1) SA 183 (D). In this case South African law of contract was applicable in terms of section 6(2) of the Admiralty Jurisdiction Regulation Act,¹³⁴⁸ however, a widely accepted maritime practice of the insertion of the Himalaya clause in a shipping document resulted in the contradiction of the contractual rule of South African law, that being, privity of contract. The court held that in applying contract law to shipping contracts, such application must be done with due regard to established maritime practices such as the insertion of the Himalaya clause.

The Himalaya clause has its origin in the decision of the court in *Alder v Dickson*¹³⁴⁹ In this case the defendants were the master and boatswain¹³⁵⁰ of the P&O passenger liner Himalaya. The plaintiff was injured when an insecure gangway¹³⁵¹ slipped and he fell 16ft to the wharf. The plaintiff had a contract with P&O which excluded liability¹³⁵² for such an injury. The defendants relied on that

¹³⁴⁷ Article 7 provides that '(1) The principal or the agent on the one hand and the third party on the other are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) They are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.'

¹³⁴⁸ 105 of 1983.

¹³⁴⁹ [1955] 1 QB 158.

¹³⁵⁰ This term is used to describe a warrant officer on a warship, or a petty officer on a merchant vessel, in charge of rigging, anchors, cables, etc. See <http://dictionary.reference.com/browse/boatswain> 7102 25 March 2010.

¹³⁵¹ This term refers to an opening in the railing or bulwark of a ship, as that into which a gangplank fits, see <http://dictionary.reference.com/browse/boatswain> 7102 25 March 2010.

¹³⁵² See paragraph 18 and 19, where the exclusion of liability was contained in the clause providing that 'The contract between the Company and the Plaintiff, as evidenced by the ticket issued to her by the Company, included the following provisions. Printed on the ticket itself were the words: "*Your attention is specially directed to the conditions of transportation on the covers containing this ticket. Passengers and their baggage are carried at passengers entire risk*". Printed on the inside front cover were certain conditions which (so far as material for the present purpose) ran thus: "*Conditions and Regulations. This ticket is issued by the Company and accepted by the passenger subject to the following conditions and regulations. The Company will not be responsible for and shall be exempt from all liability in respect of any..... injury whatsoever of or to the person of any passenger.....whether such injury of or to the person of any passenger.....shall occur on land, on shipboard or elsewhere.....and whether the same shall arise from or be occasioned by the negligence of the Company's servants on board the ship or on land in the discharge of their duties, or while the passenger is embarking or disembarking, or whether by the negligence of other persons directly or*

clause. The court found the defendants liable on the basis that they owed the plaintiff a duty of care in tort.¹³⁵³

This means that the Agency Convention will regulate diamond sales agency conduct however all other diamond trade peculiarities and trade usages will not be covered in terms of the Convention. Further, where the Agency Convention is not to be governing law, a forum court may have to decide what law is to be applied even if that alternative law is in a form of other model laws,¹³⁵⁴ uniform customs or trade usages. However, these provisions are subject to agreement by the parties and the standard business practices¹³⁵⁵ of the particular trading parties.

Chapter II of the Convention deals with the establishment and scope of the agent's authority. It is established as fully accepted in South African law that the authority of an agent may be express or implied. An example of express authority of an agent to act on behalf of a principle includes a case where a mandate is signed in terms of law. An instance would be the appointment of estate agents in terms of the Estate Agency Affairs Act.¹³⁵⁶

This statute provides that an estate agent holds himself or herself out to the public that he or she on the instruction of or on behalf of another person sells or purchases publicly immovable property or hires and lets or publicly exhibits for

indirectly in the employment or service of the Company, or otherwise, or by the Act of God.....dangers of the seas.....or by accidents.....or any acts, defaults or negligence of the..... Master, Mariners..... Company's agents or servants of any kind under any circumstances whatsoever.....".
The above-quoted provisions of the contract admittedly precluded.'

¹³⁵³ Para. 34.

¹³⁵⁴ Bridge Michael *The International Sale of Goods Law and Practice*, Oxford University Press (1999) 37.

It is important to note here that uniform substantive law is different from model laws of the kind usually sponsored by international organizations such as UNCITRAL and UNDRIT. Model laws are proffered for enactment to States without becoming contractually bound to do so. See UNCITRAL Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997) (III)(11) A model law is legislative text that is recommended to States or incorporation into their national law and does not require the enacting State to notify the United Nations (UN) or other States that may have also enacted such model law.

¹³⁵⁵ Sarcevic Petar and Volken Paul *International Sale of Goods Dubrovnik Lectures* Oceana Publications (1986) 459.

¹³⁵⁶ 112 of 1976.

hire immovable property. This type of agency clearly does not fall within the realm of the Convention but is an illustration of a business agency that is rigorously regulated in South African law¹³⁵⁷ to provide for all the essential elements of an agency agreement and thus the authority of an estate agent is clear by express authority.

With regard to implied authority, the issues become technical and sophisticated since more often than not parties may already be in a dispute and wish to have a court determine whether an agency agreement was concluded or not. The court stated in the case of *O'Connell, Manthe, Cragg and Partners v Charles*¹³⁵⁸ that the agent in this case had implied authority to act because the principal was at all times aware of the actions of the agent and had not questioned such actions as they were in any case required to reasonably allow the agent to execute his mandate. The question of the agent's authority to act affects the liability to third parties and thus becomes important in law to determine the scope of such authority and whether actions of agents do not exceed such authority.

Article 9(2) is a wide and all encompassing provision designed to protect agents in international trade. It provides that the agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authorization was given. This provision allows each agent to be able to freely enter into contracts which will be incidental and natural in the completion of the principal's mandate. This allows for a fair degree of freedom and 'commercial decision making leeway'. An agent in such cases is free to make such decisions in the international trade context for instance that would allow the agent to negotiate other incidental contracts and arrangements to mitigate losses and protect the interests of the principal and third parties.¹³⁵⁹

¹³⁵⁷ See *Taljaard v TL Botha Properties* 2008 (6) SA 207 (SCA). In this case the court upheld the validity of an agency agreement and stated that the contract of mandate cannot be invalidated by lack of fidelity fund certificate required in terms of the Estate Agency Affairs Act 112 of 1976.

¹³⁵⁸ 1970 (1) SA 7 (E).

¹³⁵⁹ Article 9(2) provides that the agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authorization was given.

The Convention does not prescribe formalities for the agency contract. Accordingly, oral contracts are enforceable and binding by virtue of Article 10. This provision is also present in the CISG Convention¹³⁶⁰ which requirements no formalities in drawing up international sales contracts. It is submitted that the move to enforce oral contracts in international trade is practical and realistic. The prevalence of modern devices that allow communication and formation of contracts makes it difficult to prescribe a particular form of contract. Oral contracts however pose a risk from an evidentiary perspective as clearly demonstrated in the case of *Flint v Flemyng*.¹³⁶¹ To overcome the oral contract dilemma for evidentiary purposes the Convention provides that parties may require that all agency contracts be concluded in writing by opting out of oral contract provision in Article 10.¹³⁶²

In *Flint v Flemyng*¹³⁶³ the vessel *Hope* was insured by the plaintiff with the defendant insurers for a voyage at and from Madras to London. The cargo carried comprised of 25 tons of redwood, which the master had purchased on behalf of his owner, 122 tons of saltpeter (KNO₃), which the ship was contracted to carry and a further 90 tons of light goods for which there was no written contract of carriage, only a verbal agreement. Before the cargo was loaded, the vessel was lost by a peril insured against and the plaintiff sought to enforce his claim in terms of the policy. The question before the court was: 'on which items of cargo could the policy on freight be held to have attached?'

The court found that the insurers were liable for the freight on the redwood and saltpeter, but were only liable for the freight on the light goods if the contract of carriage could be found. What was interesting about this case is that the court stated that in order for an insured to recover on a policy on freight, that insured

¹³⁶⁰ <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> 17 March 2010.

¹³⁶¹ (1830) 1 B & Ad 45, English case.

¹³⁶² Article 11.

¹³⁶³ (1830) 1 B & Ad 45, English case.

must prove that but for the intervention of some perils insured against, some freight would have been earned. The insured must show that either goods were loaded on a vessel or there was some contract for doing so. Therefore, the contract for the carriage of light goods, which was a verbal one, had to be proved before the insured could recover under the policy on freight. The irony of this case is that while it was acknowledged in a sense that there was a verbal contract of carriage in respect of the light goods, there was no recovery in terms of the insurance policy because such contract could not be proved.¹³⁶⁴

It was apparent in the case of *Gardner & Another v Margo*¹³⁶⁵ that it is more apt to have all aspects of the agent's mandate recorded in written form, including any subsequent oral agreements as failure to do so may cause uncertainty and create room for disputes. In the above case, the court had to interpret an agency agreement where the agent was mandated to sell shares however it was alleged by the agent that part of the mandate included an incorporation of a subsequent oral agreement which would result in the agent being a higher amount for the sale of shares than that reflected in the written contract.

One of the arguments that were made before the court in this case was that the written contract of mandate was not a correct reflection of the intentions of the parties¹³⁶⁶ and it was pleaded that the oral agreement had to be taken as the correctly intended effect of the contract.¹³⁶⁷ This line of argument in a contract of mandate is unacceptable on two grounds. Firstly, there is the obvious fact that the oral contract alleged by one party is usually beneficial to the party alleging it and secondly the courts have to interpret the contract and determine for the parties what they intended, it has always been undesirable that courts should formulate contracts on behalf of parties.

¹³⁶⁴ *Ibid.*

¹³⁶⁵ 2006 (6) SA 33 (SCA).

¹³⁶⁶ 38 A.

¹³⁶⁷ 39 H.

In this case the court interpreted the contract of mandate with regard to the alleged oral contract by examining the actual effect of the alleged oral terms. The court determined the probability of having adopted subsequent oral terms by testing them against what was contained in the written agreement and held that the written terms themselves were unclear as to the actual sale price of the shares to which the mandate to sell related or the fate of the proceeds sold in excess of what was provided in the written agreement.¹³⁶⁸ In light of these uncertainties created in the written contract alone, the court had to use the rules of interpretation established in South African law to determine the intention of the parties by considering the terms that follow naturally from the surrounding circumstances of the contract.¹³⁶⁹

The court held that from the evidence provided in the case particularly in light of the uncertainties created by the written mandate, it followed that parties probably did orally agree to additional terms that would address the gaps of the written contract. The court also held that the evidence of the witness proving a subsequent oral agreement was not successfully challenged and thus it was accepted as a true representation of the parties' subsequent oral agreement reflecting their intention.¹³⁷⁰

The case above illustrates the classic conundrum that can be potentially created by lack of clarity of terms contained in the contracts of agency. This can easily be prevented by requiring contracts to be in writing. It is submitted however that a state such as South Africa should generally seek to respect oral contracts as much as written ones. This is because often agency agreements in international trade need to occur quickly and efficiently without being hindered by the requirement of form. From the reading of the ratified Agency Convention in South Africa it is clear that a declaration in terms of Article 27 has not be taken in South

¹³⁶⁸ 41 A.

¹³⁶⁹ 41 G.

¹³⁷⁰ 46 E.

Africa and therefore there is no prescription for form for agency in the international trade context.

Chapter III of the Convention provides for important legal implications of the actions of the agent and this section of the provisions can be termed the backbone or core of the Convention as that is where the uniformity of private law is achieved by parties to the Convention. This chapter sets out the basic international law on agency and clearly outlines the extent of liability, if any, of the agent under the mandate and this is linked to the manner in which the agent has presented himself or herself to third parties.

Article 12 sets out general principles of agency one of which provides that an agent who acts within the scope of authority granted to him or her by contracting with a third party who knows or ought to have known that the agent was acting as an agent, such acts of the agent shall bind the principal directly. However, depending on the circumstances of the agreement, the agent is free to bind himself directly to third parties and this is acknowledged in the Convention for cases, for example, that involve commission¹³⁷¹ for the agent. There is an a further exclusion of liability for the principal contained in Article 12(1)(a) which provides that an agent acting within the scope of authority shall be personally liable if the third party did not know or reasonably have known that the agent was acting as an agent.

The Convention also gives the principal a contractual safety net in circumstances where the agent has bound him to obligations to a third party, though such a third party may not have been aware that the agent is acting as such. This is provided for in Article 13(2)(a) which states that if the contract of mandate is breached by some failure on the part of the third party or any other reason, the principal may exercise the rights acquired on his or her behalf by the agent and this is naturally

¹³⁷¹ This is recognized in South African law that an agent must be an effective cause of sale in order to be entitled to agent's commission. See *Mano Et Mano Ltd v Nationwide Airlines (Pty) Ltd & Others* 2007 (2) 512 (SCA).

subject to any defences that may have been raised by the third party against the agent.¹³⁷²

One of the main concerns in agency and the nature of the protection afforded by agency contracts in international trade and other domestic contracts in general revolves around the concern as to what ought to take place if the parties would not have contracted with the undisclosed principal had they known of his or her identity. The Convention deals with this question in Article 13(6) where it is provided that a principal may not exercise against the party the rights acquired on his or her behalf if it appears from the circumstances of the case that the third party, had he known of the principal's identity would not have entered into the contract.

This Article is commendable as it seeks to uphold freedom of contract by ensuring that the identity of parties in international sales contracts is somewhat disclosed. This may be necessary in the context of international sales in that some goods sold may be produced by parties who do not observe or adhere to some internationally acceptable standards or practices such as human rights or environmental standards. Further, this may guard against products of questionable quality. The courts or drafters of the Convention may need to pronounce on the circumstances that would justify a third party wishing to be exonerated from an agency contract as a result of the identity of the principal. It is submitted that such circumstances in diamond trade may involve parties not wishing to contract with a principal that is not part of the KPCS¹³⁷³ for instance.

Article 13(6) also acknowledges the fact that parties may seek to induce or forge international sales contracts by remaining in obscurity but the ability to escape such a contract of mandate creates a loophole that will enable aggrieved or

¹³⁷² In the same manner, it is also open to the third party to exercise rights created by the contract of mandate against the principal, where the agent has failed or unable to fulfill his or her obligations, to the third party subject to the applicable defences that may be raised by the parties in such contracts.

¹³⁷³ An international effort to keep conflict diamonds out of legitimate diamond markets. See Diamonds Act 56 of 1986.

repudiating third parties from escaping contracts of mandate and sales. Further, courts will have to determine and establish the meaning of 'circumstances' that would enable the third party to argue that had he or she known of the principal's true identity he or she would not have contracted.

In South African law, the doctrine of undisclosed principals is very clear¹³⁷⁴ in that where there is an undisclosed principal, outwardly the agent is the principal. In such a case the third party has a right to elect to sue either the principal or agent on the contract. The third party can not object to being sued by the agent in the agent's name, further, the undisclosed principal may emerge from obscurity and claim on the contract concluded by the agent, but that principal has no greater rights than the agent would have had.¹³⁷⁵

It has been stated that the application of the doctrine does not vary the agreement between the agent and the third party. This principle in the Convention can be challenged by virtue of Article 13(6).¹³⁷⁶ It is important to understand the courts' interpretation of this doctrine in terms of South African common law. The issue of an undisclosed principal was been dealt with in *Sasfin Bank Ltd v Soho Unit*¹³⁷⁷ albeit not in the context of international trade law. The court made important statements pertaining to a scenario where third party wishes to be released from an agency agreement because had he or she known

¹³⁷⁴ *Sasfin Bank Ltd v Soho Unit 14 CC t/a Aventura Eiland and Others* 2006 (4) SA 513 (T), *Springfield Omnibus Service Durban CC v Peter Maskell Auction CC and Another* 2006 (4) SA 186 (N), *Talacchi and Another v The Master and Others* 1997 (1) SA 702 (T), *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Beperk* 1972 (1) SA 761 (A) 761 B. The doctrine of the 'undisclosed principal', as it exists in English law, is incorporated into our law, has been applied for a long time and must be regarded as accepted law, but it is not extended to more than one undisclosed principal; i.e. the doctrine has not been so extended that an agent can lawfully contract with a third party on behalf of more than one undisclosed principal who on the strength of such contract can obtain rights and incur obligations. See Nagel C.J. *Undisclosed principal-locus standi of agent to sue in his own name-remedies for breach of contract, Botha v Giyose t/a Paragon Fisheries* [2007] SCA 73 (RSA) [http://www.up.ac.za/dspace/bitstream/2263/5570/1/Nagel_Undisclosed\(2007\).pdf](http://www.up.ac.za/dspace/bitstream/2263/5570/1/Nagel_Undisclosed(2007).pdf) 17 March 2010.

¹³⁷⁵ *Ibid.*

¹³⁷⁶ Article 13(6) provides that 'the principal may not exercise against the third party the rights acquired on his behalf by the agent if it appears from the circumstances of the case that the third party, had he known the principal's identity, would not have entered into the contract.'

¹³⁷⁷ 2006 (4) SA 513 (T).

of the principal's identity, he or she would not have entered the contract of mandate.

The facts of the case are that the plaintiff in its capacity as undisclosed principal claimed payment for arrear rentals from the lessee as first defendant and sureties as second, third and fourth defendants as per agreement of lease. The sureties excepted the claim as lacking averments to sustain a valid cause of action on the basis that by relying on the doctrine of undisclosed principal the plaintiff was attempting to alter the terms of the lease which prevented the altering of the parties to the lease as contained in the non-variation clause of the lease agreement. In response the plaintiff argued that the lease agreement allowed the agent of the plaintiff as lessor to transfer its rights in terms of the agreement to a third party.¹³⁷⁸

In the cogent judgment of Van den Heever AJ the doctrine of undisclosed principal was considered with reference to established precedent¹³⁷⁹ that was used by counsel to support their arguments. Having heard counsels' arguments, pertaining to the doctrine of undisclosed principal the court stated that although the doctrine of the undisclosed principal has been accepted as part of South African law, its true dogmatic basis and operation has never been certain.¹³⁸⁰

The court explained that the doctrine of the undisclosed principal means that the undisclosed principal can claim that he or she and not the intermediary or agent with whom the third party contracted, is the real creditor of the third party. This application of law has been described as being 'an untrue' in reality because the third party did not contract with the undisclosed principal but with the intermediary who is his or her real creditor. The doctrine is borne out by the recognition of the third party's right to set off against the undisclosed principal's

¹³⁷⁸ See summary of facts in headnote.

¹³⁷⁹ See *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Kooperasie Bpk* 1972 (1) SA 761 (A), *Karstein v Moribe* 1982 (2) SA 282 (T).

¹³⁸⁰ 518 C – E.

claim any debt owed to him or her by the intermediary. By the same token the undisclosed principal will have no claims against the third party if the latter pays the debt or performs his obligations to the intermediary before the undisclosed principal intervenes. Therefore it can be concluded that in terms of this doctrine the undisclosed principal steps into the shoes of the agent when he elects to do so.¹³⁸¹

The court held that in principle the doctrine of undisclosed principal is not to be regarded as a variation or an amendment of the contract of mandate, the respective rights and duties that flow from the contract of mandate remain unchanged therefore the third party can sue the agent or alternatively the principal who has emerged from obscurity. The principal and agent become liable to the third party at his or her choice. This was confirmed by the court to also be the position in English law.¹³⁸²

This principle in South African law is quite clear. It does not deal with the question of the third party not wishing to contract with the undisclosed principal upon gaining subsequent knowledge of his or her true identity as provided in Article 13(6) of the Convention. In fact it provides for little room for the third party to escape the contract of mandate. It is submitted with respect that this is the general position that should be followed in international agency law in commercial agency agreements in order to ensure that trade is strengthened unless there is evidence that the undisclosed principal is involved in activity that promotes trading in illicit goods that have violated certain human rights.

This provision creates uncertainty in that it does not seem to accord with the general ethos or spirit of the Convention which seeks to uphold the protection of a contract of agency in international trade because suddenly it makes the identity of a party a main issue in seeking to withdraw from such a respectable and

¹³⁸¹ 518 F – G.

¹³⁸² 519 F – J.

crucial contract in international trade. It also creates an impression that parties in international trade contracts have commercial foes that they need to avoid. This is clearly not desirable when attempting to increase cooperation among States.

Article 14¹³⁸³ clearly provides that the actions of an agent who goes beyond the authority and scope of his or her mandate will not bind the principal. However, this rule is qualified by the conduct of the principal. If the principal causes the third party reasonably and in good faith to believe that the agent has authority to bind the principal, such a principal is bound in those circumstances.¹³⁸⁴ Further, where an agent acts outside the scope of his or her authority, it is open to the principal to ratify such an act to make it have a binding effect as if it was in the normal bounds of the mandate.¹³⁸⁵

Article 15¹³⁸⁶ deals with the implications of ratification or refusal of ratification by the principal and the rights of the third party in such circumstances as it is undesirable that a third party should be prejudiced by an over-zealous agent who has procured a deficient agency contract. Chapter IV deals with the law regulating the termination of the authority of an agent and it is desirable in an ideal situation that the typical scenario for such termination is as a result of successful completion of the mandate. Chapter V of the Agency Convention deals with the final provisions relating to the signatory of the Convention. It is submitted that this Convention serves as a succinct document of simple unification of private law for contracts of agency in the sale of goods. It is not an overly technical document and that is probably the reason it has not attracted much national or international debate. It can on that basis be argued that the aims behind the creation of this Convention have been sufficiently realized.

¹³⁸³ Article 14(1).

¹³⁸⁴ This is in line with South African law, *O'Connell, Manthe, Cragg and Partners v Charles* 1970 (1) SA 7 (E).

¹³⁸⁵ Article 15.

¹³⁸⁶ Article 15(1), (2), (3), (4), (5), (6), (7) and (8).

It has been questioned whether or not a third party is obliged to accept ratification in the circumstances where an agent has acted beyond his or her scope of authority. It has been argued that the answer to this question generally speaking will depend on whether or not the third party in question entered into the contract of agency in good faith.¹³⁸⁷ In other words did the third party believe that the agent was acting within the bounds of his or her given authority and if he or she was not can the third party avoid the subsequently ratified act of the agent?¹³⁸⁸

To answer this question it has been proposed that if the third party neither knew nor ought to have known of the lack of authority at the time of the agent's act, he or she may refuse to accept the ratification but this must be done within reasonable time by notice to the principal before the principal ratifies the acts of the agent.¹³⁸⁹ This is arguably a weak technicality that may be used by a third party to avoid the contract and it is very acceptable in the case where there is no ratification, however, where there is ratification it is submitted that that should not really make any difference to a third party who in good faith has entered a contract of mandate believing that the agent has the authority required.

Generally the whole Convention is based on the principle that the contracts of agency should be honored and the freedom of the parties has to be respected in entering into such contracts. This principle is evident in the provisions of the Convention that allow for party autonomy as contained in the Convention clause referred to as 'opting-out' clause, which generally permits parties may select the law which the contract is to be governed. Further, parties are also permitted to modify the provisions of the Convention by agreement.¹³⁹⁰

¹³⁸⁷ This good faith rationale is in line with Article 14(2) which provides that '...the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.' Therefore an agency agreement is easier to justify when good faith is shown.

¹³⁸⁸ Sarcevic Petar and Volken Paul *International Sale of Goods Dubrovnik Lectures* Oceana Publications (1986) 470.

¹³⁸⁹ *Ibid.*

¹³⁹⁰ Article 5; Sarcevic Petar and Volken Paul *International Sale of Goods Dubrovnik Lectures* Oceana Publications (1986) 456.

8.3.2 The New International Economic Order

The Agency Convention states that one of the primary purposes for its creation relates to the existence of the NIEO. This term is also present in the CISG Convention.¹³⁹¹ The term is not explicitly defined in the body of the Convention because it is a very wide terms based on many philosophical and jurisprudential principles. Therefore its meaning has to be necessarily considered as it is one of the motivations of the international community when creating uniform private law rules transnational.

It is essential at this juncture to study this economic driving ideology that is based on the NIEO as a force behind the creation of the Conventions pertaining to the international sale of goods. One of the important aspects of international law ideologies such as the NIEO is that they may be adopted in South Africa in so far as they reflect the spirit and purport of the South African Constitution. The ideals in the creation of the CISG under the auspices of the NIEO are no doubt connected to Constitutional values.

It is submitted that such NIEO have a direct link to other important trade objectives such as those found in the development objectives such as the United Nations 2015 Millennium Development Goals (MDG). Most relevant to this study it has been shown as discussed in the earlier parts of this study that fair economic practices in diamond trade and can assist developing countries to meet their 2015 MDGs. The MDGs are specifically listed as the eradication of extreme poverty and hunger, achievement of universal primary education, promotion of gender equality and empowerment of women, reduction of child mortality, improvement of maternal health, combating HIV/AIDS, malaria and other diseases, ensuring environmental sustainability and the development of

¹³⁹¹ <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> 17 March 2010. See preamble of CISG Convention and Agency Convention.

global partnership for development.¹³⁹² Since development under the NIEO is linked to the achievement of these goals, it is important to have due regard to its principles and mandate in the plight of improving the state of developing States.

One of the motivations behind the establishment of fair trade and the NIEO is based on the notion, as argued, of unjust enrichment. It is submitted that contemporary international law recognizes the right of every State to have permanent sovereignty over its wealth, natural resources and economic activities as contained in the UN General Assembly resolutions in particular the Charter of economic Rights and Duties of States.¹³⁹³ In other words just because on State is rich in certain resources it is unjust for another State to overtake those resources and deprive the citizens of the resource rich State any benefit from its own resources. Therefore it is cogent to accept the Agency Convention as it is based on an economic ideal that respects the sovereignty of South Africa in managing its resources.

This NIEO as referred to in light of the Convention represents and at the inception of the Agency Convention represented an acknowledgment of a world-wide awareness of the importance of international co-operation in international trade, particularly in the creation of uniform law that would allow developing countries to thrive without being bullied by developed States. In summary the new international economic order can be defined as a set of submissions relating to increased developed country assistance by tariff reduction and other means as put forward by developing countries through the United Nations Conference on Trade and Development (UNCTAD).¹³⁹⁴

The main core terms and submissions of the new international economic order provided that developing countries must be able to regulate and control the

¹³⁹² www.un.org 29 October 2009. www.ddiglobal.org 29 October 2009.

¹³⁹³ Hossain Kamal *Legal Aspects of the New International Economic Order* (1980) 222.

¹³⁹⁴ See *Declaration for the Establishment of a New International Economic Order*, 1974 as adopted by the United Nations General Assembly, 1 May 1974 A/RES/S-6/3201.

activities of multi-national corporations within their own countries, they must be able to control by nationalization, they must also be free to set up structures similar to the Organization of Petroleum Exporting Countries (OPEC)¹³⁹⁵ and all other States must refrain from taking economic, military and political measures to restrict a developing country's right to development. Finally the submissions also provided that international trade should be based on the need to ensure stable, equitable remunerative prices for raw materials while ensuring fair trade tariffs and transfer of technology and technical assistance.

One of the major industries that would be affected by the submissions as provided for in the NIEO is the South African diamond industry. The South African diamond industry is substantially controlled by multi-national companies, Anglo-American,¹³⁹⁶ for example, which is based in the United Kingdom.¹³⁹⁷ South Africa's diamond industry has benefited from the recognition of the NIEO submissions as it is an industry that forms an integral portion of international trade and the multi-national companies that have controlled a significant portion of the industry have changed their approach to seeking development of nations through trade.¹³⁹⁸

The core principles of the NIEO uphold human rights through international law and these rights are upheld in order to promote fair trade and assist in eradicating the scourge of blood diamonds, for example, and other illicit diamond trade.¹³⁹⁹ This is because the principals of the NIEO are based on the universally accepted notions of equity, fairness, justice and the respect of human rights,¹⁴⁰⁰

¹³⁹⁵ This body was established by intergovernmental organizations on 20 September 1960.

¹³⁹⁶ <http://www.angloamerican.co.za/aa/> 17 March 2010.

¹³⁹⁷ It must be noted that Anglo American has a South African branch which is currently active in the development of South Africa in various social responsibility projects. See Anglo American South Africa. <http://www.angloamerican.co.za/aa/media/releases/2008pr/2008-11-11/?t=print> 17 March 2010.

¹³⁹⁸ *Ibid.*

¹³⁹⁹ Constitution of the Republic of South Africa Act, 1996 the Bill of Rights which contains the rights of human beings including dignity and bodily integrity among other rights, see sections 7 to 39.

¹⁴⁰⁰ Johnson H.G. *The New International Economic Order*, Graduate School of Business University of Chicago Selected Papers No. 49 (1976) 1; 2.

which are fundamental to the Constitutional values of the South African Bill of Rights.

Generally the new economic order has been hailed as being based on morally positive principles and standards. However, it has been criticized in that most of the arguments concerning the NIEO tend to down play its negative side that seeks to advance capitalism at all costs whilst ignoring its ills to society. It has been argued that the justifications for the arguments in favour of the new economic order are not new at all; they represent ideas that have been in existence from time immemorial.¹⁴⁰¹

It has been further argued that while it may actually be correct to state that the new economic order represents on the surface a need to address the grievances of less developed countries against developed countries by increasing the developmental aid. This is difficult to achieve and the extreme dependency of developing countries on the developed world is exacerbated. This dependence does not reduce the gap between the rich countries and the poor at all or in any way.¹⁴⁰² The critical writer who has expressed these views should not it is proposed be seen as a critic of the NIEO but he is simply offering a warning not to take these abstract moral values of the NIEO at face value as in practice they may result in a situation where developing countries become overly dependent on developed countries and this may result in a situation where developing countries never learn to walk as it were for fear of standing on their own two feet.

It is clear that the NIEO has had some positive as well as negative implications to the conduct of trade in developing countries. As highlighted earlier on, the new economic order encourages formation of regional economic blocs such as OPEC in the interests of some countries in a particular region. However, the developed world community has not particularly encouraged policies and developmental

¹⁴⁰¹ Johnson H.G. *The New International Economic Order*, Graduate School of Business University of Chicago Selected Papers No. 49 (1976) 3.

¹⁴⁰² *Ibid.*

objectives of these regional blocs in developing states.¹⁴⁰³ Ultimately at the end of the day countries to counteract negatives in applying the intentions of the NIEO need to create and codify more instruments that reflect the sentiments of the Agency Convention, for instance to make sure that trade remains humane and fair without resorting to negative actions that will conflict with the moral aims of the NIEO.

The determination and regulation of tariffs in international trade was also an important aspect of the inception of the NIEO. The debate surrounding trade tariffs began in the 1950s when it became clear that the existing General Agreement on Tariffs and Trade (GATT)¹⁴⁰⁴ was unsuitable for developing countries and amendments were necessary to it to meet the expectations of developing countries. The developing world, for example, made a compromise in that it did not expect reciprocity for their commitments to remove or reduce tariffs and other trade barriers.¹⁴⁰⁵

This resulted in the amendments of the GATT to incorporate some of the expectations of the developing world. The effects of this were many but one important one was the permission granted to developing countries to exchange tariff preferences among themselves. These changes or waivers as it were, were permanently included in the 1979 GATT provisions as enabling clauses. These provisions are meant to create a more balanced economic order¹⁴⁰⁶ that would

¹⁴⁰³ As recently as 2007, the Organization of Petroleum Exporting Countries (OPEC) was celebrating its 47 years of existence however it was reported as having been assailed with hostility by members of the Washington Policy Community to the point that it should be declared an illegal body particularly in view of the oil embargoes and rising oil prices and allegations that it was the body responsible for the impoverishment of many of the non-oil producing countries in the third world. Reported in Africa News Daily Champion Newsletter of 28 September Nigeria: OPEC at 47 (2007).

¹⁴⁰⁴ 30 October 1947, entered into force 1 January 1948.

¹⁴⁰⁵ Justice Chimugwuanya Nwobike *The WTO Compatible ACP-EU Trade Partnership: Interpreting the Reciprocity Requirement to Further Development* Review of International Business and Trade Law 8 Asper Rev. Int'l Bus. & Trade L. (2008) 90.

¹⁴⁰⁶ Justice Chimugwuanya Nwobike *The WTO Compatible ACP-EU Trade Partnership: Interpreting the Reciprocity Requirement to Further Development* Review of International Business and Trade Law 8 Asper Rev. Int'l Bus. & Trade L. (2008) 91.

accommodate the special needs of least developed countries thus allowing for a more democratic international trade.

Generally the NIEO was deemed desirable as it promoted and still promotes a form of international trade that is based on equity, sovereign equality, interdependence, common interest and co-operation among all States. It also promoted the elimination of existing unfairness and inequalities in modern international trade and enabled the reduction of the gap between economies of developing and developed countries. Finally it should ensure accelerated economic and social development, peace and justice for present and future generations.¹⁴⁰⁷ If these themes can be identified in many of the international trade conventions and model laws, then it would be desirable to ratify such instruments as formulated within the context of the new economic order as they are in line with the Constitution of the Republic of South Africa Act¹⁴⁰⁸ in spirit.

It was argued in the initial phases of the NIEO that such NIEO cannot be established on a foundation of the old international legal system and a new proposed foundation was rather a gradual substantive evolution and adjustment to new realities of the global trade context. This gradual movement was said to be contained in documents such as the UN principle of the Atlantic Charter which makes a mention of the promotion of the economic and social advancement of all peoples. Advancement as contained in the UN charter included aims to promote a higher standard of living all people.¹⁴⁰⁹

The Atlantic Charter is an important document to South Africa and the world alike. The Atlantic Charter was initially accepted by the allied powers during the Second World War. African leaders drafted a monograph entitled, 'The African Charter' which was followed by an early 'Bill of Rights' which formed the basis for

¹⁴⁰⁷ Ioannis Lianos *The Contribution of the United Nations to the Emergence of Global Antitrust Law* Tulane Journal of International and Comparative Law 15 (2007) 415 a 421.

¹⁴⁰⁸ 108 of 1996.

¹⁴⁰⁹ Hossain Kamal *Legal Aspects of the New International Economic Order* (1980) 45; 46.

the Freedom Charter.¹⁴¹⁰ The Atlantic Charter¹⁴¹¹ also served as a precursor to the creation of the UN and GATT.¹⁴¹²

Once again these ideals agree with the Constitution of the Republic of South Africa Act¹⁴¹³ however, this is subject to available resources and achieving these goals is a gradual process that can only be achieved when each person in a particular country is somehow empowered and willing together with his or her government to contribute to the realization of this ideal otherwise these ideals will remain abstract at least for the excluded and marginalized of societies. However, having said that it is proposed that the codification of international trade rules such as the CISG and the Agency Convention as discussed in this chapter illustrate that due regard has been given to the sentiments of the NIEO and further these international instruments demonstrate practical steps that the international community, developed countries partnering with developing countries have taken to achieve the goals expressed under the NIEO.

8.3.3 The Liberal International Economic Order

It is worth mentioning *albeit* very briefly in this chapter that there is also a Liberal International Economic Order (LIEO). This is defined as a global free trade establishment and has been generally understood to be a creation of the United States. The WTO¹⁴¹⁴ creates and implements free trade agreements while the

¹⁴¹⁰ Devenish G.E. (Original Text by Goldblatt R.E.) *Constitutional Law: The Bill of Rights Law of South Africa* Volume 5(3) (2004) 23.

¹⁴¹¹ By Douglas Brinkley, David Richard Facey-Crowther *The Atlantic Charter*, Library Congress Cataloging (1994) x. In 1941 a meeting between President Roosevelt and Prime Minister Winston Churchill gave rise to the Atlantic Charter. This was a seminal moment in the history of creating global cooperation.

¹⁴¹² See Eisenberg G.S. *The Gatt and the WTO Agreements: Comments on their Legal Applicability to the Republic of South Africa* South African Yearbook of International Law (1993) 127. It is submitted by the author in his paper that GATT is a premier multinational treaty regulating global trade relations.

¹⁴¹³ 108 of 1996 sections 25(5), 26(2) and 27(2). These sections of the Constitution deal with different and related rights under the Bill of Rights but each of the rights can only be given effect to subject to available resources.

¹⁴¹⁴ See http://www.wto.org/english/docs_e/legal_e/04-wto.pdf 25 March 2010. 'AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing

volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows:

Article I

Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

Article II

Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have

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accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

Article III

Functions of the WTO

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for

World Bank issues structural adjustment loans to developing countries and these conditions may encourage the opening up of markets to Western business. It is believed that as long as markets are free and global trade is liberal, there is hope for a sustainable and stable global economy.

This view of global trade expressed above is in line with Adam Smith's philosophy¹⁴¹⁵ of the invisible hand regulating a healthy economy ensuring that all of society's needs are automatically met in a successful economy. This theory would work well in a society where all individuals were contributing on a relatively balanced scale but this is more difficult in certain societies because there is no invisible force that would regulate greed levels in individuals and therefore the economy becomes automatically unbalanced particularly where unregulated diamond trade is involved.

8.4 A Brief Note on the Contribution of the UNIDROIT

UNIDROIT is a body which is exceptionally active through various working groups in order to create model laws and uniform rules in the international context. Some of the UNIDROIT efforts relevant to trade include pioneering the Organization for the Harmonization of Business Law in Africa (OHADA). It is submitted that these efforts are crucial to international trade and must always be borne in mind when a State seeks to develop its private law or participate meaningfully in the international sale of goods.

The UNIDROIT Principles of International Commercial Contracts and other Conventions such as the CISG and the Agency Convention were formulated by the UNIDROIT. It tailored these instruments to fit with international sales law which at the same time was intended to be consistent with the general philosophies of all legal systems. As a whole it is submitted that the UNIDROIT

Reconstruction and Development and its affiliated agencies.'

¹⁴¹⁵ Adam Smith (1723-1790), moral philosopher and economist, wrote two great books, the well-known *Wealth of Nations* (1776) and *Theory of Moral Sentiments* (1759). See <http://www.quebecoislibre.org/05/050415-16.htm> 17 March 2010.

principles generally do not openly conflict with the respective domestic laws of various countries. The international instruments in the commercial world complement the provisions in legal systems of various countries such as South Africa as demonstrated above.

8.5 Conclusion

This chapter has considered the impact of the ratification of the UN Convention on Agency, formally referred to as the Convention on Agency in the International Sale of Goods, 1983 and contained within the Convention on Agency in the International Sale of Goods Act.¹⁴¹⁶ South Africa is a diamond producer and contributes substantially to the international diamond trade. This necessarily brings it into contact with the rest of the world. The domestic legal system is influenced by this contact with the global community and this is evident in its laws such as the Convention on Agency in the International Sale of Goods Act.¹⁴¹⁷

This analysis has demonstrated the nature, scope and relevance of the international law of agency in the context of diamond trading while investigating the core international themes that have driven working groups of the United Nations to create uniform international sales rules and instruments that would seriously impact international trade in a positive and human rights conscious manner with respect to State Sovereignty whether a country is developed or not.

It is clear that the law concerning a State's sovereignty with an ability to act as custodian over its own mineral and petroleum resources is drawn from the New Economic Order principles that drive international trade law. These themes are captured in local legislation such as the MPRDA¹⁴¹⁸ which makes the State custodian of its own mineral resources for the benefit of its people. Clearly this demonstrates a shift both nationally and internationally into a system where developing countries can stand on their own and control and utilize their nation's

¹⁴¹⁶ 4 of 1986.

¹⁴¹⁷ 4 of 1986.

¹⁴¹⁸ 28 of 2002.

resources free from outside interference but also respecting principles that promote comity among nations.

The themes that can be gleaned from this chapter are various but the most important one is that the contact between South African law and that of the international community enriches its own legal system. This may be through ratifying various conventions and incorporating them into South Africa's own domestic law, or participating in the formulation of international standards to regulate commercial arrangements of an international nature. It is through the adoption of the international instruments that the post apartheid Constitutional dispensation can be enhanced and strengthened.

Chapter 9: Insolvency and International Diamond Trade: South African Legislation On Cross-Border Insolvency

9.1 Introduction

It is important in this study of international trade and diamond regulations to mention the area of cross-border insolvency or transnational insolvency law as it affects the manner in which business is conducted across national borders in testing times.¹⁴¹⁹ Having regard to the fact that a GFC¹⁴²⁰ in 2008 and 2009 was a factor that exacerbated insolvency, this part of the study proves significant.¹⁴²¹ Therefore this area of international trade becomes important to consider as it is relevant to the diamond trade industry in times where insolvency becomes an influential factor.¹⁴²² Since South Africa is an active trading country within the context of the global economy the international law aimed at regulating the effects of insolvency are relevant to all its international markets. What will emerge from this chapter is the Constitutionally influenced set of laws dealing

¹⁴¹⁹ PM Meskin; B Galgut; PAM Magid; JA Kunst; A Boraine; DA Burdette *Insolvency Law* Butterworths, Lexis Nexis (2008) Chapter 17. See Bekink B. and Botha C. *The Role of a Modern Central Bank in Managing Consumer Bankruptcies and Corporate Failures: A South African Public-Law Angle of Incidence* South African Mercantile Law Journal Volume 21 (2009) 74. The authors submit that the global economy is showing clear signs of stress as was illustrated during the 2008, 2009 GFC.

¹⁴²⁰ *Ibid.*

¹⁴²¹ United Nations Intergrated Regional Information Networks, *Job Losses as Diamonds Lose Their Lustre*, Africa News 11 February (2009) www.afrika.no/Detailed/17940.html 16 July 2009.

¹⁴²² As a general rule a diamond trading entity seeks to always establish itself as being solvent at all times of active trading and diamond production. This is due to the fact that to be involved in diamond trade at the highest level, for instance, when trading as a client of ADB Bank, such a bank requires that all their clients be solvent because as a bank ADB is self-securing and self-liquidating, see https://www.antwerpdiamondbank.com/index.php/ADB_en/profile/5 13 March 2010. In any case, any business entity desires to aspire confidence in their clients by showing that they are able to meet their debts. In *AFGEM v Rex Mining Corporation Ltd* [2007] JOL 19337 (W) 7 par. 11 the court dealt with an urgent application to wind up the respondent company, Rex Mining Corporation Ltd. The court held that 'that the court has inherent jurisdiction to refuse to entertain proceedings which amount to an abuse of court process. The court had been coerced into hearing the matter on an urgent basis, which was not necessary in the circumstances. Because of the haste it was not possible to adjudicate on the matter. The confusing case presented to the court involved an inordinate amount of reading time in order to try and "plumb unnecessary opaqueness and contradiction". The application was dismissed with punitive costs.' This case did not dwell on the insolvency issue but that the papers alleging such insolvency were contradictory and inadequately drafted. The case does however illustrate that there is a strong desire by this diamond trading entity to show itself as being solvent. See a report dated 14 June 2007 on the alleged insolvency of AFGEM in <http://www.miningmx.com/diamonds/967809.htm> 18 March 2010 posted by McKay David Thursday 14 Jun 2007, where an AFGEM representative makes the following statement: 'Afgem will remain as a cash shell. All debts will be paid off and all legal issues will be resolved. It will be a totally clean company as will be the one we sell.'

with Cross-Border insolvency. The Constitution of the Republic of South Africa Act¹⁴²³ is evidenced in insolvency law in areas of attempting to salvage businesses while dealing with matters in an equitable manner with due regard to human dignity.

This study is being conducted at a time when the world is experiencing a grievous economic down turn or global financial crisis (GFC) and the courts in many States are faced with having to deal with many bankruptcy matters. Governments, for example, the US sought to achieve the aims of the international model laws on insolvency by creating rescue packages for suffering businesses, for example, the motor industry (in the form of Daimler Chrysler and GM Motors) in the US has been reported in global news as one of the industries that will gain governments rescue packages that will save those businesses and mitigate the effects of the job losses taking place during the current economic crisis.¹⁴²⁴ This is in line with the South African Constitutional ideals explained above and the law related to cross-border insolvency. The US has stated the following principles in providing aid to various businesses during the GFC:

¹⁴²³ 108 of 1996 section 22 which provides for the right to freedom of trade. It is submitted that the Constitutional principle in this case is to protect business where there are viable methods of doing so with the assistance of the State. This is in line with sections 39 and 231 of the Constitution as well which seek to encourage international cooperation in supporting trade and business and laws related to insolvency on this issue. The Cross-Border Insolvency Act 42 of 2000 preamble provides that ‘Whereas the General Assembly of the United Nations on 15 December 1997 adopted a resolution, co-sponsored by the Republic of South Africa, recommending that States review their legislation on cross-border insolvency and, in that review, give favourable consideration to the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law; And whereas the Republic of South Africa acknowledges the need to create effective mechanisms for dealing with cases of cross-border insolvency in accordance with the provisions of the Model Law, bearing in mind the need for internationally harmonised legislation governing instances of cross-border insolvency.’

¹⁴²⁴ These principles can clearly be expanded to other potentially suffering businesses such as the diamond industry which like all markets has been affected by the world wide recession. See also, ABI Event Round Up: Debt Conference, *New York CLE Program and Litigation Skills Training Highlight Busy May* American Bankruptcy Institute 27-5 ABIJ 1 (2008). The ABI Debt Symposium brought together international scholars from a variety of disciplines to examine the escalating problem of the debt phenomenon that influences much of today’s economy and culture. See <http://www.oecd.org/dataoecd/22/30/44601046.pdf> 18 March 2010 an unclassified document by the Organisation for Economic Co-operation and Development cited as DAF/COMP/GF/WD(2010) 67 *Global Forum on Competition, State Aids and Subsidies Contribution from the U.S. Federal Trade Commission - Session I* 12 Feb (2010) 67.

‘The United States does not have a system for the direct regulation of government financial aid to firms. In some extraordinary instances, the U.S. Government has provided assistance to industries and firms to address specific exigencies, for example, to protect critical infrastructure, employment, national defence, and the integrity of the banking and financial system.¹ In its recent rescue measures, the U.S. Government has taken steps to limit the possible negative effects of such interventions by restricting the duration and depth of its intervention. U.S. states may provide certain assistance to firms but, under the “dormant Commerce Clause” of the U.S. Constitution, their actions may not discriminate against other states or hinder interstate commerce.

2. State and Local Level Aids and Subsidies

The United States does not have a regulatory regime governing state and local aids and subsidies. However, courts have found certain state assistance to violate the Commerce Clause of the U.S. Constitution.² The Supreme Court has held that there is a “dormant” or “negative” aspect of the Commerce Clause that implicitly limits the states’ right to tax or otherwise regulate interstate commerce:

It has been long accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. ... This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competition.... Thus, State statutes

that clearly discriminate against interstate commerce are routinely struck down, [...] unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism'

While insolvency is a crucial consideration when dealing with commercial considerations, this chapter will not be a re-iteration of national law on the subject of insolvency in general. This has been sufficiently investigated in South African law and is therefore not necessary in this study. What this part of the study aims to achieve is to analyze and consider how cross-border insolvency law in South Africa affects international trade with reference being made to trade in diamonds though admittedly this legal subject is wide enough to cover other industries in areas of international trade.

It has been explained that cross-border insolvency arises when a bankruptcy procedure is initiated in one jurisdiction relating to the estate of a debtor, usually in his or her country of domicile, who own and has interests in at least one other jurisdiction. In such circumstances the insolvency representative whether in the form of a liquidator or trustee appointed to administer the debtor's estate will have to consider the legal steps he or she may have to take in order to take possession of the debtor's foreign property or interests for the benefit of local creditors. In this case such a representative would have to abide by the law of the foreign court in which the property or interest in question lies within its borders. In the absence of a treaty this situation may create uncertainty as the local court may be seeking to protect the interests of creditors within its own jurisdiction.¹⁴²⁵

¹⁴²⁵PM Meskin; B Galgut; PAM Magid; JA Kunst; A Boraine; DA Burdette *Insolvency Law* Butterworths, Lexis Nexis (2008) Chapter 17 p 1.

It has been explained by the authors¹⁴²⁶ that uncertainty can be created when there is a clash between the universality and territoriality model of the treatment of cross-border insolvency. The universality model (if absolute it allows for a singular bankruptcy process) calls for the treatment of such insolvency as a single matter so as to make sure that creditors from different jurisdictions are treated equally whereas the territoriality model (which entertains plural bankruptcy processes) seeks to protect the interests of the local creditors first before allowing foreign creditors to use the debtor's local assets.

This chapter will consider the international trade specific international regulatory framework in the form of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) by deliberating on the practical participation of South Africa as a participating and sponsoring State to the Model Law on Cross-Border Insolvency.¹⁴²⁷ This analysis will be formulated by a thorough study and consideration of the legislation and precedent as applied in South Africa and other international jurisdictions while also consulting some useful academic guidance from various learned authors¹⁴²⁸ on the very important subject of cross-border insolvency. The aim of this study is to illustrate that only through international uniform regulatory rules of cross-border insolvency can international trade be regulated in the most equitable manner that is satisfactory to national as well as international entities that may find themselves in insolvent situations.

It must be noted that the question of insolvency is so important to the global context hence South African law has provided for its implications in law through various legislative instruments. This includes *inter alia* statutory law such as the

¹⁴²⁶ *Ibid.*

¹⁴²⁷ Cross-Border Insolvency Act 42 of 2000.

¹⁴²⁸ See Wessels Bob *Current Topics of International Insolvency Law*, Kluwer (2004); Smith A.D. and Aliola D.A. *Cross-Border Insolvencies: An Overview of Some Recent Legal Developments* 11 SA Merc LJ 192 (1999), Ailola David *Recognition of Foreign Proceedings, Orders and Officials in Insolvency in Southern Africa: A Call for a Regional Convention* 31/1 Comparative and International Law Journal of Southern Africa (1999) 54, Ailola David *The UNCITRAL Model Law on Cross-Border Insolvency: Its Efficacy and Suitability as a Basis for a SADC Convention* Stellenbosch Law Review (2000) 215, PM Meskin; B Galgut; PAM Magid; JA Kunst; A Boraine; DA Burdette *Insolvency Law* Butterworths, Lexis Nexis (2008) Chapter 17 for example.

Judicial Matters Second Amendment Act.¹⁴²⁹ This law together with the regulations applicable under it is a relatively recent statute that was promulgated to provide for the consolidation and amendment of law relating to insolvent persons and their estates. The Judicial Matters Second Amendment Act¹⁴³⁰ provides for the repeal of various insolvency laws¹⁴³¹ and widens the jurisdiction of the court to provide specifically for matters relating to insolvency. Further, the Judicial Matters Second Amendment Act¹⁴³² provides that preferences must be afforded to employees in cases where their employers have become insolvent.¹⁴³³

The Judicial Matters Second Amendment Act¹⁴³⁴ provides that the South African court, the High Court, shall have jurisdiction over every debtor and in regard to any estate of every debtor who on the date on which a petition for the acceptance of the surrender or for the sequestration of his or her estate is lodged with the registrar of the court, is domiciled or owns property that is situated within the jurisdiction of the court or at any time within twelve months immediately before the lodging of the petition normally resided or carried on business within the jurisdiction of the court.¹⁴³⁵

The jurisdiction of the court is uniquely provided for in this statute as pertaining to cross-border insolvency matters by making reference to the court's discretion based on equity and convenience to refuse or postpone the acceptance of surrender or sequestration of a person domiciled in a State not designated¹⁴³⁶ in

¹⁴²⁹ 55 of 2003. Also relevant to cross-border insolvency is the Judicial Matters Amendment Act 42 of 2001.

¹⁴³⁰ 55 of 2003.

¹⁴³¹ Insolvency Act 32 of 1916; Insolvency Amendment Act 29 of 1926 (except the title and preamble thereof and sections 1, 71, 72 and 74 thereof); section 24 of the Land Bank Amendment Act 58 of 1934.

¹⁴³² 55 of 2003.

¹⁴³³ Judicial Matters Second Amendment Act 55 of 2003 introduces section 98A to the Insolvency Act 24 of 1936 which provides for the preference of employees. This is clearly a social justice issue.

¹⁴³⁴ 55 of 2003.

¹⁴³⁵ Judicial Matters Second Amendment Act 55 of 2003 section 1(a)(b).

¹⁴³⁶ It is common cause that there has not been any designation of the States in terms of section 2 by the Minister of Justice in any case and this has caused the Act to remain dormant.

terms of the Cross-Border Act.¹⁴³⁷ This pertains to a person who should be sequestrated by a court outside of South Africa or the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic.¹⁴³⁸

Further, the laws such as the Securities Service Act¹⁴³⁹ and the National Credit Act,¹⁴⁴⁰ *inter alia*, must be read together with all the South African law relating to insolvency as these specific statutes appear to operate in such a way as to systematically lead persons away from situations where they are insolvent by ensuring and curbing the over-dependency on credit¹⁴⁴¹ as a means to structure day to day business dealings while legally ensuring that persons are living or managing their commercial activities within their means.

Barry Herman in his paper on dealing with developing country sovereign debt makes certain proposals for reform in the international treatment of sovereign debt via ethical analysis. The proposals made by the learned author are important to international insolvency laws because generally insolvency does not only concern commercial entities but entire States themselves particularly developing States. It is stated in Herman's submissions that there is a trend of over-indebtedness and insolvencies that have occurred and re-occurred many times in developing countries.¹⁴⁴² Having regard to the systems that have the potential of leading individuals, businesses and States into insolvency,¹⁴⁴³ it is

¹⁴³⁷ 42 of 2000 section 2.

¹⁴³⁸ *Ibid.*

¹⁴³⁹ 36 of 2004.

¹⁴⁴⁰ 34 of 2005 section 3 of which provides that the purpose of the Act is to 'The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions.'

¹⁴⁴¹ See National Credit Act 34 of 2005 section 7 together with regulations thereunder which deals with the determination of thresholds and credit limit facilities to avoid over-indebtedness.

¹⁴⁴² Herman Barry *Doing the Right Thing: Dealing With Developing Country Sovereign Debt* North Carolina Journal of International Law & Commercial Regulation 32 N.C.J. Int'l L. & Com. Reg. (2007) 773.

¹⁴⁴³ By virtue of a culture of over-indebtedness or other uncontrollable influences that may lead to market failure, for example, product failure due to climate changes or other *vis major*.

prudent that some international uniform regulation be adopted to deal with this situation.

It is therefore relevant in this study to highlight and test these issues of insolvency in the context of international trade and determine whether these laws are effective and achieving their purpose particularly when dealing with cross-border insolvency which becomes a global concern that originates from each country's financial and market driven systems. Further, when relating these issues to the diamond industry if one is not discussing the industrial diamond which is an economic necessity; it generally induces mirth to find that persons who are insolvent are concerning themselves with luxury items such as diamond jewellery.¹⁴⁴⁴ Having said that though a commercial entity which deals in luxury diamond items may find itself insolvent of that business is not obtaining support from the market and thus unable to meet its overheads thus making cross-border insolvency law applicable for international trade purposes.

9.2 Background of UNCITRAL Model Law on Cross-Border Insolvency

It is important at this stage to consider the origins or motivations behind the creation of the UNCITRAL Model Law on Cross-Border Insolvency as identified by the UNCITRAL Secretariat.¹⁴⁴⁵ This will be done in order to create an opportunity for a more careful study of the influences that led to the establishment of this international model law particularly considering that embraces such a wide and universalistic scope for the protection of creditors and debtors alike in the global economy. It will not be necessary in this section to once again flesh out the substantive provisions of the model law, what will be considered are the actual endeavors and economic thoughts that led to the final shape of the instrument.

¹⁴⁴⁴ Granted the situation is distinguishable if such insolvent persons are looking to luxury items as a means of resolving their debt problems.

¹⁴⁴⁵ See UNCITRAL Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997).

<http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> 19 March 2010;

http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html 19 March 2010.

One of the motivations behind the Model Law was centered on the need to curb fraudulent conduct by insolvent debtors. In the context of cross-border insolvency debtors may behave fraudulently by concealing assets or transferring them to foreign jurisdictions. This problem is one that was becoming a serious concern in frequency and magnitude in the global context and therefore mechanisms had to be developed at an international level to deal with this issue. Further, with the modern global interdependence carrying out such fraud was becoming easier therefore the international community had to react.¹⁴⁴⁶

The Model Law was not developed in a vacuum. This is evident in the references to the Convention on Insolvency Proceedings of the European Union, the European Convention on Certain Aspects of Bankruptcy (1990), the Montevideo treaties on international commercial law (1889 and 1940), the Convention regarding Bankruptcy between Nordic States (1933) and the Convention on Private International law (Bustamante Code) (1928). Further, proposals from non-governmental organizations were also taken into account including the Model International Insolvency Cooperation Act and the Cross-Border Insolvency Concordat, both developed by the Committee J of the Section on Business Law of the International Bar Association.¹⁴⁴⁷

One of the concerns that were raised leading to the creation of the Model Law involved a widespread limitation on cooperation and coordination between judges¹⁴⁴⁸ from different jurisdictions in cases of cross-border insolvency. This

¹⁴⁴⁶ UNCITRAL Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997) Part IV Main Features of the Model Law, Background section 14. <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> 19 March 2010.

¹⁴⁴⁷ *Ibid.* Section 18.

¹⁴⁴⁸ *Ibid.* Part Two I section 5 ‘Prior to the decision by UNCITRAL to undertake work on cross-border insolvency, the Commission and International Association of Insolvency Practitioners (INSOL) held two international colloquiums for insolvency practitioners, judges, government officials and representatives of other interested sectors. The suggestion arising from those colloquiums was that work by UNCITRAL should have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.’ See www.insol.org/ 19 March 2010.

challenge was attributed to the lack of legislative framework or uncertainty regarding the scope of the existing legislative authority for pursuing cooperation with foreign courts.¹⁴⁴⁹ It is submitted that this was the very complaint raised by Mullins J in the court *a quo* judgment in *Moolman v Builders & Developers (Pty) Ltd (In Provisional Liquidation) Jooste Intervening*.¹⁴⁵⁰

It is acknowledged in the Secretariat's commentary that the Model Law had to be created to resolve this issue since it was learnt from experience that no matter how much discretion a court may enjoy, as very evident in South African common law on cross-border insolvency law, the passage of a specific legislative framework is useful for promoting internal cooperation in cross-border cases. Further for the same reasons it is submitted that the Model law includes cooperation between the enacting court and a foreign representative and *vice versa*.¹⁴⁵¹

Further, the Model Law lists possible forms of cooperation and leaves the lawmakers to list other cooperative measures in order to adopt relevant cooperative measures into law so as to fit with the specific circumstances that may arise.¹⁴⁵² A specific circumstance may for instance be a peculiarity to the diamond industry, where hypothetically a law may be adopted to include intergovernmental cooperation in instances that require for example decisions on what to do with physical location of an insolvent mine or other furniture, equipment and stockpiled diamonds. This will naturally occur if there are no other prevailing general laws that may provide for these circumstances.

¹⁴⁴⁹ UNCITRAL Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997) Part IV Main Features of the Model Law, Background section 14. <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> 19 March 2010. Section 38.

¹⁴⁵⁰ [1990] All SA 77 (A).

¹⁴⁵¹ See Article 26.

¹⁴⁵² UNCITRAL Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997) Part IV Main Features of the Model Law, Background section 38 - 41. <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> 19 March 2010.

Some of the concerns which were also debated by the working group involved in the development of the Model Law pertain to the regulation of the coordination and cooperation with regard to concurrent proceedings. This is dealt with in Article 32 of the Model Law and this particular provision is referred to as the 'hotchpotch' rule. The rule regulates coordination and cooperation in concurrent proceedings by preventing situations where a creditor might obtain a more favorable treatment than other creditors of the same class by obtaining payment for the same claim in different jurisdictions.¹⁴⁵³

Without being repetitive the core motivational issues behind the creation of the Model Law are clearly stated above. What strongly emerges from the UN Secretariat's commentary in the actual principles of the Model Law is the strong desire to create 'harmony' and 'uniformity' in the global economy to address the challenges that are peculiar to cross-border insolvency.

9.3 Deliberations Prior to the Adoption of International Cross-Border Insolvency Law

The South African perspective on the United Nations Cross-Border Model Law has generally invited some insightful academic debate however it seems that the common view on the legislation that has made such an instrument part of South African Law is that it would have significant impact on South African relations with the outside world.¹⁴⁵⁴ It has also been suggested that such law make a cogent basis for developing a regional block in the form of the SADC Convention.¹⁴⁵⁵

¹⁴⁵³ UNCITRAL Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997) Part IV Main Features of the Model Law, Background section 198. In such cases a creditor will only receive payment in the enacting State that is limited to the total payments that the creditor has already received.

¹⁴⁵⁴ Dugard John and Abraham Garth *International Law and Foreign Relations* Public International Law 2000 Annual Survey 103; 109.

¹⁴⁵⁵ <http://www.sadc.int/> 19 March 2010. The members of the SADC are Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Ailola David *Recognition of Foreign Proceedings, Orders and Officials in Insolvency in Southern Africa: A Call for a Regional Convention* 31/1 Comparative and International Law Journal of Southern Africa (1999) 54; Ailola David *The UNCITRAL Model Law on Cross-Border*

Some of the South African views on the cross-border expressed above in law make it logical to infer that the Cross-Border Model Law of the United Nations was considered to be positive developmental law in South African relations on insolvency with other States. Further, the call for a development of a Convention suggests that this law intends to further encourage international relations in matters of insolvency. In South African legislation it allows the court to be approached¹⁴⁵⁶ as an international forum for the enforcement of insolvency laws of other States.¹⁴⁵⁷

In 1999 a conference was held on UNCITRAL instruments in Southern Africa at the formerly named Rand Afrikaans University.¹⁴⁵⁸ The purpose of the conference was to determine the future reform of South African trade or international trade law. It was noted at this conference that South Africa was slowly shifting from its Eurocentric stance to become part of the community of States represented by the United Nations which would be important for South Africa as a developing State.¹⁴⁵⁹

It emerged from the deliberations of the conference mentioned above that the purpose of the UNCITRAL Model Law on Cross-Border Insolvency was to

Insolvency: Its Efficacy and Suitability as a Basis for a SADC Convention Stellenbosch Law Review (2000) 215. See also Coutsooudis Basil *UNCITRAL Instruments in Southern Africa* De Rebus, November (1999) SA Attorneys Journal 30. See article also on <http://www.law-online.co.za/IntTradeLaw/20Instruments.htm> (06/12/2006); Rothbart S. *Mars: The Law of Insolvency in South Africa: Mars 'A Welcome Return'* De Rebus, 1 December 9 ed (2008) 47.

¹⁴⁵⁶ Cross-Border Insolvency Act 32 of 2000 section 9 which states that 'a foreign representative may apply directly to a court in the Republic for relief.' Section 10 provides that 'the sole fact that an application pursuant to this Act is made to a court in the Republic by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of the Republic for any purpose other than the application.'

¹⁴⁵⁷ Cross-Border Insolvency Act 32 of 2000 section 3 which provides for the application of law subject to international obligations of the Republic of South Africa in terms of any applicable treaty. Section 5 provides that 'a trustee, liquidator, judicial manager, curator of an institution, or receiver is authorised to act in a foreign State in respect of proceedings under the laws of the Republic relating to insolvency, as permitted by the applicable foreign law.'

¹⁴⁵⁸ See www.jstor.org/stable/40176531 19 March 2010.

¹⁴⁵⁹ Coutsooudis Basil *UNCITRAL Model Law on Cross-Border Insolvency* (1999). <http://www.law-online.co.za/IntTradeLaw/UNCITRAL%20Instruments.htm> 19 March 2010.

encourage States to review their legislation on cross-border insolvency and determine whether existing legislation met the objectives of the modern and efficient insolvency system. One of the main observations that came out of the conference is that South Africa was a part of a global economy with a fast growing international trade role and therefore international borders were becoming diminished. It was proposed at the conference that the model law would support free trade in developing economies or at times of recession by removing the threat of injustice in instances of cross-border insolvency.¹⁴⁶⁰

What emerged from the conference was that the insolvency legislation that South Africa prior to the adoption of the model law was inadequate. This is particularly because the common law position for dealing with cross-border situations in South Africa as expressed in *Ex Parte Steyn*¹⁴⁶¹ provided that a court has the power to recognize a foreign trustee but this was coupled with a practice that the courts had unfettered discretion to accept or allow a foreign trustee thus leading to uncertainty as to when a foreign trustee would be accepted.¹⁴⁶² However it must be noted that the common law would still be crucial for the courts to have due regard to when dealing with States that are not to be dealt with according to the model law.

Clearly the findings of law at the conference on UNCITRAL Instruments in South Africa adopted the view that the model law would address the *lacunae* in South African insolvency law which needed urgent reformation therefore a proposal for the adoption of the model law was made to the Law Commission. When the

¹⁴⁶⁰ *Ibid.* Para. 17.

¹⁴⁶¹ 1979 (2) SA 709 (O). There are other cases of similar cross-border uncertainty that were presented before the court with contrasting decisions as expressed by writer Ailola David *The UNCITRAL Model Law on Cross-Border Insolvency: Its Efficacy and Suitability as a Basis for a SADC Convention* Stellenbosch Law Review (2000). These cases included *Moolman v Builders and Developers (Pty) Ltd (In provisional Liquidation): Jooste Intervening* 1990 (1) SA 954; *In re Gurr v Zambia Airways Corporation Ltd* [1998] All SA 479 (A); *Clegg v Priestly* 1985 (3) SA 950 (W); *Ex Parte Palmer NO v In re Hahn* 1993 (3) SA 359 (CPD); *Bekker NO v Kotze and Others* 1996 (4) SA 1293.

¹⁴⁶² South African writer, Ailola David *The UNCITRAL Model Law on Cross-Border Insolvency: Its Efficacy and Suitability as a Basis for a SADC Convention* Stellenbosch Law Review (2000) 215 also proposed the same reforms.

Cross-Border Insolvency Bill was tabled in parliament in the year 2000 certain amendments were made to it to make it into a law that would be more reflective of the South African insolvency context, for example structure of the law and the courts which would administer the law were fully canvassed in the bill. It has been submitted that the memorandum of the objects of the model law were fully debated in the bill and now form part of South African law while promoting the aims of the model law.¹⁴⁶³

The prior deliberations on the Model Law on Cross-Border Insolvency illustrate that it was a well received instrument in South Africa and hence its promulgation as a South African statute was accelerated.¹⁴⁶⁴ Such adoption of the model law has indeed led to a reform of South African trade law. Further South African trading partners and other States that are party to this law can be viewed as having a common process for resolving insolvency matters regardless of the location of the court dealing with the matter.

In *Sackstein NO v Proudfoot SA (Pty) Ltd*¹⁴⁶⁵ the court dealt with the issue of cross-border insolvency in this case although it was not entirely a matter based solely on the cross-border insolvency issue as contemplated in the Cross-Border Insolvency Act¹⁴⁶⁶ or the Model Law on Cross-Border Insolvency. This case was decided prior to the promulgation¹⁴⁶⁷ of the model law into South Africa. The facts of the case however serve a useful purpose for the practical scenario that is envisaged by the South African Cross-Border Insolvency Act.¹⁴⁶⁸

¹⁴⁶³ Stretch R.; Silke J. *Cross-Border Insolvency A New Bill* Income Tax Taxgram Issue 10 Butterworths, Lexis Nexis (2000) par. 1.7.

¹⁴⁶⁴ *Ibid.* The Cross-Border Insolvency Act 42 of 2000 was assented to on 8 December 2000 and the date of commencement was 28 November 2003.

¹⁴⁶⁵ 2003 (4) SA 348 (SCA).

¹⁴⁶⁶ 42 of 2000.

¹⁴⁶⁷ The South African Cross-Border Insolvency Act 42 of 2000 has a commencement date of 28 November 2003.

¹⁴⁶⁸ 42 of 2000.

The facts demonstrate a typical scenario as to firstly, how a cross-border situation may present itself, secondly the facts show what is meant by concurrent insolvency proceedings and thirdly, the facts demonstrate the legal rights or position of foreign representatives in relation to a South African court if or should they wish to enforce a liquidation of an order given by another court. With this understanding of the practical aspects as illustrated by this case it is important then to study the facts of the case.

The matter revolved around a Namibian based company¹⁴⁶⁹ having a body corporate in South Africa. The company's name was Tsumeb Corporation Ltd (Tsumeb SA) and incorporated in Namibia but having its offices in Johannesburg, South Africa and subject to the provisions of the South African Companies Act 61 of 1973. The defendant company, Proudfoot SA (Pty) Ltd (Proudfoot) was also company registered in South Africa carrying on business as industrial consultants in Johannesburg South Africa. In 1997 Tsumeb SA concluded a contract with Proudfoot in terms of which Proudfoot undertook to provide certain consulting services to Tsumeb in Namibia. In return for those services Tsumeb was to pay a total amount on R10 million in fixed weekly installments however the total amount that was paid amounted only to R5 708 957.00 much less than agreed.¹⁴⁷⁰

It was an established fact that Tsumeb was placed under provisional liquidation by an order of the High Court of Namibia after the conclusion of the contract with Proudfoot, on 29 April 1998. A final winding-up order was granted by the same Namibian court the subsequent year, on 12 March 1999, with the liquidators being appointed on 26 May 1999. On 29 July 1998 Tsumeb was simultaneously placed in provisional liquidation by an order of the South African court and final winding up was granted on 16 March 1999.¹⁴⁷¹ The decision of the court in this case forms an important example of cross border insolvency where it became

¹⁴⁶⁹ The foreign company was registered in South Africa in terms of section 323 of the Companies Act 61 of 1973.

¹⁴⁷⁰ 354 D – H.

¹⁴⁷¹ 354 H – J; 355A.

apparent that there were concurrent liquidation orders involving the same entity. The court referred to them as the South African liquidation order and the Namibian liquidation order in order to distinguish the concurrent proceedings.

In this case, however, the Namibian liquidators did not apply for an order for their recognition in a South African court in order to enable them to wind up the affairs of Tsumeb. Further, in terms of the South African liquidation order, a Mr. Leslie Sackstein was appointed as liquidator on 17 May 1999. On 3 November 1999 the Proudfoot, the defendant, proved a claim at a meeting of creditors of Tsumeb in Namibia in terms of Namibian law. The claim was based on the balance owed to Proudfoot by Tsumeb under the consultancy contract between the parties. It is this balance of payments that were the subject of the proceedings in the South African court *in casu*.¹⁴⁷²

The issue of concurrent proceedings came to an end in this case, however, when an offer by Ongopolo Mining Processing Ltd made a scheme arrangement in terms of section 311 of the Companies Act of Namibia, though it was clearly stated by the court that the Namibian proceedings did not affect the South African process.¹⁴⁷³ This scheme was sanctioned by the Namibian High Court on 10 March 2000 with the effect that the Namibian Court discharged the liquidation order pertaining to this case. Upon the cancellation of the Namibian liquidation order, Mr. Sackstein acting as liquidator in terms of the South African liquidation order instituted an action against Proudfoot for the recovery of moneys paid to it in pursuance of the consulting contract between the two parties. The liquidator's main contention was that the payments made to Proudfoot were made at a time when the liabilities of Tsumeb were exceeding its assets and therefore paying

¹⁴⁷² 355 B – D.

¹⁴⁷³ 357 E.

Proudfoot at that time had the effect of placing Proudfoot above other creditors of Tsumeb.¹⁴⁷⁴

The Supreme Court of appeals in this case clearly established that in South African law an external company may be wound up by the court like any other domestic company by virtue of the Companies Act¹⁴⁷⁵ which includes an external company. Such an external company can be liquidated as an independent entity regardless of the fact that the company to which it relates is a foreign country has not been liquidated.¹⁴⁷⁶ This means that a Namibian diamond trading company with South African representation as an external company, for example, may be liquidated in South Africa while the Namibian commercial activities are continuing or vice versa, all that is required is to prove insolvency for a company to be wound up not just that it is related to a certain foreign thriving or failing company.¹⁴⁷⁷ However, this does not create two legal personalities, it is still one company registered in two different countries.¹⁴⁷⁸

The court stated that the law pertaining to the demarcation of territory for liquidators in such a situation must still be developed.¹⁴⁷⁹ It is submitted that the purpose of the Model Law on Cross-Border Insolvency has brought about such development.¹⁴⁸⁰ However, for the purposes of this case the court's guidance on the law regarding separating the responsibilities of liquidators according to the

¹⁴⁷⁴ 355 D – H. The liquidator's claim was based on sub-section 29(1) and 30 of the South African Insolvency act 24 of 1936 which read in conjunction with section 340 of the Companies Act 61 of 1973 Proudfoot was obliged to repay the amounts paid to it to the liquidator in his capacity as such.

¹⁴⁷⁵ 61 of 1973 section 337 which provides that 'in this Chapter, unless the context otherwise indicates- 'company' includes a company, external company and any other body corporate.'

¹⁴⁷⁶ 357 A – B.

¹⁴⁷⁷ 357 C. The court emphasized this point further by stating that in a situation where there are concurrent liquidations taking place in respect of a company with a foreign country of origin and is also represented in South Africa as an external company, in such cases the liquidators of such companies are independent and may deal with assets and liabilities of the respective companies separately according to the requirements of each company.

¹⁴⁷⁸ 357 F.

¹⁴⁷⁹ 357 I.

¹⁴⁸⁰ Cross-Border Insolvency Act 42 of 2000 where the preamble of the Act provides that the purpose of the Act is to provide effective mechanisms for dealing with cases of cross-border insolvency; and to amend the Insolvency Act 24 of 1936, so as to further regulate the jurisdiction of the High Courts; and to provide for matters connected therewith.

entity for which they were appointed to manage is a guide in law particularly because it seems to respect the intentions of the Model Law on Cross-Border Insolvency by in a way respecting the findings concerning insolvency of the foreign court although this was not the issue in this matter.

With regard to the liquidator's contention that the payments to Proudfoot were unlawful dispositions in terms of the Insolvency Act,¹⁴⁸¹ the court held that if the disposition of property occurred outside the Republic, a South African liquidator has no power to impeach such a disposition,¹⁴⁸² however, where section 391 of the Companies Act¹⁴⁸³ is also applicable the court held that the limitation of the recovery of property to property only situated in the Republic in terms of the Insolvency Act¹⁴⁸⁴ must be ignored¹⁴⁸⁵ with the result that the South African liquidator of an external company is entitled to carry out impeachment procedures for that disposition and may proceed in South Africa in terms of section 391 of the Companies Act¹⁴⁸⁶ or take action recognized by the courts of the foreign country concerned, therefore the appeal was allowed.¹⁴⁸⁷

This case law truly illustrates the position and spirit of the Model Law on Cross-Border Insolvency prior to its promulgation into South African law which resulted in the most equitable protection of interests of all parties in an insolvency situation. Arguably this view might not have been one shared by Proudfoot in the matter however the point is that Proudfoot was not having any rights taken away as creditor but simply being placed on an equal footing with all the other creditors as if to respect the *pari passu*¹⁴⁸⁸ principle in this case.

¹⁴⁸¹ 24 of 1936.

¹⁴⁸² 358 J.

¹⁴⁸³ 61 of 1973.

¹⁴⁸⁴ 24 of 1936.

¹⁴⁸⁵ 359 B.

¹⁴⁸⁶ 61 of 1973.

¹⁴⁸⁷ 360 E – F.

¹⁴⁸⁸ The application of the *pari passu* principle was considered by the court in the following cases, *MV Olympic Countess: Fortis Bank (Nederland) NV v Orient Denizcilik Turizm Sanayi Ve Tricaret AS* 2008 (1) SA 376 (SCA) 380 A - F, *Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd and Another* 2008 (5) SA 159 (SCA) 165 C.

9.4 The Cross-Border Insolvency Act 42 of 2000

It is important as a first port of call to consider the relevant law on cross-border insolvency in South African law as related to international trade matters. The statute to look to in this instance is the Cross-Border Insolvency Act¹⁴⁸⁹ as amended¹⁴⁹⁰ which is effectively an acceptance of international law in the form of a Model Law for the purposes of providing effective mechanisms for dealing with cases of cross-border insolvency, to amend the Insolvency Act.¹⁴⁹¹ As a starting point the law makers must be commended for the recognition of the need to create certain rules on cross-border insolvency. Without stating that the law-makers acted with commendable foresight, they were also able to create rules that could prevent bankruptcy anarchy especially in times of the world wide recession.

It has been submitted by Professor David Ailola, a prolific writer in matters of insolvency, that when considering the South African Constitution and the Bill of Rights contained therein it is essential to study what its impact is on cross-border insolvency. Professor Ailola submits that in light of cross-border insolvency laws of South Africa it is clear that one group that could be adversely affected by insolvency is that group of foreign-based creditors of a local debtor. This adverse

¹⁴⁸⁹ 42 of 2000.

¹⁴⁹⁰ The Cross-Border Insolvency Act 42 of 2000, as amended by the Judicial Matters Amendment Act 42 of 2001 and must be read together with the following statutes, The Administration Amendment Act 9 of 1929; The Maintenance Act 99 of 1998; The Sheriffs Act 90 of 1986; Extradition Act 67 of 1962; Insolvency Act 24 of 1936; Criminal Procedure Act 51 of 1977; Judicial Matters Second Amendment Act 55 of 2003; Recognition of Customary Marriages Act 120 of 1998; General Law Fourth Amendment Act 132 of 1993; Judicial Matters Amendment Act 42 of 201; General law Sixth Amendment Act 204 of 1993; General Law Third Amendment Act 129 of 2001; Rules Board For Courts of Law Act 107 of 1985; National Prosecuting Authority Act 32 of 1998; South African Law Reform Commission Act 19 of 1973; Promotion of Access to Information Act 2 of 2000; Promotion of Administrative Justice Act 3 of 2000; Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996; Judges' Remuneration and Conditions of Employment Act 47 of 2001; Judicial Officers (Amendment of Conditions of Service) Act 28 of 2003; Mediation in Certain Divorce Matters Act 24 of 1987; Prevention of Counterfeiting of Currency Act 16 of 1965; Promotion of Access to Information Act 2 of 2000; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁴⁹¹ 24 of 1936. See introductory note on Cross-Border Insolvency Act 42 of 2000. To make the application of this legislation more effective this Act also provides for further regulation of the jurisdiction of High Courts who are tasked with matters relating to insolvent persons.

prejudice that may be potentially suffered by foreign creditors clearly conflicts with Constitutional values which provide that all forms of discrimination on the basis of origin or citizenship are unconstitutional. Therefore it was required in law that a process be established to equalize the interests of foreign based creditors and creditors based in South Africa.¹⁴⁹² It is submitted by Professor Ailola that while the UNCITRAL Model Law on Cross-Border Insolvency is helpful it does not guarantee equity in all States as the various States are free to adopt those parts of the Model law that suit their liking.¹⁴⁹³

While the submissions above provide an excellent understanding of the Constitutional dimension of cross-border insolvency law and educates us on some equity challenges that may be posed in the application of the Mode Law, it is also important to note that the UNCITRAL Model law as adopted into South African law clearly shows that it will be a contribution to equity and fairness in South African law when applied. This is because it is a law that reflects important Constitutional values such as equality of all who approach the South African courts for cross-border insolvency justice regardless of where such persons originate. This is important for the protection of debtors and creditors alike in cross-border insolvency.

It is stated in the preamble of the Cross-Border Insolvency Act¹⁴⁹⁴ that as a result of the 15 December 1997 UN General Assembly resolution as co-sponsored by the Republic of South Africa recommending that States must review their legislation on cross-border insolvency and give favorable consideration to the Model Law on Cross-Border Insolvency as developed by UNCITRAL. One of the key objectives in adopting this model law was to create a uniform body of rules in the international community providing for such matters. This is the main theme

¹⁴⁹² Constitution of the Republic of South Africa Act, 1996 section 9 which provides for the right to equality and equal protection for all before the law. The Cross-Border Insolvency Act 42 of 2000 section 7 provides for additional legal remedies in terms of other law in the Republic to be made available to foreign creditors in appropriate circumstances.

¹⁴⁹³ David A. *The Law of Insolvency and the Bill of Rights* Bill of Rights Compendium, Commercial Law, Butterworths, Lexis Nexis (2000) SI 8.

¹⁴⁹⁴ 42 of 2000.

that also permeates the CISG and the Convention on Agency in the International Sale of Goods.¹⁴⁹⁵

The Cross-Border Insolvency Act,¹⁴⁹⁶ apart from creating a uniform global approach to insolvency this law serves to enhance certainty in international trade by providing for a solid regulatory framework for trade and investment that will also provide for a fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, other interested persons and the debtor alike.¹⁴⁹⁷ As if anticipating possible effects of recession and market failure type of situations, the instrument uniquely also provides for the protection and maximization of the value of the debtor's assets while creating mechanisms for the financial rescue of troubled businesses for a humane objective of protecting investment and preserving employment.¹⁴⁹⁸

It must be noted that protection of employment and ensuring the continuance of a business is particularly important to the diamond industry as illustrated in the unreported case of *De Beers Consolidated Mines Ltd v Anglovaal Mining Limited*.¹⁴⁹⁹ In this case the Competition Tribunal was considering a merger concerning a diamond interest which as far as the court was concerned in this case was already successfully competing and controlling this particular diamond market in a non-abusive manner. One of the major reasons for the tribunal's endorsement of the merger was that the merger did not cause any job losses. These themes are very important in light of the South African Bill of Rights therefore the international Model Law on Cross-Border Insolvency reflects Constitutional values to the utmost.

¹⁴⁹⁵ 4 of 1986.

¹⁴⁹⁶ 42 of 2000.

¹⁴⁹⁷ Cross-Border Insolvency Act 42 of 2000 where the preamble proves 'for fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor.'

¹⁴⁹⁸ Constitution of the Republic of South Africa Act, 1996, Bill of Rights. Cross-Border Insolvency Act 42 of 2000 where the preamble.

¹⁴⁹⁹ Case No: 36/LM/Mar00, Competition Tribunal of the Republic of South Africa. The clearance was given by the court on 15 may 2000 prior to some of the amendments expressed in the Diamonds Act 56 of 1986 that have altered the methods of diamond trade in South Africa.

In a similar scenario as illustrated in *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd*¹⁵⁰⁰ where the Koffiefontein mine under the management of De Beers was in trouble as a result of consistent under performance in production. The mine had to be shut down and the court looked into the issue of potential job losses that would be consequent. The De Beers Industry report however illustrated that the mine was sold to Petra diamonds and thus the required business rescue was underway.¹⁵⁰¹

The structure of the South African law, the Cross-Border Insolvency Act¹⁵⁰² illustrates that it is a technical and yet clearly structured statute with an interpretation section¹⁵⁰³ using the relevant terms of reference that are specific to the area of law. The Cross-Border Insolvency Act¹⁵⁰⁴ also has a section dealing with access of foreign representatives and creditors to courts in the Republic,¹⁵⁰⁵ the recognition of foreign proceedings and relief provisions,¹⁵⁰⁶ cooperation with foreign courts and foreign representatives as provided¹⁵⁰⁷ and consequently

¹⁵⁰⁰ (2006) 27 ILJ 1909 (LC).

¹⁵⁰¹ Petra Diamonds Ltd (Petra) in July 2007 bought the Koffiefontein mine for US\$ 12 million. See De Beers *Living Up to Diamonds from Natural Resources to Shared National Wealth: Operating and Financial Review* (2007) 9. www.debeersgroup.com 14 January 2007.

¹⁵⁰² 42 of 2000.

¹⁵⁰³ Chapter 1, which encapsulates certain fundamental principles of the law such as the definitions, scope of application and the public policy exception among other provisions.

¹⁵⁰⁴ 42 of 2000.

¹⁵⁰⁵ Cross-Border Insolvency Act 42 of 2000, chapter 2 section 9 which provides that ‘a foreign representative may apply directly to a court in the Republic for relief.’

¹⁵⁰⁶ Cross-Border Insolvency Act 42 of 2000, chapter 3 section 15 which states that ‘(1) A foreign representative may apply to the court for recognition of the foreign proceedings in which the foreign representative has been appointed.

(2) An application for recognition must be accompanied by-

(a) a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceedings and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in paragraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceedings and of the appointment of the foreign representative.

(3) An application for recognition must also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The court may require a translation of documents supplied in support of the application for recognition into an official language of the Republic.’

¹⁵⁰⁷ Cross-Border Insolvency Act 42 of 2000, chapter 4 sections 25, 26 and 27.

provisions for dealing with circumstances where concurrent proceedings¹⁵⁰⁸ are taking place. A few of these provisions will be made reference to in order to analyze and study the mechanisms provided in the Cross-Border Insolvency Act¹⁵⁰⁹ for dealing with cross-border insolvency.

The location of a business and the jurisdiction of the court in cross-border insolvency are crucial. Therefore the Cross-Border Insolvency Act¹⁵¹⁰ clearly defines the potential situation where an insolvency matter is being dealt with in more than one court and makes reference to the term ‘foreign main proceedings’ which means foreign proceedings taking place in the State where the debtor has the centre of his or her main interests, while the terms ‘foreign non-main proceedings’ pertain to foreign proceedings that do not fall within the main category where the debtor has an place of operations and carries out a non-transitory¹⁵¹¹ economic activity with human means and goods or services.¹⁵¹²

In the definitions section of the Cross-Border Insolvency Act¹⁵¹³ foreign proceedings as a whole are clarified as meaning collective judicial or administrative proceedings in a foreign State, including interim proceedings pursuant to insolvency law where the debtors assets and affairs have are made subject to the control or supervision of a foreign court with the aim of restructuring or liquidation. When reading the Cross-Border Insolvency Act¹⁵¹⁴ it

¹⁵⁰⁸ Cross-Border Insolvency Act 42 of 2000, chapter 5 sections 28, 29, 30 and 31. With regard to the payment rule in concurrent proceedings, section 32 is very clear in that it provides that, ‘ without prejudice to secured claims or rights *in rem* , a creditor who has received part payment in respect of his or her or its claim in proceedings pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in proceedings under the laws of the Republic relating to insolvency regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.’

¹⁵⁰⁹ 42 of 2000.

¹⁵¹⁰ 42 of 2000.

¹⁵¹¹ See Wessels Bob *Current Topics of International Insolvency Law*, Kluwer (2004) 287 where he suggests that the provision of the model law in this case is not referring to a fleeting economic activity of the debtor but envisages a more established kind of presence in that place.

¹⁵¹² Section 1(c), (e) and (f).

¹⁵¹³ 42 of 2000 section 1(g).

¹⁵¹⁴ 42 of 2000.

is important to note the distinct references to all these types of 'foreign proceedings' as each has distinct implications attached to it.¹⁵¹⁵

It is submitted that the definition that should be given to the meaning on non-transitory economic activity has to do with structural organization of the debtor's business in order to realize the objectives of the debtor's respective economic activity. Examples have been made to suggest that a debtor's construction site and a warehouse abroad would constitute establishments. Human means relates to the ability of human input as agents or employees of the establishment and their ability to form contractual relationships between creditor and debtor. Goods pertain to the relative economic activity whether it is processing raw materials, semi-raw materials packing etc. and creating final products.¹⁵¹⁶ This means that in the diamond industry a diamond mine and other diamond processing venues belonging to the debtor would be establishments.

The Cross-Border Insolvency Act¹⁵¹⁷ is one that is mainly based on inter-State cooperation. This is due to the scope of the Act as it applies to matters where a foreign court¹⁵¹⁸ or foreign representative,¹⁵¹⁹ a body or person authorized by a foreign court to administer the re-organization or liquidation of the debtor's assets, seeks assistance from the High Court of South Africa in connection with foreign proceedings. This also includes a situation where a foreign representative seeks assistance from the South African court with other insolvency matters of a similar nature, where there are concurrent proceedings under South African and

¹⁵¹⁵ Cross-Border Insolvency Act 42 of 2000 section 1(e), (f) and (g) describe foreign proceedings as follows: '(e) 'foreign main proceedings' means foreign proceedings taking place in the State where the debtor has the centre of his or her or its main interests;

(f) 'foreign non-main proceedings' means foreign proceedings, other than foreign main proceedings, taking place in a State where the debtor has an establishment within the meaning of paragraph (c) of this section;

(g) 'foreign proceedings' means collective judicial or administrative proceedings in a foreign State, including interim proceedings, pursuant to a law relating to insolvency in which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation'

¹⁵¹⁶ Wessels Bob *Current Topics of International Insolvency Law*, Kluwer (2004) 287.

¹⁵¹⁷ 42 of 2000.

¹⁵¹⁸ Section 1(d).

¹⁵¹⁹ Section 1(h).

foreign insolvency laws or where interested foreign parties wish to intervene in an insolvency matter.¹⁵²⁰ The Cross-Border Insolvency Act¹⁵²¹ also specifically applies to designated¹⁵²² States.

In one of the most comprehensive legal works on cross-border insolvency law in South Africa, as written by PM Meskin and others¹⁵²³ it is stated that the Cross-Border Insolvency Act¹⁵²⁴ has an inbuilt reciprocity requirement as a result of its section 2. It is submitted that practically this means that the Act is of application to both inward-bound (where local representatives seek help abroad) and outward-bound requests pertaining to cross-border insolvency matters. By virtue of the requirement of reciprocity in relation to the designated foreign States to which the Act will apply in future, the Act is more limited in its application than the actual UNCITRAL Model Law.¹⁵²⁵

It is submitted that while the UNCITRAL Model law is made a part of South African law in terms of the Cross-Border Insolvency Act,¹⁵²⁶ if it conflicts with a treaty that forms part of South African law in terms of the Constitution¹⁵²⁷ such a treaty will take precedent. Further, the UNCITRAL Model Law excludes in its application specialized institutions such as banks and insurance companies,¹⁵²⁸

¹⁵²⁰ Section 2(1)(a), (b), (c) and (d).

¹⁵²¹ 42 of 2000.

¹⁵²² Section 2 of the Act. The Minister of Justice has the authority to designate such States although it has been submitted that one of the challenges of the cross-border legislation in South Africa is that no States have been designated by the Minister and thus the Act lacks practical applicability. It is submitted that perhaps the solution to this delay in State designation be read into the law by the courts by the courts' assumption that the contracting States are designated States for the purposes of this law. See De Witt Ian *Challenges of Cross-Border Insolvencies*. A talk presented to the 16th Commonwealth Law Conference in Hong Kong by Ian De Witt. (2009).

¹⁵²³ PM Meskin; B Galgut; PAM Magid; JA Kunst; A Boraine; DA Burdette *Insolvency Law* Butterworths, Lexis Nexis (2008) Chapter 17 para. 17.4.3.

¹⁵²⁴ 42 of 2000.

¹⁵²⁵ *Ibid.* See also, UNCITRAL Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997) Part IV Main Features of the Model Law, Background section 22.

¹⁵²⁶ 42 of 2000.

¹⁵²⁷ Constitution of the Republic of South Africa Act, 1996 section 231.

¹⁵²⁸ *Ibid.* Section 25. See *In re Tri-Continental Exchange Ltd* US Bankruptcy Court for the District of California No. 06-22652-C-15, 06-22655-C-15 and 06-22657-C-15 where the debtors in the case were insurance companies where the US court held that in terms of the US law (Bankruptcy code) which

when compared to the Cross-Border Insolvency Act,¹⁵²⁹ it becomes clear that the South African Cross-Border Insolvency Act¹⁵³⁰ is more concerned with the entire legal system pertaining to cross-border insolvency and does not mention specific types of debtors.¹⁵³¹

This is a very important factor to South African law particularly in light of the fact that once the Act becomes active, a foreign representative may seek to enforce a debt against a specifically excluded type of debtor¹⁵³² in terms of the UNCITRAL Model law which is not mentioned in the South African Cross-Border Insolvency Act,¹⁵³³ in such cases the court will have to make it clear whether such an application can be opposed on the grounds of the specific type of debtor being excluded in terms of the UNCITRAL Model Law. On the other hand this will likely not take place if the UNCITRAL Model Law is adhered to exclude certain types of debtors in that particular foreign representative's internal law.

Currently the States that are a party to the Model Law are Eritrea (1998), Japan (2000), Mexico (2000), South Africa (2000), Montenegro (2002), Poland (2003), Romania (2003), Serbia (2004), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005), US of America (2005) Colombia (2006), Great Britain (2006), New Zealand (2006), Republic of Korea (2006); and Australia (2008).¹⁵³⁴

The Cross-Border Insolvency Act¹⁵³⁵ uniquely provides for broad humanitarian jurisprudential concepts in addition to technicalities for dealing a debtor within

corresponds with the UNCITRAL Model Law on Cross-Border Insolvency, the insurance company debtors were ineligible to file insolvency proceedings however foreign insurance companies were eligible for such relief in terms of the US Bankruptcy code.

¹⁵²⁹ 42 of 2000.

¹⁵³⁰ 42 of 2000.

¹⁵³¹ PM Meskin; B Galgut; PAM Magid; JA Kunst; A Boraine; DA Burdette *Insolvency Law* Butterworths, Lexis Nexis (2008) Chapter 17 para. 17.4.3.

¹⁵³² This is highly possible as banks and insurance companies are also highly affected in times of recession. A foreign representative may be desperate to attach the assets of such an organization in South Africa.

¹⁵³³ 42 of 2000.

¹⁵³⁴ http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html 16 July 2008.

¹⁵³⁵ 42 of 2000.

this Act. Such concepts are captured in the *boni mores*¹⁵³⁶ provision of the act and the interpretation clause which promotes unity among States while observing good faith.¹⁵³⁷ This means that laws that are taken under this Act are not to be read as punitive to defaulting and struggling commercial entities and therefore the decisions taken and enforced by the court in each unique situating must have due regard to a holistic approach to the prevailing debtor and other interested parties¹⁵³⁸ as well. Where the court in South Africa is of the view that an action against the debtor is offensive to that rather chameleon concept of public morality, the court may refuse to take action.

The Cross-Border Insolvency Act¹⁵³⁹ provides clearly the right of access to the High Court for relief¹⁵⁴⁰ however the court's jurisdiction does not extend to any other matter outside of the application in terms of the Cross-Border Insolvency Act.¹⁵⁴¹ With regard to the access of foreign creditors to proceedings in terms of South African law, the Cross-Border Insolvency Act¹⁵⁴² provides that subject to the provisions of the Act foreign creditors have the same rights as South African creditors¹⁵⁴³ and this will not affect the rankings of the claims under South African insolvency law, however, subject to foreign claims not being ranked lower than non-preferent claims.¹⁵⁴⁴ Further, the Cross-Border Insolvency Act¹⁵⁴⁵ makes provision for the recognition of foreign proceedings¹⁵⁴⁶ subject to a foreign

¹⁵³⁶ Section 6, public policy exception. See also *ABSA Bank Ltd v Chopdat* 2000 (2) SA 1088 (W) 1092 H. where the court held that as a matter of public policy an act of insolvency should not be kept as privileged information as contained in the common law of privilege particularly in settlement negotiations.

¹⁵³⁷ Section 8.

¹⁵³⁸ Section 22 which provides for the protection of creditors and other interested persons even if that means granting or denying the relief which may be granted by the courts in terms of the Act. Section 23 provides for the general avoidance of acts that may be detrimental to creditors.

¹⁵³⁹ 42 of 2000.

¹⁵⁴⁰ Section 9.

¹⁵⁴¹ 42 of 2000 sections 10 and 11.

¹⁵⁴² 42 of 2000.

¹⁵⁴³ Section 13(1).

¹⁵⁴⁴ Section 13(2).

¹⁵⁴⁵ 42 of 2000.

¹⁵⁴⁶ Section 15.

representative producing certified¹⁵⁴⁷ documentation¹⁵⁴⁸ to make an application for such recognition before the court.

The Cross-Border Insolvency Act¹⁵⁴⁹ clearly makes it facile for the foreign representatives and the South African courts to resolve insolvency matters expeditiously while also making clear provisions that permit for the courts to take a decision to recognize foreign proceedings.¹⁵⁵⁰ Having clarified the rights of parties to insolvency proceedings it becomes crucial to consider the types of relief that a court may grant. The Cross-Border Insolvency Act¹⁵⁵¹ provides for relief that may be granted by a court upon application for recognition of foreign proceedings and relief upon recognition of foreign proceedings.

This relief includes an order by the court, *inter alia*, to order a stay in the execution against the debtor's assets, entrusting administration or realization of the debtor's assets to a foreign representative in order to protect the value of such assets or in the case of the Cross-Border Insolvency Act¹⁵⁵² the court may stay other individual legal actions or suspend the disposal of debtor's assets. It is submitted that once this model law becomes effective, it will contribute to legal testing and consequently achieve justice in cross-border insolvency matters. Further, in current financial crisis it is submitted that it has become imperative that such a law is made practically applicable.

9.5 Some Debates around South African Cross-Border Insolvency Law

It must be noted that though South Africa became a party to the UNCITRAL Model Law on Cross-Border Insolvency in 2000, the Cross-Border Insolvency

¹⁵⁴⁷ Section 16, which contains an in-built presumption of the authenticity of the foreign documents. See UNCITRAL Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997) 113. The UN guide to 'legalization' or guidelines on proof of documents as authentic.

¹⁵⁴⁸ Section 15(2).

¹⁵⁴⁹ 42 of 2000.

¹⁵⁵⁰ Section 17.

¹⁵⁵¹ 42 of 2000 sections 19 and 21.

¹⁵⁵² 42 of 2000 section 21.

Act¹⁵⁵³ was only promulgated on 28 November 2003 and many of the reported decisions on cross-border insolvency were taken by the court without reliance on this Act as it is not applicable at present. It is submitted that in spite of the decisions not being based on the model law, there are cases will also be considered carefully as a starting point on the courts interpretation and application of South African law on cross-border insolvency. The cases referred to herein will be considered in order to highlight some of the debates around the reforms that have taken place in as far as South African cross-border insolvency law is concerned.

9.6 The Current Application of Cross-Border Insolvency Law in South Africa

The current law on cross border insolvency is contained in The Cross-Border Insolvency Act¹⁵⁵⁴ although to date there have no reported judgments on South African case law pertaining to the application of this Act as it operation is dependent upon the designation by the Minister of Justice as to the States to which the Act will apply.¹⁵⁵⁵

With these circumstances in mind it is essential to consider some of the legal opinion on the subject as it will form a basis through which courts may be able to obtain guidance from when approached to make a decision as to the reliefs contained in the Cross-Border Act.¹⁵⁵⁶ It seems clear that at present South Africa has simply made the halfway progress in the adoption of the UNCITRAL Model Law on Cross-Border Insolvency¹⁵⁵⁷ therefore it cannot be said *stricti sensu* that South African current law on cross-border insolvency reflects that of the UNCITRAL Mode Law since the Cross-Border Insolvency Act¹⁵⁵⁸ remains

¹⁵⁵³ 42 of 2000.

¹⁵⁵⁴ 42 of 2000.

¹⁵⁵⁵ PM Meskin; B Galgut; PAM Magid; JA Kunst; A Boraine; DA Burdette *Insolvency Law* Butterworths, Lexis Nexis (2008) Chapter 17.

¹⁵⁵⁶ 42 of 2000.

¹⁵⁵⁷ See www.uncitral.org/uncitral/en/.../insolvency/1997Model.html 19 March 2010.

¹⁵⁵⁸ 42 of 2000.

inoperative at present. Therefore South Africa has to look to common law and other statutory law on cross-border insolvency matters.

It is proposed on the other hand however because of the many financial challenges facing commercial entities throughout the world that it is only a matter of time before the South African courts are called to, with the help of lawmakers to look to the Cross-Border Insolvency Act.¹⁵⁵⁹ Clearly the Minister is under pressure to be expediently designate the States in terms of section 2 of the Cross-Border Insolvency Act¹⁵⁶⁰ and allow the for the full application of the Act. Further, international trade transactions form a constant concern for South Africa even through a world wide recession or GFC which was at its highest level of impact in 2008 and 2009.¹⁵⁶¹ Therefore it is important that all aspects of international trade law in this case matters relating to cross-border insolvency in South Africa become fully reformed and functioning. As a country affected by the recession there seems to be no justification for half-bake statute that is essential to trade in times of recession.

According to the writings of Professor Lee Steyn it is submitted that apart from looking to the Cross-Border Insolvency Act¹⁵⁶² it is possible to also have due regard to decisions such as *Gendor Holdings Ltd v City Fishing Holdings (Pty) Ltd; Breemond Trust (Intervening Party)*¹⁵⁶³ on issues of cross-border insolvency. It is submitted that in cross-border insolvency, as reflected *in casu*, are superseded by provisions of the Admiralty Jurisdiction Regulation Act.¹⁵⁶⁴ The matter involved an application for the winding up of a company in terms of the

¹⁵⁵⁹ 42 of 2000.

¹⁵⁶⁰ 42 of 2000.

¹⁵⁶¹ Bekink B. and Botha C. *The Role of a Modern Central Ban in Managing Consumer Bankruptcies and Corporate Failures: A South African Public-Law Angle of Incidence* South African Mercantile Law Journal Volume 21 (2009) 74. The authors submit that the global economy is showing clear signs of stress as was illustrated during the 2008, 2009 GFC.

¹⁵⁶² 42 of 2000.

¹⁵⁶³ [2007] 3 All SA 400 (C). See Steyn L *Insolvency Review* Juta's Quaterly Review Insolvency Juta (2007) (3).

¹⁵⁶⁴ 105 of 1983.

Companies Act¹⁵⁶⁵ on the grounds that it was unable to pay its debts as envisaged within the provisions of the Act. The respondent opposed the application on the basis that this application constituted an abuse of the court process and that the winding up of the respondent would provide no tangible benefit to the applicant.¹⁵⁶⁶

The cross-border aspect of this case was evident in the fact that the applicant and respondent were both Namibian companies although the respondent had established a place of business in Cape Town. One of the respondent's arguments in the matter was that the application for winding up should be stayed in terms of section 10A(2)(a) of the Admiralty Jurisdiction Regulation Act¹⁵⁶⁷ as the Cape High Court had previously granted an order authorizing the same applicant to sell the respondent's only asset, which was a shipping vessel. In terms of the Admiralty Jurisdiction Regulation Act¹⁵⁶⁸ the proceeds of the sale of the ship would establish a fund which would be administered by an appointed referee whose responsibility involves the examination and reporting to the fund on the validity and ranking of the claims against the fund.¹⁵⁶⁹

The court's ruling in this case was that in the circumstances the application to have the respondent's company wound up was not an abuse of process further; there would be benefit for the applicant in having the company wound up. However, the effect of section 10A(2)(a)¹⁵⁷⁰ of the Admiralty Jurisdiction Regulation Act¹⁵⁷¹ in this case was that it would stay the application for the winding up of the respondent company. It is proposed by Professor Steyn that when considering cross-border insolvency it is essential to consider the

¹⁵⁶⁵ 61 of 1973 section 346.

¹⁵⁶⁶ Steyn L *Insolvency Review* Juta's Quaterly Review Insolvency Juta (2007) (3) par 2.1.

¹⁵⁶⁷ 105 of 1983.

¹⁵⁶⁸ 105 of 1983 section 9(2) dealing with proceeds.

¹⁵⁶⁹ Steyn L *Insolvency Review* Juta's Quaterly Review Insolvency Juta (2007) (3) par 2.1.

¹⁵⁷⁰ *Ibid.* Section 10A (2)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983 provides that 'all proceedings in respect of claims which are capable of proof for participation in the distribution of the fund shall be stayed and an such claims shall be proved only in accordance with such order.' The court took the view that 'all proceedings' includes liquidation orders.

¹⁵⁷¹ 105 of 1983.

provisions of the Admiralty Jurisdiction Regulation Act.¹⁵⁷² This is a very important point to consider as effectively the Admiralty Jurisdiction Regulation Act¹⁵⁷³ covers several international trade issues that may be directly linked to cross-border insolvency.

It has been correctly submitted that in South Africa the Cross-Border Insolvency Act¹⁵⁷⁴ is not concerned with substantive issues of insolvency but procedural issues.¹⁵⁷⁵ This is evident in the statute's pre-occupation of court process, court procedure and access to courts. It is also clearly evident that the reliefs that may also be granted in pursuance of the Cross-Border Insolvency Act¹⁵⁷⁶ are in their nature concerned with procedural issues.

It is important to note that the presence of the Cross-Border Insolvency Act¹⁵⁷⁷ does not overtake the common law cross-border approach because the common law approach will continue to be applicable to non-designated States in terms of the Cross-Border Insolvency Act¹⁵⁷⁸ and the Judicial Matters Second Amendment Act¹⁵⁷⁹ which gives the South African court discretion to apply the territorial approach to insolvency matters when dealing with a foreign representative from a non-designated State.¹⁵⁸⁰

9.6.1 Common Law Principles

The common law principles on cross-border insolvency in South Africa are easily accessible. These principles have been sufficiently tested and applied by the

¹⁵⁷² 105 of 1983.

¹⁵⁷³ 105 of 1983.

¹⁵⁷⁴ 42 of 2000.

¹⁵⁷⁵ PM Meskin; B Galgut; PAM Magid; JA Kunst; A Boraine; DA Burdette *Insolvency Law* Butterworths, Lexis Nexis (2008) Chapter 17.

¹⁵⁷⁶ 42 of 2000.

¹⁵⁷⁷ 42 of 2000.

¹⁵⁷⁸ 42 of 2000 section 2.

¹⁵⁷⁹ 55 of 2003.

¹⁵⁸⁰ See *Ex Parte Steyn* 1979 (2) SA 709 (O); *Moolman v Builders and Developers (Pty) Ltd (In provisional Liquidation): Jooste Intervening* 1990 (1) SA 954; [1990] All SA 77 (A); *In re Gurr v Zambia Airways Corporation Ltd* [1998] All SA 479 (A); *Clegg v Priestly* 1985 (3) SA 950 (W); *Ex Parte Palmer NO v In re Hahn* 1993 (3) SA 359 (CPD); *Bekker NO v Kotze and Others* 1996 (4) SA 1293.

courts in order to provide guidance on such matters. In *Moolman v Builders & Developers (Pty) Ltd (In Provisional Liquidation) Jooste Intervening*¹⁵⁸¹ the court considered a cross-border insolvency situation. The facts of the case illustrate that the respondents, Builders & Developers (Pty) Ltd a company incorporated in the then Republic of Transkei was placed under provisional liquidation by order of the Supreme Court of Transkei. The appellant, one Moolman was appointed as provisional liquidator.¹⁵⁸²

The liquidator subsequently obtained an order from the same court in terms of the Transkeian Companies Act authorizing an examination in terms of section 417 of the Companies Act and an appointment of a commissioner. The examination commenced in Transkei and then convened in Port Elizabeth for the purposes of interrogating certain parties in that city. In Port Elizabeth were three persons to be interrogated. These were one Mr. Jooste a major shareholder and sole director of the company, one Mr. Visser and one Mrs. Scott. It was common cause that Mr. Jooste had paid large sums of money to one Mrs. Scott prior to the provisional liquidation¹⁵⁸³ of the company. Jooste and Visser objected to the interrogation on the grounds that the Commissioner had no jurisdiction in South Africa and that they were as a consequence not obliged to submit to the interrogation.¹⁵⁸⁴

The objection came about as a result of an *ex parte* application in the court *a quo* by the appellant, Moolman the provisional liquidator in terms of the Transkei Supreme court order. In the application the appellant had applied for an order recognizing his appointment as provisional liquidator and the appointment of a commissioner,¹⁵⁸⁵ in terms of the foreign Transkei court order. One of the crucial

¹⁵⁸¹ [1990] All SA 77 (A).

¹⁵⁸² See judgment by Hefer JA.

¹⁵⁸³ Already the facts clearly hint an establishment of a case of unlawful dispositions in light of the Companies Act 61 of 1973 therefore a *prima facie* cause for interrogation was sufficiently justified in the facts.

¹⁵⁸⁴ See judgment by Hefer JA.

¹⁵⁸⁵ Though the recognition of the appointment of a commissioner was neither canvassed in the rule *nisi* nor was there a respondent cited in the rule papers.

prayers in the appellant's papers pertaining to cross-border insolvency was that he was seeking an order:

'declaring that thereafter the applicant shall by virtue of this recognition be empowered to administer the said estate in respect of all assets of the said estate which are situated within the Republic of South Africa.'¹⁵⁸⁶

The court *a quo* refused the order in terms of the rule *nisi* stating according to Mullins J who stated the following:

'As I understand the position therefore, while comity extends to affording a foreign trustee or liquidator the opportunity of recovering assets within our jurisdiction, there is no basis for affording him or her other powers or functions which he or she may have within the area of jurisdiction of the country in which he or she was appointed. There may be sound arguments in favour of granting an application such as this one but there must be authority therefore. Such authority is not to be found either in our statute law, or in our common law either directly or as an extension of recognition orders which have been granted in the past.'¹⁵⁸⁷

In arriving at a decision in the appeal in this case, the appellate court established that in cross-border cases there is a practical frustration that is immediately brought about and this must be balanced with a well recognized common law principle. This principle provides that 'where a foreign representative, such as

¹⁵⁸⁶ *Ibid.* See judgment.

¹⁵⁸⁷ *Moolman v Builders and Developers (Pty) Ltd (In provisional Liquidation): Jooste Intervening* 1990 (1) SA 954; [1990] All SA 77 (A) 77.

executor, liquidator, or receiver (as couched in the language of the Cross-Border Model Law)¹⁵⁸⁸ wishes to deal with assets in this country in his or her representative capacity and by virtue of his foreign authorization he or she must be first recognized in his or her appointment by a court of law or person of competent jurisdiction in South Africa before he or she is entitled to act.¹⁵⁸⁹

The appellate court in this case continued to explain that in South African law recognition orders are sought and granted not only in respect of locally situated immovable property but also in respect of movables and in respect of incorporeal property, for example, a right of a foreign receiver to collect outstanding debts in South Africa. It was found *in casu* that the application while it was in order it was complicated by the company's lack of property in South Africa. On the other hand recognition was crucial to allow the appointed commissioner to continue his enquiry in South Africa.¹⁵⁹⁰

The court recognized in the circumstances of this case the need for the commissioner to investigate the payments made to Mr. Visser and Mrs. Scott as these payments would be crucial to the recovery of the company's assets, if any. Further, since the granting or refusal of the recognition of a foreign representative's recognition is a matter for the court's discretion¹⁵⁹¹ the court *a quo* had been in error to take the view that there existed no such discretion. Having stated this principle it became clear *in casu* that the court would exercise its discretion either in favour of or against the appellant. If the discretion is taken in favour of the appellant the court would further have to establish whether or not

¹⁵⁸⁸ Cross-Border Insolvency Act 42 of 2000 section 1(h) which provides that a foreign representative 'means a person or body, including one appointed on an interim basis, authorised in foreign proceedings to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceedings.'

¹⁵⁸⁹ See judgment. See also, *Liquidator Rhodesian Plastics (Pvt) Ltd v Elvinco Plastics Products (Pty) Ltd* 1959 (1) SA 868 (C); *Zinn NO v Westminster Bank Ltd* 1936 AD 89 where an English administrator was not permitted to issue summons for payment of moneys in a South African court without first obtaining recognition.

¹⁵⁹⁰ *Ibid.*

¹⁵⁹¹ *Ex Parte Stegmann* 1902 TS 40.

in the circumstances, it would be appropriate to attach conditions to the recognition in order to prevent prejudice to local interested parties.¹⁵⁹²

In this case the court held that recognition is granted solely on the grounds of comity¹⁵⁹³ and convenience. In this case the law of Transkei and South Africa was identical in the circumstances with the interdependence between the two countries it was clear that comity favored the recognition. Further, it was clear that there were matters¹⁵⁹⁴ that were of such nature in this case that it was essential that these be investigated by the commissioner as per further relief sought by the appellant requesting the recognition of the commissioner. The court in conclusion granted the recognition of the foreign representative.¹⁵⁹⁵

This case above serves as a useful example to clarifying the common law principles on cross-border insolvency in South African law. Clearly common law is insufficient in light of ameliorating international trade relations. To leave it in the recognition of foreign representatives issue in the hands of the broad application of the court's discretion creates uncertainty as already mentioned. Further, judging from this case if common law cross-border rules are applied as in the case above a foreign representative whose legal system is strange or unfamiliar in South African law, such a representative will likely not be recognized because of the doubtful comity and convenience in recognizing such a representative. This may lead to a cross-border situation that may operate as an injustice to the foreign representative and this may create all kinds of other negative implications when entering into international trade relationships with South Africa.

The principle of the universality of sequestration and the reciprocity and comity of nations is still respected in South African law and should be protected at all costs

¹⁵⁹² See judgment by Hefer JA.

¹⁵⁹³ See Zulman RH *Insolvency Law (Including Winding up of Insolvent Companies)* Annual Survey, Juta (2002) 681. See *US v JA Jones Const. Group, LLC* US District Court for the Eastern District of New York No. CV2003-1383 (SJF)(MDG).

¹⁵⁹⁴ In this case concerns about the payment of large sums of money to Mr. Visser and Mrs. Scott prior to the liquidation of the company had to be interrogated.

¹⁵⁹⁵ See judgment by Hefer JA.

as established in the case of *Gardner & Another v Walters & Another NNO (In re Ex Parte Alters & Another NNO)*.¹⁵⁹⁶ This case dealt with the 'letter of request' which a local court asks a foreign court to recognize a locally appointed liquidator and to allow such liquidator to institute proceedings in the foreign court as may be necessary to enable a liquidator to carry out his or her duties of winding up a company. Such letter of request is well known and recognized in international law. All that the liquidator has to show in an application for a letter of request is a *bona fide* belief that proceedings should be initiated in a foreign country. The liquidator does not have to show reasonable prospects of success. The letter of request however must be followed by an appropriate legal process to address a cross-border insolvency situation.

The principle of recognition of foreign representatives according to the court's discretion is a long standing principle which has been applied in South African law from the earliest reported judgments. It seems therefore that in law this principle was practical prior to the development of international model laws as the South African courts had to be trusted with making equitable decisions in cross-border insolvency matters. This was illustrated in an earlier judgment of *Re African Farms Ltd*¹⁵⁹⁷ where the matter involved an English company in voluntary liquidation in England. The court recognized the English liquidator and held that

'In thus recognizing the appointment of a foreign liquidator, it should be clearly understood that it is a matter purely in the discretion of the Court, to be exercised in cases where it seems convenient and desirable and subject to conditions. Speaking generally with regard to these latter, the Court should, I think, provide that all local preferences validly acquired under the law of the colony should be given effect

¹⁵⁹⁶ 2002 (5) SA 796 (C).

¹⁵⁹⁷ 1906 TS 373.

to, and should see that facilities are provided for local creditors proving their claims.’¹⁵⁹⁸

This principle was also upheld in *Mtd (Mangula) Ltd v Frost and Power, NO; Ex Parte Power, NO*¹⁵⁹⁹ where the court stated that even if the domicile of the debtor is Rhodesia, as was alleged in the papers before the court, there was nothing in law or on the facts before the court to preclude the granting of recognition to the *curator* appointed in the Transvaal. This case was a confirmation of the foreign representative recognition principle as stated in *Re African Farms Ltd*.¹⁶⁰⁰

In *Ex Parte Steyn*¹⁶⁰¹ the court dealt with an application brought about by a duly appointed trustee in the estate of one Augusto Moreira whose estate was sequestrated by an order of the High Court of the Kingdom of Lesotho. The applicant sought recognition of his appointment as trustee in the South African court in order to act in his capacity as trustee in regard to administering assets of the insolvent which were said to be situated in the Republic of South Africa. The applicant also submitted that the recognition was necessary in order that all assets of the insolvent estate be discovered and collected.¹⁶⁰²

The court re-iterated the common law principles pertaining to the court’s rationale when granting of recognition orders for the recognition of foreign representatives in cross-border insolvency matters. The court stated that these principles are based on the power of the court to exercise discretion and that such power is based on comity of nations. The court held that in these circumstances there was no bar to granting the recognition of the foreign trustee in this case.¹⁶⁰³

¹⁵⁹⁸ 392.

¹⁵⁹⁹ [1966] 2 All SA 510 (R) 514 and 515.

¹⁶⁰⁰ 1906 TS 373.

¹⁶⁰¹ [1979] All SA 773 (O).

¹⁶⁰² See judgment by Flemming J. The court made a note that there was no support in the applicants contention for the ultimate ‘discovery and collection’ of insolvent estate assets.

¹⁶⁰³ *Ibid.* See also *Ex Parte Francis, N.O.* 1933 SWA 11 p 12, this matter dealt with the recognition in South West Africa of an assignee appointed by the Master of the Natal Provincial Division. The court stated the following principle ‘It is clear that the power is in the absolute discretion of the court. But for that reason this power should not be exercised in a way which may result in prejudice to interested persons.’

To further clarify the relevant principles the court made two important remarks in this case which cast important light to the knowledge of cross-border insolvency in South African law. First the court stated that the order should not be seen as a precedent for making special provision for local creditors. Secondly, the granting of recognition is thought adequate to protect all interested parties by extending practically all the rights created by South African insolvency laws.¹⁶⁰⁴ In essence common law although fairly uncertain seeks to enforce some of the main themes of the UNCITRAL Model Law such as the fair protection of all creditors and the desire to uphold comity.

9.6.2 Insolvency Law and the Diamond Industry

Insolvency in diamond trade can be a direct consequence of the diamond producing mine's failure to provide sufficient revenue to sustain its commercial liquidity or a recession.¹⁶⁰⁵ It is crucial to mention briefly that in current reports during the course of this study it became apparent that the recession has undoubtedly affected the diamond industry with threats of insolvency looming

Although the final order is usually made subject to conditions favourable to local creditors, it is not for the court to assume that conditions framed by itself, without giving persons interested an opportunity of being heard, will suffice to protect those interests in all contingencies.'

¹⁶⁰⁴ *Ibid. Re African Farms Ltd* [1979] All SA 773 (O) judgment.

¹⁶⁰⁵ Rafferty T. *De Beers Executive Sees Signs of Diamond Market Revival* 20 October (2009) 1.

http://www.namakwadiamonds.co.za/nd/uploads/wysiwyg/documents/091020_IdexOnline.pdf 21 March 2010. In the report by the author above, it becomes evident that the diamond industry was one that was worst affected by the recession. This is a typical example of market challenges that may give rise to concerns of insolvency in the diamond industry. The report provides as follows: 'De Beers sees recovery in the global diamond market, and the company's mines in Botswana are now running at 80 percent capacity. This is despite the fact that consumers are not yet buying polished diamonds in the amounts they were before the economic collapse.' See <http://www.busrep.co.za/index.php?fArticleId=5361707> 21 March 2010. In a business report powered by Independent Online dated 21 February (2010) it was reported that Botswana's diamond industry was affected by the economic collapse. The report stated that 'for years was hailed as an economic success story, but the collapse in demand for the country's diamonds has hit revenues hard and raised questions about an ambitious spending scheme. Botswana produces 22 percent of the world's diamonds, making it the top producer and accounting for half of government revenue. The country prides itself as a model of a successful African democracy. But in 2009, Botswana halved output and suspended much of its diamond activities as the global economic crisis hit its mine.... Botswana produces 22 percent of the world's diamonds, making it the top producer and accounting for half of government revenue. The country prides itself as a model of a successful African democracy. But in 2009, Botswana halved output and suspended much of its diamond activities as the global economic crisis hit its mines.' This report is a further example of a mine's failure to provide sufficient revenue to sustain commercial liquidity and as a result potentially create a gap for cross-border insolvency challenges.

over various diamond production entities in the Southern Africa region and some of the world's mines; therefore the cross-border insolvency law is particularly relevant at this time. It was reported in the United Nations forum in 2009.¹⁶⁰⁶

It became apparent earlier in 2009 that there were many job losses in Botswana as a result of sales dwindling and the companies retrenching in order to cut costs. It is difficult times for Debswana Diamond Company, which is a joint venture between the South African diamond company, De Beers and Botswana's government. This is most unsettling since Botswana, like South Africa, is one of the African countries that have used its rich mineral resources to fund development.¹⁶⁰⁷

The New York Times also painted a grim picture in 2009 of the plunging diamond sales and prices. It was reported recently that the famed New York, Tiffany jewellery chain was struggling even after lowering prices. It was also further reported that many a diamond producer throughout the world were also suffering loss of business together with many other luxury businesses at this time. It has been estimated in the rather negative reports concerning the diamond industry that even with new discoveries of diamond deposits, it is estimated that the world will eventually run out of new diamonds within 20 years, this means that the industry must take steps to not only to maintain sales but to accommodate the geographical changes that will come with the eventual drying up of new mining deposits.¹⁶⁰⁸

It is submitted in this study that even if the estimate above concerning the drying out of natural diamond deposits is established to be true. It is proposed that this is insufficient to ignore the holistic impact of the diamond industry because the

¹⁶⁰⁶ See United Nations Intergraded Regional Information Networks, *Job Losses as Diamonds Lose Their Lustre*, Africa News 11 February (2009) www.afrika.no/Detailed/17940.html 16 July 2009.

¹⁶⁰⁷ *Ibid.* http://www.namakwadiamonds.co.za/nd/uploads/wysiwyg/documents/091020_IdexOnline.pdf 21 March 2010; <http://www.busrep.co.za/index.php?fArticleId=5361707> 21 March 2010.

¹⁶⁰⁸ Werdigier J. The New York Times: *Diamond Sales, and Prices, Plunge* 21 February, Late Edition-Final (2009).

diamond industry can still be sustained by looking to stock piled diamonds. Diamonds kept by diamond companies as stockpiles will naturally become more valuable should the natural deposits run out as estimated. Further, it is submitted that the diamond industry may also look to scientific alternatives for stones of similar use or nature, for example, laboratory diamonds. Further, the diamond industry will always be viable as a business form designed to deal with poverty and create business opportunities by, for example, strengthening other aspects of the industry such as artisanal skills development and using previously mined diamond sights as tourist destinations.¹⁶⁰⁹

The commercial failure of a mine was considered in the case of *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd*,¹⁶¹⁰ which involved the retrenchment of employees of DBCM at the Koffiefontein mine. This diamond mine was reported as having run at a consistent loss over its inconsistent operative years which culminated in a R75 million rand loss in the budget year of 2005. In 2005 DBCM seriously contemplated closing the mine; however, instead of closing the mine cost-saving measures were implemented.¹⁶¹¹ Clearly the facts of this case illustrate a typical scenario where insolvency and the objectives of insolvency laws would have to be considered carefully to deal with the reality of these crippling effects of an economic challenge of a diamond mine.

The strategy of implementing cost saving measures adopted by De Beers in this case and their attempts to retrench fewer employees or finding a buyer for the mine as a rescue package for this struggling business entity was in line with the objectives of the insolvency laws as contained in the now fully adopted United Nations Model Law of cross-border insolvency. However, the cross-border relevance of insolvency in this case would only have been raised and tested by the courts if it was found that the business had so failed as to be unable to meet its foreign debts or if foreign representatives such as liquidators or other

¹⁶⁰⁹See example of such tourist sight in South Africa, www.goldreefcity.co.za/ 21 March 2010.

¹⁶¹⁰(2006) 27 ILJ 1909 (LC).

¹⁶¹¹912 A.

interested parties wished to be part of the proceedings in a South African court. This was not obviously the issue in this case however the example used shows the importance of having well developed cross-border insolvency laws in South Africa.

A diamond entity that is faced with the difficult task of saving employment for the mine employees in spite of economic failure because the mine is unable to support itself is a very real concern. Further, if the raw material mined in that particular mine causes significant financial losses because it has become unfeasible to continue to do so must also be taken into consideration as required by the insolvency laws. Dealing with the diamond producers stockpiled diamonds, industrial machines and mine properties¹⁶¹² that have to be closed subsequently as assets must be clearly dealt with having taken into account holistically the interest of all parties involved. The main purpose of removing the injustice threat from insolvency is however the very first step that must be taken by a court dealing with the matter and this is now ensured through the application of current laws.

The final effect of phenomena such as mine failure and recession, if left to chance¹⁶¹³ is that diamond entities will not be able to sustain their usual commercial and mining activities. This would inevitably lead to an undesirable result of insolvency. However, with just and effective insolvency law in place potential for utmost protection of affected parties' interests will be somewhat

¹⁶¹² Mine properties may be upon ceasing mining operations be used as tourist attractions, educational facilities or other means of producing revenue. This approach is part of dealing with cross-border insolvency. If mining operations are no longer feasible proposals may be put forward to attempt to generate revenue in other ways. See www.goldreefcity.co.za/ 21 March 2010 an example of a South African tourist destination reborn out of previous mining activities.

¹⁶¹³ In a document prepared by Gem Diamonds Limited *Incorporated in the British Virgin Islands under the International Business Companies Ordinance Cap.291 of the British Virgin Islands with registered number 66975 Proposed acquisition of Kimberley Diamond Company NL and Notice of Extraordinary General Meeting* 1 January (2007) it is clear that diamond companies are careful to have strategies in place to deal with market related problems that may threaten their diamond trading activities. See http://www.gemdiamonds.com/im/files/d/GEMD_circular_sep07.pdf 21 March 2010. Clearly no element of market influences is left to chance. This means that sufficient investigation often go into the research pertaining to trends that take place in the markets.

protected¹⁶¹⁴ and consequently prevent financial anarchy declining trade sectors. Further, the research and reports given at this stage will assist States to take measures to ensure sustainable trade and development of diamond markets.

In order to have an example of preparation that a diamond entity may have to deal with threats to its diamond trade, this study will make reference to a document prepared by Gem Diamonds Limited.¹⁶¹⁵ Gem Diamonds Limited is a diamond trading company incorporated under the business laws of the British Islands. In the company's document certain world diamond trade trends are investigated in order to allow this diamond trading entity to be able to cope with market forces that may lead to the company's inability to function optimally. The information captured in this sample report also influences the business decisions to be taken by a company in the normal or extra-ordinary course of business. The information in the document covers important areas of a diamond company's business and makes reference to several market related influences which will be explained below.¹⁶¹⁶

The market related influences discussed in the company's report include *inter alia* information that relates to the internal structure of the company including its latest mergers and acquisitions, its role in the international diamond market, financial information and a mineral experts report. It becomes clear from this documented information that a thoughtful process of planning for a successful

¹⁶¹⁴ UNCITRAL Model Law on Cross-Border Insolvency seeking to create the most ideal and internationally acceptable manner of dealing with matters of cross-border insolvency. <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> 19 March 2010.

¹⁶¹⁵ Gem Diamonds Limited *Incorporated in the British Virgin Islands under the International Business Companies Ordinance Cap.291 of the British Virgin Islands with registered number 66975 Proposed acquisition of Kimberley Diamond Company NL and Notice of Extraordinary General Meeting 1 January (2007)* it is clear that diamond companies are careful to have strategies in place to deal with market related problems that may threaten their diamond trading activities. See http://www.gemdiamonds.com/im/files/d/GEMD_circular_sep07.pdf 21 March 2010.

¹⁶¹⁶ *Ibid.*

future of this diamond company.¹⁶¹⁷ With regard to preparations for the recession, the report provides as follows:

‘The diamond industry is a highly specialized business and production and distribution is largely consolidated in the hands of a few key players. By far the majority, that is 70 per cent by value of the diamonds, are mined in four countries namely Botswana, Russia, Canada and the DRC, and the marketing of these diamonds takes place in traditional diamond trading centers. The outlook for the diamond market remains good. A shortage in the supply of rough diamonds is expected in the ensuing ten years as global production is predicted to remain relatively constant whilst global demand continues to increase.

This would result in continued price increases in the short to medium term. The market in 2006 was subdued and according to International Diamond Exchange (IDEX) research the global diamond demand is expected to cool in 2007, reflecting the economic slowdown predicted by most forecasters. Volatility has been evident and price corrections have been necessary and will continue. However, apart from major economic meltdown, the global diamond market and the associated diamond prices are driven by the balance between the supply and demand. The supply volume is anticipated to be reasonably static whilst growing middle income markets in United States and Asia will continue to grow. In summary the supply/demand

¹⁶¹⁷ Gem Diamonds Limited *Incorporated in the British Virgin Islands under the International Business Companies Ordinance Cap.291 of the British Virgin Islands with registered number 66975 Proposed acquisition of Kimberley Diamond Company NL and Notice of Extraordinary General Meeting 1 January (2007)* it is clear that diamond companies are careful to have strategies in place to deal with market related problems that may threaten their diamond trading activities. See http://www.gemdiamonds.com/im/files/d/GEMD_circular_sep07.pdf 21 March 2010. p 4, 16, 24 and 116 of the report.

scenario is positive. According to Royal Bank of Canada (RBC) Capital Markets (May 2007) diamond prices will remain firm for up to five years and are forecast to increase by 2– 5 per cent per annum. No major diamond mine is forecast to begin production and exploration spending will continue to run at a high level. The global exploration costs for diamonds in 2006 was US\$7.5 billion, more than five times what it was five years ago. The market will be favourable for at least five years for any company bringing successful new projects on stream, and good projects will be valued by both trade buyers and the stock markets.

5.1 Current and Forecast World Diamond Supply

Global diamond production is dominated by Africa which contributed 61 per cent by carats in 2006, as shown in Figure 2.¹⁶¹⁸ The major producers within Africa are the DRC and Botswana which each produce approximately 20 per cent of Africa's output. South Africa contributed 10 per cent to global production and Angola a further 5 per cent. Contributions by the Central African Republic are typically 1 per cent of global production. Australia contributed approximately 19 per cent by carats in 2006.¹⁶¹⁹

¹⁶¹⁸ Gem Diamonds Limited *Incorporated in the British Virgin Islands under the International Business Companies Ordinance Cap.291 of the British Virgin Islands with registered number 66975 Proposed acquisition of Kimberley Diamond Company NL and Notice of Extraordinary General Meeting 1 January (2007)* it is clear that diamond companies are careful to have strategies in place to deal with market related problems that may threaten their diamond trading activities. See http://www.gemdiamonds.com/im/files/d/GEMD_circular_sep07.pdf 21 March 2010. p 129 of the report.

¹⁶¹⁹ Gem Diamonds Limited *Incorporated in the British Virgin Islands under the International Business Companies Ordinance Cap.291 of the British Virgin Islands with registered number 66975 Proposed acquisition of Kimberley Diamond Company NL and Notice of Extraordinary General Meeting 1 January (2007)* it is clear that diamond companies are careful to have strategies in place to deal with market related problems that may threaten their diamond trading activities. See http://www.gemdiamonds.com/im/files/d/GEMD_circular_sep07.pdf 21 March 2010. p 128 of the report.

With regard to the availability of diamond resources as per Mineral Expert's report the document provides that:

'The ability to realise the projected valuation of the Ellendale Diamond Mine is dependent on a number of industry factors and assumptions, some of which are outside the Group's control.'

The diamond resources at the Ellendale Diamond Mine, as outlined in Part I "Letter from the Chairman of Gem Diamonds" and Part VII "Mineral Expert's Report", are predominantly in the indicated or inferred class. There is no guarantee, that as mining operations progress, the recovered grades will meet the predicted levels. Furthermore, the Ellendale Diamond Mine was evaluated using figures from historical production and forecast price increases. There can be no assurance that these estimates and forecasts are correct or that unforeseen events will not impact negatively on these elements; for example, a pit optimisation review will be undertaken at the Ellendale Diamond Mine following completion of the Acquisition, which might impact upon the expected rate of resource to reserve conversion (currently estimated at approximately 70 per cent in the Mineral Expert's Report contained in Part VII "Mineral Expert's Report"). In addition, the Directors anticipate that the modifications which are intended to be made to the plants at the Ellendale Diamond Mine will achieve the forecast increased throughput levels. Gem Diamonds has only been able to base these intended modifications on a limited number of inspections and no detailed designs or plans have been completed. As such, there can be no guarantees that the increases forecast

for production and throughput have been estimated correctly, which could therefore result in the Ellendale Diamond Mine not achieving the targets planned by Gem Diamonds.¹⁶²⁰

9.7 Foreign Law Perspective

It must be noted that in foreign law, there exists other examples of an attempts to unify laws pertaining to cross-border insolvency. This is evident for example in the European Union's EU Regulation as contained in (EC) 1346/2000 of 29 May 2000¹⁶²¹ on Insolvency Proceedings. It has been said that this binding on all European Union member States, with the exception of Denmark. It is important for the law on cross-border insolvency to have due regard to the provisions of this regulation and perhaps some of the precedent that has emerged from its application as this may effectively be used as a guide if necessary to dealing with the interpretation of South African law.

Obviously a single study is not able to capture all the perspectives of all foreign cross-border law therefore this chapter will concentrate on a few legal considerations of the US as a more economically palpable or developed country which has been influential in shaping the UNCITRAL Model Law on Cross-Border Insolvency. It is proposed that it is essentially it is cogent to study the US and its perspective on cross-border insolvency law which will be helpful to consider at a time when the international community is studying the actions of the US during the times of a recession.

¹⁶²⁰ Gem Diamonds Limited *Incorporated in the British Virgin Islands under the International Business Companies Ordinance Cap.291 of the British Virgin Islands with registered number 66975 Proposed acquisition of Kimberley Diamond Company NL and Notice of Extraordinary General Meeting* 1 January (2007) it is clear that diamond companies are careful to have strategies in place to deal with market related problems that may threaten their diamond trading activities. See http://www.gemdiamonds.com/im/files/d/GEMD_circular_sep07.pdf 21 March 2010, p 10 of the report.

¹⁶²¹ Official Journal (OJ) L160 30/06/2000 p 1-13. See PM Meskin; B Galgut; PAM Magid; JA Kunst; A Boraime; DA Burdette *Insolvency Law* Butterworths, Lexis Nexis (2008) Chapter 17. See also, UNCITRAL Secretariat *Guide to Enactment*, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 17 (A/52/17) (1997) Part IV Main Features of the Model Law, Background section 18.

Having made a note about the EU Cross-Border Regulation it must be noted that in this study, the primary concern on cross-border insolvency law pertains to the UNCITRAL Model Law as contained in the South African Cross-Border Act¹⁶²² as this is the law that seems to be more influential to South Africa and perhaps many more of its trading partners. Having said that it is important to note that the international community, whether it is represented by the United Nations or the European Union, has great concerns about the mechanisms for dealing with cross-border insolvency therefore it is important to keep abreast with other international jurisdictions on the legal implications of laws of cross-border insolvency. The foreign law perspective on the deliberations of this law will be succinctly analysed below.

It has been submitted that international trade developments together with global market finance has been significantly altered in the last three decades. This has resulted in the direct international integration of economies. This integration of economies was marked by conflicts of law as a result of national bankruptcy laws that were distinct and thus uncertain. Therefore, the UNCITRAL Model Law on Cross-Border Insolvency was created as a means of producing greater legal certainty for trade and investment.¹⁶²³ It is submitted that bankruptcy is a serious issue in international commerce and it has been exacerbated by conditions such as the fragile nature of the financial sector, high inflation rates, poor banking supervision an excessive public debt.¹⁶²⁴

According to Locatelli who focuses on US insolvency law his article submits that the UNCITRAL Model Law on Cross-Border Insolvency came about to solve the uncertainty that existed in the bankruptcy laws of economically interdependent countries by providing as one of its goals 'an establishment of provision of

¹⁶²² 42 of 2000.

¹⁶²³ Cross-Border Insolvency Act 42 of 2000, see preamble.

¹⁶²⁴ Locatelli Fernando *International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits on International Trade)* SMU Dedman School of Law and Business Review of the Americas 14 Law & Bus. Rev. Am. 313 (2008) 316.

certainty to promote economic stability and growth.’ This provision is contained in the introductory sections of the model law and the South African Cross-Border Insolvency Act.¹⁶²⁵ This is because it has been acknowledged in the international community that in practical economics credit availability is essential for the economy and so are optimal insolvency systems because the extension of credit by its nature involves risk.¹⁶²⁶

It is further submitted that effective insolvency law, as clearly evident in the Model Law, must serve two objectives. The first one is to reduce the cost of financing by generating a manager’s incentives for liquidation in cases of financial failure so that further capital losses can be avoided whenever liquidation is the most favorable option. The second objective is to provide rules to avoid detrimental liquidation by creditors in economic circumstances where maintaining the business activity results in asset protection and higher valuation of the company. It is submitted that maximizing asset value and rehabilitation of a company are crucial elements of law that are used as a means to protect that business from individual creditor actions with the consequence that it will provide efficient rescue of distressed companies.¹⁶²⁷

The UNCITRAL Model on Cross-Border Insolvency Law was received in US law as a positive universal framework. The Model Law was enacted in the US code which became effective in 2005 and takes the form of chapter 15¹⁶²⁸ of the Bankruptcy Abuse Prevention and Consumer Protection Act¹⁶²⁹ (BAPCPA).¹⁶³⁰ It is submitted that historically the US approach to Multinational Corporation

¹⁶²⁵ 42 of 2000.

¹⁶²⁶ Locatelli Fernando *International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits on International Trade)* SMU Dedman School of Law and Business Review of the Americas 14 Law & Bus. Rev. Am. 313 (2008) 320. Therefore it is cogently submitted that one of the contributions of the Model Law is that it seeks to promote confidence in domestic and foreign creditors in order to attract investment.

¹⁶²⁷ *Ibid.* 321; 328.

¹⁶²⁸ Section 304 of the American Bankruptcy Code.

¹⁶²⁹ 11 USC 1501

¹⁶³⁰ Proskurchenko Ksenia *Chapter 15 Cross-Border Insolvency: Is it True to its Universalism Aspirations?* The Rutgers Business Law Journal 5 Rutgers Bus. L.J. 96 (2008).

restructuring has always been flexible and successful with a pragmatic view of extensive jurisdiction to solve cross-border insolvency challenges. With the adoption of the Model Law, in the US Bankruptcy code it appears that it has served the purpose of improving procedural domestic regulation.

In the same way as the Cross-Border Insolvency Act¹⁶³¹ of South Africa, the US chapter 15 of the BAPCPA makes reference to a 'petition for recognition' by a foreign representative which must be accompanied by a procedure proof of foreign insolvency proceedings which usually take a form of a certificate from a foreign court or other acceptable evidence. The US court will then decide whether or not to recognize foreign proceedings. Further, it is accepted as a general rule that the US courts have the power to refuse foreign proceedings if they are against US policy. If the debtor has its COMI in a foreign country the proceeding will be recognized as main proceeding but if the debtor only has assets in a foreign country or an establishment then it will be classified as non-main proceeding.¹⁶³²

It has been argued that the enactment of the US insolvency code in chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act has not changed the jurisdictional rules at all. Essentially it has been argued that the conflict of law on bankruptcy matters continues to be the same. On the other hand it has been acknowledged that the contribution of the Model Law on the US cross-border insolvency law is that it has allowed the US courts to have full respect and cooperation to the maximum extent possible with the foreign main proceeding

¹⁶³¹ 42 of 2000.

¹⁶³² Locatelli Fernando *International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits on International Trade)* SMU Dedman School of Law and Business Review of the Americas 14 Law & Bus. Rev. Am. 313 (2008) 333; 334. The writer in his submissions makes a statement that countries such as Brazil continue to face substantive and procedural difficulties in resolving cross-border insolvency challenges because they have simply failed to embrace the international law that was created to deal with such matters. Therefore it can be inferred from submissions of this nature that the Model Law has been reformatory to international trade bankruptcy laws.

taking place in a foreign State thereby giving maximum protection to assets located in the United States.¹⁶³³

One of the justified criticisms of the Model Law on Cross-Border Insolvency is that it provides an attractive option of universalism which appeals to the context of the global economy. While this seems acceptable, it has been submitted that this pure concept of universalism is a utopian concept which in reality cannot be expected to be adopted by every country. It has been argued in fact that to do so would serve to undermine State sovereignty.¹⁶³⁴ It is submitted that the utopian expectation is certainly not practical, it is however quite possible for a country to share its sovereignty simply by recognizing the rights of parties that are foreign to a national court as long as such rights are proven.

9.8 Case Law on Cross-Border Insolvency

The consideration of some UNCITRAL case law¹⁶³⁵ on cross-border insolvency serves to illustrate the manner which the UNCITRAL Model Law on Cross-Border Insolvency is being applied in other countries including the US. Further, the case law provides a mechanism for legally testing the effectiveness of the provisions of the model law to resolve trans-national insolvency challenges. It is submitted that these legal tests and interpretations will serve to be useful persuasive guiding tools for guiding South African courts when applying cross-border law.

¹⁶³³ Locatelli Fernando *International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits on International Trade)* SMU Dedman School of Law and Business Review of the Americas 14 Law & Bus. Rev. Am. 313 (2008) 333.

¹⁶³⁴ Proskurchenko Ksenia *Chapter 15 Cross-Border Insolvency: Is it True to its Universalism Aspirations?* The Rutgers Business Law Journal 5 Rutgers Bus. L.J. 96 (2008) 112. On the other hand there are writers who maintain that comity is essential to cross-border challenges and should be maintained at all costs. See Timothy Brock, Satterlee Stephens Burke *The Assault on Offshore Havens in Bear Stearns Undermines New Chapter 15* American Bankruptcy Institute Journal 27-1 ABIJ (2008) 24.

¹⁶³⁵ Some of which may be obtained from the UNCITRAL, Case Law on UNCITRAL Texts (CLOUT). http://www.uncitral.org/uncitral/en/case_law.html 16 March 2010.

In the Mexico City Federal District Court in *Smith (Foreign Trustee) v Xacur and Two Others*¹⁶³⁶ the facts of the case illustrate that the defendants were brothers who were shareholders, directors and otherwise involved in the business of numerous Mexican grain and grain related companies. These businesses also had various places of operation in the US. Following many defaults in payments on their loans and guarantees to numerous Mexican and US banks, the banks as creditors commenced bankruptcy proceedings against the brothers.

The brothers were declared bankrupt by the US Bankruptcy Court for the Southern District of Texas on 22 August 1997. This decision was unsuccessfully appealed by the brothers. The Mexican Court was approached by an official trustee of the co-defendants seeking an acknowledgment of the foreign bankruptcy proceedings, sentences and international cooperation. The Mexican court applied its Commercial Bankruptcy Law, title twelve of which is based on the UNCITRAL Model Law on Cross-Border Insolvency. The court acknowledged the foreign bankruptcy proceedings and granted the petition for cooperation and collaboration for the purposes of executing the sentences of the US court. Interestingly enough the defendants tried to raise the defence of *res judicata* however the court rejected this defence on the basis that the Mexican acknowledgment was not a new process but simply an acknowledgment of one that had already taken place.¹⁶³⁷

In an English¹⁶³⁸ case of *In re Rajapakse*¹⁶³⁹ the debtors were a married couple and residents of the US who commenced a foreign insolvency proceeding, in the US. The US court appointed an insolvency representative over their estate. The foreign representative identified several assets of the debtors located outside the US and this included a residential property in England. The foreign

¹⁶³⁶ Proceedings No. 29/2001.

¹⁶³⁷ *Ibid.*

¹⁶³⁸ It must be noted that the United Kingdom is an enacting State of the UNCITRAL Model Law on Cross-Border Insolvency (MLCI) but when this case was heard reference to the United Kingdom of Great Britain and Northern Ireland was not made. It has however to date been shown that all these States have enacted the MLCI.

¹⁶³⁹ [2207] B.P.I.R. 99 23 November 2006, unreported judgment.

representative applied to the English court under Articles 15 and 21 of the Cross-Border Insolvency Regulation 2006 which corresponds with Articles 15 and 21 of the UNCITRAL Model Law on Cross-Border Insolvency by seeking recognition of the foreign proceeding, the foreign representative's authority and recognition that the residential property in England formed part of the insolvency estate. The English court granted the application.¹⁶⁴⁰

The US Bankruptcy courts in direct contrast to South African courts have had more decisions pertaining to the application and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.¹⁶⁴¹ It will not be necessary to consider a vast number of these judgments however it will be important for the purposes of this chapter to at least consider one of the cases that illustrates the US court's approach to the meaning of 'centre of main interests' (COMI) which becomes relevant in insolvency proceedings. This issue was raised as a consideration in the case of *In re Tradex Swiss AG*.¹⁶⁴² In this case the debtor was an exchange trading company registered in Switzerland using an internet based trading platform. It maintained offices in Switzerland and in the United States. The manager of the US office had the signing authority for the debtor's bank accounts. Over the years the operations of the debtor were transferred to the US.

In November 2007 the Swiss Federal banking Commission commenced a foreign insolvency proceeding against the debtor and appointed two insolvency representatives as foreign representatives. Shortly after the commencement of the foreign proceeding, an involuntary insolvency proceeding was initiated against the debtor in the United States. Three weeks later the foreign representative applied to the US court for the recognition of the foreign

¹⁶⁴⁰ It is well worth noting that the application was supported with authentic documentation from the foreign court and therefore it was evident that the application complied with the requirements of the UNCITRAL Model Law on Cross-Border Insolvency.

¹⁶⁴¹ See for example CLOUT case law reports, *In re Lloyd* US Bankruptcy Court for the District of New York No. 05-60100 (BRL), *In re Basis Yield Alpha Fund (Master) Lloyd* US Bankruptcy Court for the District of New York No. 07-12762 (REG), *In re Klytie's Developments, Inc., Klytie's Developments, LLC* US Bankruptcy Court for the District of Colorado No. 07-22719 (MER) to name a few.

¹⁶⁴² US Bankruptcy Court for the District of Massachusetts No. 07-17180 (JBR) and 07-17518 (JBR).

proceeding as a foreign 'main' proceeding under the UNCITRAL Model Law on Cross-Border Insolvency of the US and the dismissal of the US proceeding.

The creditors opposed the recognition application alleging that the foreign proceeding was not a foreign proceeding as identified in chapter 15 of the US Bankruptcy code which corresponds with the UNCITRAL Model Law on Cross-Border Insolvency. They argued further that the COMI of the debtor was located in the US therefore foreign proceeding should be recognized, if at all, as a foreign non-main proceeding. The creditors further argued that it was in their best interests to continue with the US proceeding. In response the foreign representatives sought a consolidation of the pending involuntary proceeding with the foreign proceeding and argued that there was no need to continue with the US proceeding.

The court in arriving at its decision gave strict interpretation of the US law which corresponds with the provisions of the UNCITRAL Model Law on Cross-Border Insolvency. The court took the view that the lack of full translation of the foreign order was not enough to render the application invalid as argued by the creditors. This interpretation of the law pertaining to language difficulties illustrates the manner in which the US court was able to uphold the principle of comity and convenience as intended by the model law.

Further, the court held that the foreign proceeding was an administrative one in a foreign country under a law relating to insolvency or adjustment of debt pursuant to the UNCITRAL Model Law on Cross-Border Insolvency. This is due to the fact that it remained unchallenged by the creditors that the Swiss Federal bank was an administrative agency with authority to regulate banks and brokers. In contract to the creditors the US court gave the same status of foreign court to the Swiss Federal banking agency as expressed in Article 2(e) of the UNCITRAL Model Law on Cross-Border Insolvency which includes a judicial officer or other

authority competent to regulate, control or supervise a foreign proceeding. Therefore, the foreign proceeding was such in terms of the model law.

The court also dealt with the issue of the location of the debtor's COMI because this would be critical in analyzing whether the foreign proceedings were main or non-main proceedings. The court noted that the UNCITRAL Model Law on Cross-Border Insolvency did not provide a definition for the COMI therefore the interpretation of COMI was extracted from precedent and defined as a concept similar to a principal place of business. It was established in the case that the debtor's principal place of business was in the US and consequently the foreign representatives had not proved that the Swiss proceeding was a main proceeding as alleged.

In response to an application to dismiss the US proceeding, the court did not dismiss the US proceeding in that it was not barred in terms of chapter 15 of the US Bankruptcy code. While it was recognized by the court that a foreign representative may seek a dismissal or suspension of an involuntary proceeding in terms of Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency such dismissal or suspension would only be granted if the application for recognition has been granted and the purposes of the bankruptcy code are best served in that manner. The court held that the US proceeding was justified in that it best served the purposes of the US bankruptcy code. Further, it appeared from the facts that the US representative appointed to administer the debtor's estate had already begun collecting the debtor's assets while the foreign proceeding remained in what the court referred to as a case 'in limbo.'

The UNCITRAL case law provides invaluable academic insight to the practicalities of achieving insolvency justice in cross-border matters. It also reveals important procedural aspects of the application of the principles of the UNCITRAL Model Law on Cross-Border Insolvency. It was confirmed in *US v JA*

*Jones Const. Group, LLC*¹⁶⁴³ that in cross-border situations, it is not proper procedure to send only a letter to a foreign court where a debtor is being sued in order to stay those proceedings or to achieve other objectives of the UNCITRAL Model Law on Cross-Border Insolvency. What is required is a proper application for recognition of a foreign proceeding.¹⁶⁴⁴

With regard to practical court interpretation of what would constitute a violation of public policy in light of the UNCITRAL Model Law on Cross-Border Insolvency, the US Court in *In re Board of Directors of Telecom Argentina S.A. The Agro Fund Ltd v Board of Directors of Telecom Argentina S.A.*¹⁶⁴⁵ stated an important principle. With reference to public policy in matters of cross-border insolvency the court held that an extension of comity to foreign proceedings will be affirmed so long as such comity is based on the finding that those proceedings did not violate US public policy considerations, the best interests of creditor test or the good-faith requirement of the US Bankruptcy code which reflects principles of the UNCITRAL Model Law on Cross-Border Insolvency.

9.9 Conclusion

It is clear from the deliberations on the provisions of South African law on cross-border insolvency that the cross-border law in the form of the national statute as well as the UNCITRAL Model Law is essential to the development and continued reform of national international trade law. This reform has been made possible through much desired intergovernmental cooperation. It is proposed in this chapter that the national cross-border statute which embodies the Model Law should be given at this stage the required Ministerial support¹⁶⁴⁶ so that it may be operative in South Africa.

¹⁶⁴³ US District Court for the Eastern District of New York No. CV2003-1383 (SJF)(MDG).

¹⁶⁴⁴ Letters of request are widely recognized in international law however proper legal procedure must still be followed to enforce the law in terms of the UNCITRAL Model Law on Cross-Border insolvency.

¹⁶⁴⁵ US Court of Appeals for the Second Circuit 528 F. 3d; Bankr. L. Rep. (CCH) P81, 248; 50.

¹⁶⁴⁶ Cross-Border Insolvency Act 42 of 2000 section 2.

The full operation of the cross-border international law will enhance the common law and continue to uphold values of equality before the courts in cross-border matters. It is submitted that there is overwhelming evidence of Constitutionally sound principles¹⁶⁴⁷ of international trade law in South Africa and such laws insofar as they affect the diamond industry in order to represent the interests of debtors and creditors in the industry.¹⁶⁴⁸

Further, in light of the current economic challenges that the global community is facing it is important that South Africa is seen to be participating in the global processes that deal with cross-border insolvency. This approach will enable South African courts to protect equity in matters of cross-border insolvency. Diamond trade, whether it involves luxury goods or goods necessary for industrial purposes is one of those industries that are most challenged by a recession¹⁶⁴⁹ therefore it is important that such industries be treated according to measures that will ensure insolvency equity as expressed in the UNCITRAL Model Law objectives.

¹⁶⁴⁷ Constitution of the Republic of South Africa Act, 1996 section 9, 22, 39 and 231.

¹⁶⁴⁸ Cross-Border Insolvency Act 42 of 2000 preamble.

¹⁶⁴⁹ See example It was reported in the United Nations Intergraded Regional Information Networks, *Job Losses as Diamonds Lose Their Lustre*, Africa News 11 February (2009) www.afrika.no/Detailed/17940.html 16 July 2009 that there were many job losses in Botswana as a result of sales dwindling and the companies retrenching in order to cut costs.

Chapter 10: Anti-Corruption Laws and Diamond Trade

10.1 Introduction

Diamond trade has always been an industry that is plagued by issues of corruption because it involves trade in a valuable commodity that can be traded for vast amounts of revenue in illicit markets.¹⁶⁵⁰ This point has been partly discussed in the first chapter of this study by looking at the earlier decisions of the South African courts pertaining to diamond theft¹⁶⁵¹ and unlawful possession of rough diamonds.¹⁶⁵² This issue of corruption or crime in diamond dealings will be discussed in this dedicated chapter in light of South African law on this subject with reference to some useful input from other diamond dealing jurisdictions. This chapter is a chapter on the mandate of government agencies in the fight against diamond related crime as expressed in the South Africa Police Service Manual.¹⁶⁵³ These agencies obtain their power from the Constitution of the Republic of South Africa Act¹⁶⁵⁴ which forms the highest law and therefore is constantly applicable in diamond crime prevention.

Further and importantly to the issue of anti-corruption in diamond trade are the provisions of the Diamonds Act.¹⁶⁵⁵ The Diamonds Act¹⁶⁵⁶ contains other international diamond anti-corruption law in the form of United Nations

¹⁶⁵⁰ *National Director of Public Prosecutions v Naidoo and Others* 2006 (2) SACR 403 (T) 415F, 416 G., *S v Mkonto* 2001 (1) SACR (C) 591 E, *S v Hove S v Shumba* 1979 (4) SA 648 (ZRA) 649 F where the court held that the law in question intended to deal with the mischief of illicit diamond trading. *Incorporated Law Society v Harris* 1932 OPD 20 p 23, *Cape Law Society v Du Plessis* 1932 CPD 119 p 120, *S v Thomas and Another* [1988] 4 All SA 220 (NC) see judgment where the court held that a fine for illicit diamond buying was appropriate in the circumstances. *Nusca v Da Ponte and Others* [1994] 4 All SA 417 (BG), par. A factual background. Income Tax Case NO 1683 62 SATC 406 p 408, 409 where the amount of money to be taxed was a reward for information leading to the arrest of one involved in illicit diamond trading.

¹⁶⁵¹ See additional examples of cases involving diamond theft, *Queen v Klaas* (1893-1895) 7 HCG 245, 246. *S v Gauss v Mukete; S v Petrus; S v Teodor* 1980 (3) SA 770 (SWA) 771, 772, *National Union of Mineworkers v De Beers Consolidated Mines Ltd* (1997) 18 ILJ 1442 (CCMA) 1455 F where it was stated in the case that diamond theft the mine threatens its profitability and ultimately its existence.

¹⁶⁵² See chapter 1 of this study *Rex v Broodryk* 1932 AD 131, *Rex v Fourie and Another* 1937 AD 31 p 38, *Rex v Lipshitz* 1921 AD 282.

¹⁶⁵³ Gazette No. 28500 17 February 2006. See Prevention of Organized Crime Act 121 of 1998, Prevention and Combating of Corrupt Activities Act 12 of 2004.

¹⁶⁵⁴ 108 of 1996.

¹⁶⁵⁵ 56 of 1986.

¹⁶⁵⁶ 56 of 1986.

Resolutions for adopting the KPCS which has been developed by the international community and adopted by South Africa to effectively remove conflict diamonds from legitimate diamond trade. This chapter will not be a focus on the KPCS as that has already been highlighted in other parts¹⁶⁵⁷ of this study. Instead this chapter will focus on additional legislation that deals with the protection of the integrity of the diamond industry in South Africa insofar as other criminal activities are concerned in diamond trade, for example, diamond theft or the buying of illicit diamonds.

It is prudent for any diamond producing State to enact legislation that will protect all the relevant areas of a particular sector if necessary in order to protect its economy. This is done through various government agencies to protect the diamond industry, for example the Gold and Diamond branch of the South African Police Service,¹⁶⁵⁸ in partnership with the corporate entities and other diamond producers uses legislative measures to curb corruption in diamond trade. Most diamond dealing corporate entities in partnership with the State also have various intelligence teams and in-house accountability structures that will protect employers and employees alike from the temptation of stealing the commodity for personal interests.¹⁶⁵⁹

¹⁶⁵⁷ See chapter 1.

¹⁶⁵⁸ Gazette No. 28500 17 February 2006.

¹⁶⁵⁹ There have been many media reports that show that diamond corruption is rampant in the diamond industry. See *The Namibian Namibia; No Production Bonuses for Namdeb Workers* Monday, 21 January (2008). It was reported in this paper that Namdeb had failed to reach its targets and as a result employees could not be paid their bonuses. One of the ills blamed for the production bonus shortfall on mining targets is the number of diamond thefts that had been a factor in the year 2007. See also, *Namibian Economist Namibia; Diamond Theft Affects Namdeb Production* Friday, 25 January (2008). It was reported in this report that Namdeb's carat production came short of its target for the year as a result of diamond theft. The company had budgeted a total of 2,248 million carats from its land and marine operations but only managed to produce 2,176 carats. The profits were realized in the marine operations but not in the land operations. There were many negative factors that had been attributed to poor production such as a fire that had broken out at one of the company's plants in Oranjemund, increases in costs particularly fuel, incidents of flooding and rough sea conditions. However, the most crippling factor was the number of recorded diamond theft cases despite a campaign to educate employees about the negative effects of diamond theft on the Namibian economy. It was apparent that syndicates still continue to draw pockets of employees into diamond theft practices. In 2007 alone 21 cases of diamond thefts were investigated, 30 people were involved in these cases of which 20 were arrested by Nampol's Protected Resources Unit. With regard to the 10 remaining people there was insufficient evidence to warrant criminal prosecutions. These remaining employees were however disciplined in terms of company policies and procedures. Stones which were

recovered through investigations were recorded measuring 23.1 carats in mass with an average size stone of 1.56 carats and it became apparent that syndicates were targeting high quality goods. It was also reported in *The Namibian (Africa News) Ex-Namdeb Worker Fined Over Diamond Theft* Friday 21 November (2008) that a former Namdeb employee was sentenced in the Keetmanshoop Regional Court for stealing diamonds. He pleaded guilty to the charge of diamond theft and was sentenced to five years in prison or payment of a fine with a further two-year prison sentence wholly suspended for five years. The employee had been a multi-skilled labourer when he was arrested at the plant's checkpoint for stealing three unpolished diamonds weighing 35.36 carats from his employer. The Regional Magistrate in his decision stated that the court is under an obligation to protect the diamond industry which is considered as the backbone of the country's economy. It is submitted in light of this regional court's finding that it may be important for employers to also investigate some of the reasons that may prompt employees to steal diamonds. Perhaps this type of investigation can inform producers of how to better curb the temptation to steal and perhaps even find other ways of further reducing the temptation of stealing stones which is ultimately against the interests of all involved in the long run. The problem of diamond thefts was also reported in Botswana see Mmengi/*The Reporter (Africa News) Botswana; Police Arrest Diamond Theft Suspects* Friday 14 November (2008). It was reported that the police had arrested three Botswana men in connection with a suspected diamond theft in Gaborone. A witness had testified that the men had many precious stones in their possession when they were arrested in a popular hotel in the city. Whether the stones were real or not in this case was a matter that still had to be proved, however the threat of diamond theft was sufficiently established in the diamond producing State of Botswana. In *The Weekender (South Africa) Stealing Their Future* 8 November (2008) Stephen Tim wrote a compelling article in the economy, business and finance section of this newspaper where he reports that while it has been difficult for diamond producers to state exactly what the negative effects of diamond smuggling were on the companies' bottom line figures it has become apparent that it is the theft of larger diamonds which could significantly harm a mine's bottom line. Over the years syndicates have thought of countless ways to smuggle diamonds from mines on the coast. For instance, arrows have been hollowed and employees have stamped stones into their boots while in Namibia smugglers have even used homing pigeons. Port Nolloth, a small town notorious as a diamond smuggler's haven even though police have carried out a significant number of raids and stings which even led to the arrest of the town's mayor. It is clear that corruption is further fuelled by corrupt leadership and a promise of vast revenue, it is said for example that a rough 50 carat diamond can fetch up to five million rand depending on its quality which means that even divers who pump stones into boats that work for offshore diamond producers, have to be searched when leaving the mine. Even though searches and closed-circuit cameras are used it is possible in a ton of diamond rich gravel to miss spot diamonds and therefore it can make it easy for thieves to help themselves to it. It has been said, for example, that a ton of gravel may contain an average of just three grams of diamonds. Unfortunately one of the biggest complaints by the divers themselves is that their share in legitimate revenue for diving for the stones is minimal. It is submitted that this unhappiness with payment for mining may be a cause for temptation to steal the diamonds, however, by the same token it is important that workers also learn to be content and try not to approach diamond mining as a 'get rich quick' scheme as that may lead to all kinds of temptations for corrupt activities. These reports of smuggling are not new to the diamond industry however they do add pressure to the already shaky market of diamond sales, particularly with the worldwide recession that is taking place at present. In Canada it was reported by writer Josh Wingrove in the crime section of the *Toronto News (Canada) Suspect in one million Toronto diamond heist arrested in Saskatchewan* Saturday, 11 October (2008) that a suspect suspected of pulling off a million dollar diamond heist was arrested along the Trans-Canada Highway in Saskatchewan. This particular thief had stolen diamonds in the form of jewellery, it was unclear in this report where the diamonds had originated but it is very clear that diamond theft is a world-wide industry problem both threatening raw diamonds or processed diamond industries world-wide. All kinds of diamond thieves have been identified including reports that some thieves even use 'magic' to steal diamonds as reported in the *London Times 'High magician' linked to London diamond theft* Edition 1 Saturday, 7 February (2009). This report gives the name of a Hatton Garden who is known as an international jewel thief who dresses as a wealthy Muslim woman and steals rings worth millions of pounds by either swapping gems for replicas or steals the rings as female assistants distract staff members. This known diamond thief has been identified across Europe as the 'high magician' of crime after jewels disappeared in Paris, Berlin and Frankfurt over a seven year period. These reports clearly show that diamond smuggling needs to be dealt with in a stringent manner in law in order to protect the economy.

Diamond theft and other connected corrupt activity is an age old problem that has inspired much academic, legal and social commentary. With these considerations in mind this chapter aims to provide academic insight into the legal framework and some of the industry reactions into methods that support the removal corrupt activities in diamond trade. South African law and industry regulations will be considered while making reference to the international trade context. It is submitted that by taking cognizance of some of the mechanisms adopted by foreign diamond traders as a comparator for the methods used in the South African industry to deal with the threat of corruption in diamond trade certain useful guidelines may be drawn.

It has also been submitted by Professor Barak D. Richman that the problem with corrupt activities around diamond sales is that it is inspired by a particular feature of diamond transactions. He submits that this feature of diamond transactions is that, in America at least, there is an unreliability of State courts in enforcing executory contracts¹⁶⁶⁰ because in typical diamond transactions the sale is generally a credit sale or a brokerage arrangement. In such situations a diamond or cache of diamonds is in the possession of someone who is not the owner.¹⁶⁶¹

Since diamonds are easily portable, virtually untraceable and command high prices throughout the world, a potential thief encounters few obstacles in hiding unpaid for or stolen diamonds from law enforcement officials. Such a thief can flee the American jurisdiction and sell such diamonds to black market buyers.¹⁶⁶² Clearly the problem highlighted above by Professor Richman is not unfamiliar to South Africa as well therefore this chapter will investigate the legal strategies that have been adopted to discourage black market diamond dealings while also

¹⁶⁶⁰ This is a type of contract where some obligations still need to be performed by one of the parties.

¹⁶⁶¹ Richman D. Barak *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal* Virginia Law Review 95 Va. L. Rev. 325 (2009) 330.

¹⁶⁶² *Ibid. S v Mkonto* 2001 (1) SACR (C) 591 E where the court dealt with illicit diamond buying.

providing useful insight on strategies that have been adopted by the diamond industry itself to deal with the challenges of black market diamond sales.

10.2 Understanding the Problem

The problem of corrupt activities in diamond trade is fuelled by many factors most of which can be left for the criminologists to study however the main force behind such corruption is that diamonds produce quick and vast revenue in the black markets. It has been submitted that diamonds are often used as choice currency for fleeing fugitives. This was evident in the case of Martin Frankel a fugitive financier whose collapsed financial schemes prompted federal prosecution arranged by a shadowy purchase of over ten million dollars in diamonds just before his attempted escape from the US authorities.¹⁶⁶³

Diamond theft continues to be a serious threat to the industry despite, it is submitted, the technological advances in security. In 2003 rough and polished diamonds worth approximately one million Euros were stolen from Antwerp vaults. In 2004 a diamond heist in London included earrings that had belonged to Marie Antoinette.¹⁶⁶⁴ It is important to consider some of the reported cases of corruption threats within the industry in order to enable one to understand the seriousness of the problem of corruption in diamond sales. One must also take into account that these criminal elements of diamond trade have a serious domino effect which will result in the impoverishment of the industry and ultimately the economy, not to mention the illicit activities that seriously lead to the impairment of human dignity for those whose illicit activities lead to other illicit activities such as murder and other possible corrupt activities.

¹⁶⁶³ Richman D. Barak *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal* Virginia Law Review 95 Va. L. Rev. 325 (2009) n 13.

¹⁶⁶⁴ *Ibid.*

The problem of diamond corruption in diamond trade is a serious problem that has been the subject of many artistic works such as films¹⁶⁶⁵ and exciting fiction novels. This is not the case in reality since diamond related crime serious cutthroat business. is a While this can be dismissed as fanciful literary commentary on life, the fact is that diamond related crime is on the rise and is getting more serious as discussed by Brendan Ryan in the Crime, Law and Justice section of a South African corporate magazine. It is submitted in the writings of the author above that illegal diamond buying is attracting violent criminals in South Africa. This problem has been a long standing challenge faced by South African diamond miners, who have to find ways to prevent theft after finding diamonds in their mines.¹⁶⁶⁶

It has been submitted that one of the areas that are notorious for illegal diamond mining in South Africa is the Northern Cape. At the time that Brendan's article was written it seemed that more violent criminals were coming to trade or rob operators of their illegal diamonds in the area. These violent criminals would rob the illicit traders of their diamonds with AK 47 assault rifles and this would affect the smaller operators who cannot afford security.¹⁶⁶⁷ This is a serious and life threatening situation that illustrates how illegal diamond trade breeds more illegal activities thus exacerbating the problem on corruption in the diamond industry.

In 2008 the Geological Society of South Africa organized a symposium known as 'Diamonds in Kimberley' where presentations were made of various kinds of 'hands-off' diamond recovery systems available together with associated technologically advanced surveillance systems. This is because diamond theft is a serious and constant threat in spite of security measures. In fact security to access a mine is exceptionally tight, such that cell phones carried on mining

¹⁶⁶⁵ Jordan Mintzer *Variety: Film Reviews* 12 – 18 May 2008, France. See also The Washington Times a report by Christian Toto *Flawless' isn't; Diamond Theft Adds Interest to Heist Genre* Friday 28 March (2008).

¹⁶⁶⁶ Brendan Ryan *Diamond Theft. A Thief's Best Friend* Crime, Law & Justice Financial Mail Edition 14 September (2007) 88. <http://secure.financialmail.co.za/07/0914/features/efeat.htm> 12 August 2008.

¹⁶⁶⁷ *Ibid.*

premises have to be taken apart by security staff after visitors with cell phones have entered the mine therefore as a general rule De Beers Venetia mine for example does not permit visitors to take in cell phones, remote control devices, batteries, pastes, liquids or lip balm.¹⁶⁶⁸

In the diamond industry the problem of corruption has been described as ‘a war in which the crime syndicates have more money than us, while their intelligence is as good as ours.’ Unfortunately criminals in diamond trade are always looking for weak links in the producers’ security systems. They usually achieve this by getting one of their criminal cohorts to join the producers’ work force or by picking on a worker who is in trouble for any reason and needs money. This urgent need for money may be driven by other factors such as a need to fuel a ‘tik-tik’ drug habit which is common in the Northern Cape towns near diamond mining areas such as Douglas and Barkly West.¹⁶⁶⁹

It has been reported that diamond theft syndicates operating in the Kimberley area have a hierarchical structure. Some members are involved in stealing the actual diamonds while others act as agents. The agents transport the stolen diamonds to the organizers and dealers who legitimize these diamonds through cutting and polishing or exporting.¹⁶⁷⁰ This certainly is serious mischief which the general public is unaware of, however it is submitted that the problem does not lie with the innocent consumers but the producers who have elected to follow this illegal route of trading in illicit diamonds.

One of the well known techniques used by diamond crime syndicates involves ‘swapping.’ What happens when a diamond is swapped is that a legitimate but low-value diamond is replaced in the system by a stolen higher quality stone of the same size. The persons involved in such activities are usually discovered but

¹⁶⁶⁸ Brendan Ryan *Diamond Theft. A Thief’s Best Friend* Crime, Law & Justice Financial Mail Edition 14 September (2007) 88. <http://secure.financialmail.co.za/07/0914/features/efeat.htm> 12 August 2008.

¹⁶⁶⁹ *Ibid.*

¹⁶⁷⁰ *Ibid.*

the problem is that nothing seems to happen to them, Bredan submits. The diamond producers do try to deal with the situation however successful prosecutions can only be achieved by the police officials.¹⁶⁷¹

Unfortunately if these problems are not dealt with they will eventually compromise the productivity of the mine. Insofar as security systems are concerned it has been established that a mine may use security systems which have a capital cost of five million to fifty million rand depending on the size of a particular producer. This estimate excludes running and operating costs for such systems. However, it has been established that a mine can pay for its own security equipment if it can prevent theft of large types of stones such as those frequently found in the Middle Orange alluvial deposits.¹⁶⁷²

The fact that the diamond industry in South Africa has been forced to resort to technology in order to deal with diamond theft shows that most diamond theft seems to take place on producer sights where that human element of fault always a potential threat. It seems therefore that the diamond producer must adopt an approach which states that every worker is potentially susceptible to temptation in diamond production. This obviously creates a special type of work environment where camera surveillance and much prevention of industrial espionage in whatever form is avoided by the diamond producer at all costs.

10.3 Anti-Corruption Law and Diamond Trade in South Africa

It is important at this stage to mention the laws and regulations that have been promulgated as part of the State's mandate to remove corrupt activities and other crimes from the diamond industry.¹⁶⁷³ It is well known in South African law that

¹⁶⁷¹ Brendan Ryan *Diamond Theft. A Thief's Best Friend Crime*, Law & Justice Financial Mail Edition 14 September (2007) 88. <http://secure.financialmail.co.za/07/0914/features/efeat.htm> 12 August 2008.

¹⁶⁷² *Ibid.*

¹⁶⁷³ Examples of these laws include *inter alia* the Constitution of the Republic of South Africa Act, 1996 section 205, Prevention of Organized Crime Act 121 of 1998, Prevention and Combating of Corrupt Activities Act 12 of 2004.

there are different State agencies¹⁶⁷⁴ that are created to enforce the laws however for the purposes of understanding anti-corruption law in diamond trade this part of the study will limit its consideration to some of the policing efforts that are mandated by South African legislation.¹⁶⁷⁵ At the same time it is acknowledged that fighting crime of any kind is a partnership between the citizens, the courts and the police.¹⁶⁷⁶

The South Africa Police Service Manual¹⁶⁷⁷ created in accordance with the Promotion of Access to Information Act¹⁶⁷⁸ is useful in understanding anti-corruption law in South Africa. The manual sets out expressly the anti-corruption efforts that can be undertaken by the police to protect its citizens from general crime and these efforts have a direct effect on diamond related crime. This manual was created to give effect to the Constitutional right of access to any information held by the South African Police Service that is required in the protection of any rights.

With reference to the protection of the integrity and economic viability of the diamond industry the manual provides as follows. Firstly it sets out the express objects of the police service as contained in of the Constitution of the Republic of South Africa Act, 1996.¹⁶⁷⁹ It is provided that the objects of the police service are

¹⁶⁷⁴ For example the South African Police Service www.saps.gov.za 19 March 2010 or the South African Revenue Service (SARS) www.sars.gov.za/ 19 March 2010.

¹⁶⁷⁵ Constitution of the Republic of South Africa Act, 1996 section 205.

¹⁶⁷⁶ The courts have recognized the partnership between the State and the people living in the Republic of South Africa. This is done through the protection of whistle blowers, for example, as was the case in *Engineering Council of South Africa and Another v City of Tshwane Metropolitan Municipality and Another* 2008 ILJ 899 (T) 902 E – F. ‘The court was of the view that the present case was a good example of a bona fide whistleblower who deserved protection. The comparable protection afforded by the relevant sections in the EPA and OHSA had, no doubt, been enacted in the same spirit. Other examples included the ‘crime stop’ hotline and the practice of making use of police informers. Without these anonymous individuals, often working under extremely dangerous conditions, many crimes would otherwise remain unsolved. The court was according of the view that a court must be slow to condemn a whistleblower.’

¹⁶⁷⁷ Gazette No. 28500 17 February 2006.

¹⁶⁷⁸ 2 of 2000 which provides for transparency in the manner in which the State governs the Republic of South Africa.

¹⁶⁷⁹ 108 of 1996 sections 205, 206, 207 and 208. Section 205 in particular provides that ‘(1) the national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

(2) National legislation must establish the powers and functions of the police service and must enable the

to prevent, combat and investigate crime, to maintain public order,¹⁶⁸⁰ to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.¹⁶⁸¹

The police services are endowed with powers at all levels of government to engage in crime intelligence, crime prevention, keeping records and forensic science services, detective services, financial administration services, legal services, corporate services (management services), national evaluation services, operational response services, personnel services, protection and security services, supply chain management and training.¹⁶⁸²

The investigation units or components include a special police anti-corruption unit which effectively curbs corruption within the police service itself so as to ensure that the police themselves are not a contributor to criminal activities. There is also a commercial branch that deals with fraud. This branch focuses on commercial related crime that includes fraud, syndicate-fraud and other commercial crime.¹⁶⁸³ Since syndicate crime is a significant contributor to diamond related crime, this provision of the manual is of particular importance to the diamond industry.

There is also an additional provision specifically related to the diamond industry and this relates to the setting up of the 'diamond and gold branch' which effectively prevents and investigates crimes relating to the illegal dealing in

police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

¹⁶⁸⁰ This is particularly important in diamond trade as it has been clear throughout international law that without order in mining, chaos would reign as citizens use any kinds of methods to dig and prospect for diamonds hoping to get rich without regard to the environment or to sustainable development of the industry and the people.

¹⁶⁸¹ Gazette No. 28500 17 February 2006. Section 2(3) of the manual, under the heading 'functions.'

¹⁶⁸² Gazette No. 28500 17 February 2006. Of course each of these areas has vast responsibilities attached to each and the manual provides extensively for those aspects of crime fighting.

¹⁶⁸³ Gazette No. 28500 17 February 2006 part 2.4 (1); (3).

diamonds and precious metals nationally. This is achieved by means of the efficient gathering and utilization of relevant information in the interest of the country and the community.¹⁶⁸⁴ The manual is a significant document of prodigious size that provides elaborate information on crime fighting and this includes not only the law but the contact details of the police stations, all designed to protect citizens. The State must be commended for producing such a comprehensive and significant document particularly when living in a country where crime is of major concern.

10.4 Reaction of the Diamond Industry to Diamond Theft in Sales

The South African diamond industry was given an opportunity to elaborate on its reaction to crime, misconduct and other related corruption in diamond trade. This was done through a Commission of inquiry into the diamond industry as conducted in 1999. The topic to which these submissions were related in the report involved ‘the effectiveness or otherwise of illegal diamond buying (IDB) provisions and related matters.’ In dealing with this issue the Commission received both written and oral evidence and these submissions were duly recorded in the report. The submissions that came forth stated that it was the opinion of the industry that the South African Police Services themselves had become corrupt as they engage in setting up illegal diamond buying (IDB) stings in order to collect rewards and the problem with officials with the highest integrity is that they did not have sufficient, specialist training to handle IDB matters.¹⁶⁸⁵

In another submission the diamond industry felt that the IDB laws should be kept in place in South Africa in order to protect the local industry from theft to ensure a stable and reliable future. However, it was proposed that the existing IDB law allowed for abuse and irregularities.¹⁶⁸⁶

¹⁶⁸⁴ *Ibid.* Section 7.

¹⁶⁸⁵ Report of Task Team Appointed by the Minister of Minerals & Energy to Analyze the Memoranda and Evidence Laid Before The Commission of Inquiry into the South African Diamond Industry, 20 December (1999). Chapter 4. www.polity.org.za/polity/govdocs/reports/diamonds/chap5.html 20 October 2009.

¹⁶⁸⁶ *Ibid.*

The abuses complained of it was explained in the report, is that police could simply walk into registered premises and set up unjustified entrapments that lead to innocent people being charged and their business equipment being confiscated. The problem is that the confiscated items do not even get returned in good order even when innocence is proved on behalf of the parties. As a result there seemed to be a significant degree of discomfort in the industry about the then existing IDB laws. One of the proposals to strengthen IDB laws was that a police trap should be approved by a magistrate upon presentation of *prima facie* evidence that a crime was being committed first. This proposal was never practiced although it was proposed and approved as a trade practice that should be adopted.¹⁶⁸⁷

In American diamond trade as mentioned in the writings of Professor Richman which are focused on the New York DDC, diamond theft can occur in a credit sale transaction if the person who is not the owner of the diamond or diamonds decides to steal such a diamond or diamonds for black market sales. This type of theft makes it difficult for the State courts to discipline parties or seize stolen assets that escape their jurisdictional reach. Even with sophisticated legal instruments such as liens or other devices used to secure assets as collateral, these cannot reliably prevent diamond theft. Therefore in reaction to this threat the diamond industry is said to have reacted by relying on an elaborate reputation mechanism.¹⁶⁸⁸ The submissions of Professor Richman serve as a useful study of the reaction of the diamond industry to illicit diamond trading as will be considered below.

The way that the reputation mechanism works is that individuals charged with diamond sales activities enter into commercial relationships with others based on past actions of their potential partners. This means that in commercial contracts merchants refuse to enter into contracts with or will demand a premium from

¹⁶⁸⁷ *Ibid.*

¹⁶⁸⁸ Richman D. Barak *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal* Virginia Law Review 95 Va. L. Rev. 325 (2009) 331.

individuals who have failed to fulfill their previous contractual obligations. It has been said that the payment of a premium and the prospect of losing future business has been proven successful in eradicating bad behavior in diamond sales.¹⁶⁸⁹ The very principle of ‘reputation’ suggests that there must be an industry word going around that a particular diamond dealer is a ‘trustworthy entity with a proven track-record’ otherwise threat of theft is almost imminent if the dealer is unknown.

It has been suggested that the impediments to implementing the reputation mechanism include the availability of prompt and accurate information so that each merchant’s history is known to all potential exchange partners. Further, the imposition of a credible and sufficient punishment to deter misconduct can also be a serious impediment to implementing a reputation mechanism.¹⁶⁹⁰ Therefore, to address these challenges the diamond industry itself has reacted by creating rules that meet these challenges. This is done by inducing contractual compliance which supports transactional reliability where courts cannot enforce the same.¹⁶⁹¹

The diamond industry has a network of diamond bourses scattered throughout the world in various diamond centres. In South Africa there is the South African Diamond Exchange and Export Centre (DEEC). In New York there is the New York Diamond Dealer’s Club (DDC) located in Manhattan’s diamond district formed according to law with various by-laws and mandatory rules for its diamond merchant members. Most members in the club act as middle men between the diamond producers who mine the stones (most of which are arranged by De Beers) and the diamond retailers who turn them into jewellery.

¹⁶⁸⁹ *Ibid.*

¹⁶⁹⁰ It is submitted that this could be due to the fact that even if punishment is imposed by virtue of a premium or a threat to be excluded from future diamond exchange, this alone is insufficient to stop a thief from vanishing with the diamond or diamonds. On the other hand punishment may mean a defaulting merchant may be threatened by foreclosure of his or her business because the other traders will not ‘touch’ him or her due to loss of good standing with the DDC.

¹⁶⁹¹ Richman D. Barak *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal* Virginia Law Review 95 Va. L. Rev. 325 (2009) 330.

The most diamond sales are sold in the US and the DDC handles almost ninety-five per cent of the diamonds imported into the country. Most diamonds are bought and sold several times before they are ultimately purchased by a manufacturer therefore the DDC merchants themselves transact with each other frequently.¹⁶⁹²

The New York DDC protects itself by adhering to strict rules and by-laws, failure to comply with such rules leads to a member's dismissal. The DDC rules also govern the members' commercial activities including some technical aspects for validating contractual agreements.¹⁶⁹³ There are also rigorous requirements for dealing with new partners, admission of new members and maintaining membership of good standing. The DDC also has a DDC Arbitration Panel which is formulated by persons who have gained the respect of their peers because of their vast industry experience. The panel handles matters such as complaints regarding payments or failure to deliver the diamonds promised. The DDC insists that the internal procedures for dispute resolution must be complied with by approaching the arbitration panel before the national courts are approached for such dispute resolution.¹⁶⁹⁴

It has been submitted that the DDC Arbitration Panel is the guardian body of the industry's reputation mechanism. Once the panel reaches a conclusion, it announces this judgment, the date which the decision was taken, the merchants involved and the amounts owed. A member, who fails to pay the judgment debt as decided by the panel, is dismissed from the DDC and such default is announced to all members. This information usually gets disseminated to other diamond bourses worldwide and this affects merchant reputation. The DDC's procedures and procedure of other diamond bourses ensures that valuable

¹⁶⁹² Richman D. Barak *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal* Virginia Law Review 95 Va. L. Rev. 325 (2009) 332.

¹⁶⁹³ *Ibid.*. For example, an oral agreement only becomes binding when certain specific words are used to signify consensus.

¹⁶⁹⁴ Richman D. Barak *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal* Virginia Law Review 95 Va. L. Rev. 325 (2009) 333.

information concerning a merchant's reputation is shared so that news may spread quickly to influence future trading relationships.¹⁶⁹⁵

The diamond bourses efforts to protect the industry by adopting a reputation mechanism have been criticized as enforcing anti-competitive behavior through the protection of only certain cohesive family and business institutions that have a good reputation insofar as the DDC is concerned. The reputation mechanism in the diamond industry has also been criticized as contributing to the abuse of certain antitrust laws. These criticisms have been argued thoroughly in Professor Richman's writings however they are not the focus in this chapter. What does emerge from the commentary concerning diamond bourse reputation mechanisms, relevant to this chapter, is that reputation mechanisms in the diamond industry supports the idea that to exclude the diamond thieves from legitimate diamond trade requires that the merchants that are dealt with are well known. This goes beyond just producing a few documents to prove the worthiness of the potential diamond dealer.

In South Africa there were traditionally¹⁶⁹⁶ four Diamond Exchanges that being divided into the Johannesburg Diamond Bourse and the Kimberley Diamond Bourse. Since the promulgation of the amendments to the Diamonds Act¹⁶⁹⁷ the SADPMR determines the activities of trade in these centers and diamond trading houses in terms of the Diamonds Act¹⁶⁹⁸ must be registered and licensed as such accordingly. All these centres are associated with the international diamond trading bodies and have access to trade information from other diamond dealers' clubs throughout the world.

¹⁶⁹⁵ Richman D. Barak *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal* Virginia Law Review 95 Va. L. Rev. 325 (2009) 334. It is clear that reputation is a far more valuable trait for the diamond industry.

¹⁶⁹⁶ www.keyguide.net/bourses/ 12 August 2009.

¹⁶⁹⁷ 56 of 1986.

¹⁶⁹⁸ 56 of 1986.

The proposal for the submission that international diamond merchant bodies are associated is based on the existence of the international umbrella organization known as the World Federation of Diamond Bourses.¹⁶⁹⁹ South African diamond merchants are also associated with this international body. The existence of this body while being criticized for its exclusivity contributes positively to the reputation mechanism which bars illicit diamond buying¹⁷⁰⁰ by ensuring that only 'reputable' diamond merchants are actively trading in diamonds.

In a similar fashion with all other international diamond merchants, diamond dealing centres in South Africa also face the serious threat of illicit diamond buying (IDB). This corruption is typically dealt with by the Gold and Diamond branch of the South African Police Service.¹⁷⁰¹ This is why important information concerning undesirables in diamond trade must be circulated through bodies such as the World Federation of Diamond Bourses. This information can be used as part of criminal investigations.

What is distinctive about the South African diamond industry however in comparison to the New York DDC is that the State and national courts are much more involved in South African diamond trade and dispute resolution whereas in the DDC the Arbitration Panel is used much more as an internal procedure for dispute resolution in diamond deals. However, both jurisdictions have the protection of the national law enforcement agencies when it comes to dealing with actual diamond related crime. It may also be difficult to uphold the reputation mechanism in South Africa particularly in light of the State's Constitutional efforts¹⁷⁰² to encourage new entrants into diamond trade and commerce in South Africa.

¹⁶⁹⁹ Richman D. Barak *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal* Virginia Law Review 95 Va. L. Rev. 325 (2009) n 160.

¹⁷⁰⁰ See *S v Mkonto* 2001 (1) SACR (C) where the court dealt with the issue of illicit diamond buying as a threat to the industry.

¹⁷⁰¹ Damarupurshad Ashok South African Diamond Handbook and Operating Diamond Mines Directory (2006) 17; 18. www.dme.gov.za 16 August 2009.

¹⁷⁰² Constitution of the Republic of South Africa Act, 1996 sections 9(2) and 22.

10.5 Judicial Consideration of Diamond Related Crime

10.5.1 The South African Position

It is important at this juncture to study the manner in which the courts have dealt with the problem of corrupt activities surrounding diamond theft.¹⁷⁰³ To achieve this goal several reported judgments will be considered. These judgments will provide insight on the role played by the courts in protecting diamond trade from crime while also informing us of the factors that surround diamond crime and other civil misconduct cases. This will create a much needed broader understanding of the diamond laws insofar as the criminal law and civil law aspects relate to it.

It is also possible that allegations of diamond theft in a particular case are not proved because all the elements of a crime¹⁷⁰⁴ cannot be established. This makes it difficult for the diamond producer who has an offending employee who cannot be criminally charged and as a result such an employer is forced to use other measures in law to discipline such an employee. This study of the judicial decisions on diamonds and crime will be very helpful to showing the manner in which the courts potentially deal with such alternative disciplinary measures in the diamond industry.

¹⁷⁰³ See additional cases as considered by the courts on this matter *Queen v Klaas* (1893-1895) 7 HCG 245, 246. *S v Gauss v Mukete*; *S v Petrus*; *S v Teodor* 1980 (3) SA 770 (SWA) 771, 772 , *National Union of Mineworkers v De Beers Consolidated Mines Ltd* (1997) 18 ILJ 1442 (CCMA) 1455 F.

¹⁷⁰⁴ In certain diamond theft cases, the elements of a crime may be difficult to prove and reliance on statutory crime may be necessary for the State to prove its case. This may be in the case where diamonds are received as stolen property and the proof of their origin is insufficient to establish an one of the elements of the crime of theft, for example, as contained in section 265 of the Criminal Procedure Act 51 of 1977 which deals with the receiving stolen property knowing it to have been stolen. The section provides that 'if the evidence on a charge of receiving stolen property knowing it to have been stolen does not prove that offence, but—

(a) the offence of theft; or

(b) an offence under section 37 of the General Law Amendment Act 62 of 1955

the accused may be found guilty of the offence so proved.' In terms of section 265 of the Criminal Procedure Act 51 of 1977 'the competent verdicts referred to in s 265 (a)–(b) are only permissible if the offence of receiving stolen property, knowing it to have been stolen, is not proved.' This was confirmed dissenting judgment (on the facts) of Ogilvie Thompson JA in *S v Bolus & another* 1966 (4) SA 575 (A) 578 G. This case has been identified as providing an example of where a court may resort to a conviction of theft in the absence of proof of guilty knowledge on the part of the accused at the time when he received the property, provided, of course, that all the elements of theft are proved. It should be noted that the reverse *onus* provision in s 37(1) of General Law Amendment Act 62 of 1955 is not unconstitutional, see appeal case *S v Manamela and Others* 2000 (1) SACR 414 (CC) 452 H.

Diamond theft has been a concern of the diamond industry from early days of the establishment of such an industry. This was evident in the case of *R v Sam Ramothobi*¹⁷⁰⁵ where the accused was convicted and sentenced on a charge of theft of a rough diamond the property of De Beers Consolidated Mines Ltd. The charge had arisen from the fact that the accused had neglected to deliver up to the detective department at Kimberley a rough and uncut diamond which he had found and picked up on certain ground not being the depositing floor or place worked by him under a prospecting licence. Alternatively, that the accused had stolen the rough diamond which was the property of De Beers.¹⁷⁰⁶

In this case the court could not fully charge the accused for theft in the traditional sense and thus the case was remitted in order to take further evidence. This special circumstance had taken place because the accused had concealed the rough diamond at a place not belonging to him, that being a compound to which the Kimberley Floors belonged. What is clear in this case is that failure to deliver the rough diamond to the police would have been a more sound charge if it was found that the elements of the crime of theft were not established. The law on diamond theft has been more clarified since this earlier South African decision.

In the decision of *Ex Parte Rampi*¹⁷⁰⁷ an accused had been charged of theft of diamonds to the value of five thousand pounds. The issue in this case was not focused so much on the diamond theft as much as it was on the bail amount that had been set by the magistrate. The magistrate had set the bail amount at one thousand pounds in light of the crime and this was found to be excessive. The Attorney general left the matter in the court's discretion and the amount was reduced accordingly to four hundred pounds.¹⁷⁰⁸

¹⁷⁰⁵ (1899-1904) 9 HCG 380.

¹⁷⁰⁶ 381.

¹⁷⁰⁷ 1933 GWLD 27.

¹⁷⁰⁸ See case information.

This case is included in this study as an important starting point for diamond crime as it illustrates the attitude of the criminal courts in dealing with diamond related crime. It seems that by reducing bail and thereby making it easy for charged persons to obtain bail in such crimes, creates an impression that such theft is not so serious in that it does not threaten society as much as rape or murder, for example, therefore it is not necessary to make it difficult for persons charged with such crimes to interact with society while waiting for their trials.

It is proposed that whether or not this attitude is correct, the danger that it may create is that it contributes to the lack of fear of the law in diamond related crimes. In such cases all a syndicate member needs to do is obtain easy bail¹⁷⁰⁹ and engage in all kinds of activities to interrupt investigations which may eventually lead to a withdrawal of charges on the basis of lack of evidence particularly in the more difficult cases that the State must prove. This issue should be addressed particularly when considering the state of corruption that is trying to destroy a building block of the economy in the form of the diamond industry. It is submitted that the bail should not be used as a form of punishment indeed but it should be applied by the courts in the strictest manner so as to show the court's commitment to the protection of the diamond industry.

The issue of the release of a diamond theft suspect on bail and potentially hindering investigations was considered in *John Rampi v The Attorney-General*.¹⁷¹⁰ The accused was refused bail on the sole ground put forward by the public prosecutor that investigations were still continuing and he feared that if the accused were at liberty he might interfere with the investigations and so defeat the ends of justice. The application to re-consider the granting of the bail was refused as it was shown that the charge related to the theft of diamonds a portion

¹⁷⁰⁹ Granted a syndicate member may engage in this obstructive manner even if his or her bail was high or low, however, it is submitted that a higher more stringent bail sends a message to the public in such matters.

¹⁷¹⁰ 1933 GWLD 11.

of which were found on the accused.¹⁷¹¹ This decision is justifiable in light of the submissions on the interference with investigations however it appears that there were other co-accused persons (some 'Europeans') in this case who had been granted bail so this decision is not the most exemplary one for bail applications in diamond related crime.

In *Q v Smith*,¹⁷¹² S was employed as an after-sorter of debris in a diamond mine. He was paid no wages but received a percentage of the value of any diamonds that he found. The nature of his work was such that he was able to commence or discontinue work at will and was therefore not a servant of the employee in terms of section 58 of the repealed Diamond Trade Act 48 of 1882. section was charged with the theft of diamonds under section 58 however after presenting evidence that he was not a servant in terms of the Act, he was discharged. It was found however that section could be charged in terms of section 2 of the Act in that he had in his possession rough and uncut diamonds without being able to give satisfactory account as to his right to such possession.¹⁷¹³

S pleaded *autrefois acquit* on the grounds that he had already in regard to the same facts been charge and acquitted of contravening section 58 of the Act. The court rejected this plea and found section guilty of diamond theft in terms of section 2 of the Act because he was not a servant n terms of section 58 however this did not bar the State from bringing a second charge that is distinct from the first with other evidence provided. In this case proof of unlawful possession was necessary and since it was proved the appeal was dismissed.¹⁷¹⁴ In this case it was quite clear that the court was not prepared to entertain what it termed an ingenuous defence to avoid prosecution for diamond theft.

¹⁷¹¹ 12.

¹⁷¹² (1898) 15 SC 361.

¹⁷¹³ 362.

¹⁷¹⁴ 365.

In the rather racially biased case of *Queen v Keast*¹⁷¹⁵ the appellant was charged before the Kimberley Magistrate court with the contravention of section 3 of the by-laws approved in terms of the Griqualand West Ordinance No. 11 of 1880 and adopted by De Beers' Company. This by-law provided that, it shall be lawful for the company to appoint guards for the purpose of preventing any person or persons from entering or leaving the mines, mining areas or depositing floors, without due or proper authority in writing signed by one of the Directors of the Company.¹⁷¹⁶

Further, the by-law provided that, any unauthorized person who shall be found within the mines, mining areas or any of the depositing floors shall be liable to arrest and on conviction be liable to a further fine. A strange and racist provision was added to the by-law and it provided that, for the carrying out and enforcement of a proper and efficient system of searching the servants employed in and about such mines it shall be compulsory 'for all employers of native labour' in such mines to clothe the 'natives' so employed in some suitable uniform or dress for preventing as far as possible the secretion of diamonds.¹⁷¹⁷

It is understandable that this by-law was framed in a different political dispensation when compared to the Constitutional dispensation which South Africa has at present. The problem with this by-law is that it labeled only the black employees, generically termed as 'the natives' as diamond thieves who must be clothed in apparel that labels them as such. This was a derogatory treatment of employees particularly since the outfits were designed to prevent theft by the 'natives.'¹⁷¹⁸

The Supreme Court also confirmed this view but it did not base its reasoning on principles of equality and dignity arguments, by stating that although the object

¹⁷¹⁵ (1889-1890) 7 SC 355.

¹⁷¹⁶ 358.

¹⁷¹⁷ *Ibid.*

¹⁷¹⁸ 360.

aimed at by the ordinance may have been to assist in preventing diamond stealing. This did not authorize the framing of the by-laws for any purpose other than the proper and efficient searching and clothing of servants and that to this extent it only attempts to prevent the theft and removal of diamonds. It was held by the court that anything more than that on the part of the framers of the ordinance was *ultra vires*, as a result the conviction and sentence was set aside.¹⁷¹⁹

In making this decision, Judge De Villiers CJ actually made a reference to another case where an ordinance was promulgated by Town Council to deal with the registration of all dogs so as to control a public nuisance by preventing the prowling about of dogs with no owners. He said that in that case the regulation promulgated by the town council was for general utility and was thus acceptable.¹⁷²⁰ It is submitted that the reference to this case in this judgment creates a stark picture of how the Supreme Court was able to take a decision without reference to Constitutional values as they had not been adopted at that stage to protect human dignity for the 'native' mine employees in this case insofar as the ordinance in question was concerned. It is submitted that this was stated by the learned Judge so as to illustrate that some regulations are justifiable for controlling dogs as a nuisance but not for human beings.

In *R v Khumalo*¹⁷²¹ the accused was charged in the Rustenburg magistrate court for theft or attempted theft diamonds from the Mallin Diamond mines. Alternatively the accused was also charged with contravening section 103(1)(a) of Act 44 of 1927 in that he was engaged in unlawfully digging, prospecting on the mine without prescribed authority. The accused was found guilty on the alternative charge and this conviction and sentence was being appealed in this case. In the appeal it was established that the appellant was employed by the Mallin Diamond Mine as a night watchman ('a police boy' in true apartheid

¹⁷¹⁹ *Ibid.*

¹⁷²⁰ *Ibid.*

¹⁷²¹ [1952] 2 All SA 361 (T).

language) as a witness testified that he had discovered the appellant sifting through diamondiferous gravel which he had scraped from the mine. The appellant was searched but there were no diamonds found on him only the mine gravel which was still in his pockets. The appellant denied any such sifting.¹⁷²²

Court found, it is submitted, correctly by stating that the appeal should fail because the facts of the case show that when the appellant was found he was in fact 'prospecting and digging for diamonds' in an unauthorized manner using an iron hoop to scratch among the gravel. Further, there was an established criminal intent present in the case because there were sufficient means employed by the appellant to attain the objective of committing a crime.¹⁷²³ This case serves as a useful protection of the diamond industry by preventing the illustrated threat *in casu* of uncontrolled diamond mining, a situation which has long been a problem in most African diamond rich States.

The case of *Commissioner for SARS and Another v TFN Diamond Cutting Works (Pty) Ltd*¹⁷²⁴ provides some insight on the law pertaining to the liability of the State in cases where diamonds have been stolen while in State custody. The law of delict played a large role in answering this question *in casu* as it was essential to consider the relationship between State as master of servant employee and the potential vicarious liability that may have ensued from such a relationship. Further, the court also applied the provisions of the Customs and Excise Act¹⁷²⁵ to spell out State liability and exemptions to such liability, if any under the Customs and Excise Act.¹⁷²⁶

The facts of the case show that TFN Diamond Cutting Works (Pty) Ltd ('TFN,' the Plaintiff in the court *a quo*) is a purchaser of rough diamonds from a variety of sources in South Africa which it then cuts and polishes for resale. In October

¹⁷²² 363.

¹⁷²³ 365.

¹⁷²⁴ [2005] 2 All SA 455 (SCA). See Michael O. Dale *Mining Law Annual Survey*, Juta (2005) 449; 450.

¹⁷²⁵ 91 of 1964.

¹⁷²⁶ 91 of 1964.

2000 a diamond dealer of long standing reputation and the director of TFN traveled to New York with a consignment of diamonds. The diamonds had been duly inspected and sealed by the South African Diamond Board in accordance with the prescribed practice of the South African customs authorities.¹⁷²⁷

The export documentation with due course possible re-importation had been lodged with the employees of the Commissioner of the South African Revenue Services ('SARS' first Defendant in the court *a quo*). Some of the diamonds were sold in New York and some returned with the diamond dealer to South Africa. Upon his arrival at the airport, the dealer declared the diamonds to the employees of the defendant. As a result of some misunderstanding the original invoice for the diamonds could not be produced by the dealer. Since the customs officials at the airport were not content with the faxed invoice, the diamonds were detained in a plastic pouch supplied by one Sadler. Sadler being a clearing agent and employee of Brinks SA (Pty) Ltd. Sadler accompanied by one Daniel and Cuthbert both employees of the defendant took the diamonds to a strong room at the customs hall where the sealed pouch was placed in a locked safe. Sadler was issued with a detention slip with an appropriate record entry being made in a bond book.¹⁷²⁸

Sadler went to the airport with the duly completed documentation to secure the release of the diamonds. These documents were presented to an employee of the defendant, one Tycoon who was on duty. Having accepted the documentation without any query Tycoon went to the safe and returned to inform Sadler that the diamonds were missing. This matter was reported to the police. The plaintiff believed that the diamonds were stolen by one Joseph and continued to sue the defendant for breach of obligations under a contract of

¹⁷²⁷ 456 par. 2.

¹⁷²⁸ 457 par. 3.

deposit and alternatively asserted a delictual claim on the basis of the defendant's breach of a duty of care owed to it by the defendant.¹⁷²⁹

The defendant admitted that the package containing diamonds had been detained by its employees and it was established at trial that the diamonds had been stolen during Joseph Matshiva's shift as he was in control of the safe and the strong room at the time of the disappearance of the diamonds. This persuasive inference was not challenged on appeal.¹⁷³⁰

Counsel for the defendant argued that the defendant's employee was not acting within the course and scope of his employment by stealing the diamonds therefore the defendant should not be held vicariously liable. Secondly, Counsel for the defendant also argued that in terms of section 17(3) of the Customs and Excise Act¹⁷³¹ it was exempt from liability to the plaintiff by virtue of this section which provides that 'The State or any officer shall in no case be liable in respect of any loss or diminution of or damage to any goods in a State warehouse or in respect of any loss or damage sustained by reason of wrong delivery of such goods.' Further, the definition of State warehouse in terms of the Customs and Excise Act¹⁷³² is defined as 'any premises provided by the State for the deposit of goods for the security thereof and of the duties due thereon or pending compliance with the provisions of any law in respect of such goods.'¹⁷³³

The court did not entertain the possibility of making a finding that would allow the employee of the State to simply steal the plaintiff's diamonds without due consequences. In justifying this conclusion the court established, with Counsel for the defendant conceding the point, that Joseph Matshiva had been negligent in guarding the contents of the safe. In such cases an employer must be held vicariously liable for any loss occasioned in consequence of such negligence

¹⁷²⁹ 457 par. 5.

¹⁷³⁰ 457 par. 5; 6.

¹⁷³¹ 91 of 1964.

¹⁷³² 91 of 1964.

¹⁷³³ 457 par. 7; 458 par. 10.

particularly since negligence is a form of fault, so too is intention. The liability in this case attached to the defendant because its servant owed the plaintiff a duty to keep the diamonds safe but failed to do so.¹⁷³⁴

With regard to the second contention for an exemption of the defendant in terms of section 17(3) of the Customs and Excise Act,¹⁷³⁵ the court found as follows. Firstly, the court quickly settled the issue concerning whether or not the customs hall at the Johannesburg International Airport was a State warehouse as contemplated by the Customs and Excise Act¹⁷³⁶ by holding that it was in fact a State warehouse as contemplated in the Customs and Excise Act.¹⁷³⁷ Further, the court settled that it would be preposterous for Legislature to have intended to include theft in the exemptions covered by the section of the Customs and Excise Act¹⁷³⁸ as that would mean an employee entrusted with the responsibility of safeguarding goods could with impunity steal the goods and thereafter invoke the protection afforded by the section.¹⁷³⁹ This decision is most cogent and plausible as it also encourages the State to monitor its employees so as to not steal diamonds that have been entrusted to it.

With regard to how the courts have dealt with the application of labour laws as a means to discipline an employee for allegedly engaging in diamond related misconduct that falls short of a crime, the case of *De Beers Consolidated Mines Ltd v National Union of Mineworkers and Another*¹⁷⁴⁰ is important. This case was an appeal by the employer against a decision by the court *a quo* granting the second plaintiff, one Mochumi, reinstatement and six months pay back after he was dismissed by the appellant employer. Mochumi had been employed as a

¹⁷³⁴ 458 par. 9.

¹⁷³⁵ 91 of 1964.

¹⁷³⁶ 91 of 1964.

¹⁷³⁷ 91 of 1964.

¹⁷³⁸ 91 of 1964.

¹⁷³⁹ 459 par. 12.

¹⁷⁴⁰ [1998] JOL 3760 (LAC); [1998] 12 BLLR 1201 (LAC).

plant or extract operator by the appellant at the Kimberley metallurgical plant and had nearly ten years experience.¹⁷⁴¹

The plant's principal functions involved the recovery of diamonds from accumulative diamondiferous material derived from underground and dump sources throughout Kimberley. It was common cause that the material recovered was of great value and many security measures were adopted by the employer to prevent the constant threat of diamond theft, as a result a high degree of trust was expected of Mochumi in his duties. Further, Mochumi was expected to follow company procedure in order to make ensure the legitimacy of his handling of diamondiferous material.¹⁷⁴²

During mining operations Mochumi was captured on video in an act that was regarded as an illegitimate search for diamonds. The footage showed Mochumi shining a torch across the diamondiferous material on the screen, picking up the material with his right hand and shining a torch into it, rubbing it with his thumb and left hand and returning the material onto the screen. The appeal court had to decide whether this evidence showed evidence of an illegitimate search for diamonds and if not whether Mochumi had a legitimate reason for his conduct in any case.¹⁷⁴³

The court found in favour of the employer in this case on the basis that Mochumi's failure to act according to prescribed company policy showed evidence of an illegitimate search for diamonds. Mochumi was not to tamper with the diamondiferous material and after many contradictory statements the court made a finding that even Mochumi himself could not give a convincing explanation for his conduct. It was held by the court that Mochumi had handled the material in question with an oblique purpose which would result in a dismissal. It was found in conclusion therefore, that the company was correct in

¹⁷⁴¹ 2 par. 2.

¹⁷⁴² 4 par. 11.

¹⁷⁴³ 7 par. 23.

dismissing Mochumi and had not committed an unfair labour practice in doing so. The appeal succeeded.¹⁷⁴⁴

Clearly this case also sends a message to diamond workers to respect company policies and procedures as they are designed to keep diamond theft temptation to a bare minimum in a particular workplace. Therefore, to breach such procedures is breach of trust. A diamond producer stands to lose out on vast revenue if such an employer cannot have employees it can trust to carry out the work with required integrity. The unfortunate part of this case is that the employee had enough experience to know exactly what was expected of him and in spite of this acted contrary to company policy.

The case of *National Director of Public Prosecutions v Naidoo and Others*¹⁷⁴⁵ is important in this chapter to conclude the South African court's consideration of diamond crime. More specifically the facts of this case show that the issue was the possession of unwrought precious metal alleged to have been stolen from the mines. This case is an important decision as it was dealt with under the Prevention of Organized Crime Act 121 of 1998. It is respectfully submitted that the principles from this case may be applied to diamond related criminal matters which are often plagued by organized crime syndicates.

10.5.2 Some Foreign Law Perspective

It is important at this stage to consider cases from other jurisdictions as useful comparative guides and persuasive sources of law pertaining to illicit diamond dealings. It is obviously impossible to report or study all the possible useful diamond crime related cases from all possible jurisdictions, therefore for the purposes of this section a few cases from foreign jurisdictions will be studied just to gain international or foreign perspective on such issues. As a starting point this study will consider the State of Namibia as a diamond producing neighbor to

¹⁷⁴⁴ 11 par. 37; par. 41.

¹⁷⁴⁵ 2006 (2) SACR 403 (T).

South Africa. The case is reported as *S v De Beer*¹⁷⁴⁶ and involves an appeal against judgment and sentence for a charge of buying illegally or receiving near Windhoek rough and uncut diamonds valued at R77 946.

It was common cause that the accused persons in this case were caught as a result of a police trap that had been set. In dismissing the appeal against the sentence and conviction, the learned O'Linn J. made the following useful comments relating to criminal activity surrounding diamond theft *in casu*. Firstly, O'Linn J. did not accept the plea of innocence on the part of the accused because the judge could not accept that two foreigners would simply come to Namibia in the hope of securing some future undefined transaction.

O'Linn J. also pointed out that the fact that the appellant had been careful and intentional enough to bring all the right equipment along to test the merchandise (diamond testing apparatus), left little room for typifying him as a naïve and ignorant buyer who trusted strangers so easily. Further, it was obvious that with the appellant's background in diamond evaluation, he had paid for the rough diamonds he had seen and was thus guilty of illicit diamond buying in terms of the law. Muller AJ in a slightly dissenting statement stated that while consistency in diamond theft and like matters is essential, there also needed to be an emphasis on making decisions to be determined on a case by case basis with each matter being decided on its own merits.

What this limited consideration of foreign diamond crime related cases illustrates, is that diamond theft and illicit diamond buying are very serious international concerns. These high risk factors of the diamond industry inevitably affect the economy from a revenue production perspective as well as having high risk insurance implications. However it is clear that these cases are mostly subject to the criminal laws of the country involved.

¹⁷⁴⁶ [1991] 4 All SA 207 (NmH). For similar facts, see *S v Koekemoer & Another* 1991 (1) SACR 427 (Nm).

The factors mentioned above were considered in the English case of *R v Eshaq Basalian*¹⁷⁴⁷ where the appellant had pleaded guilty to five counts of jewellery theft. The appellant had been involved in the business of being a diamond dealer and had received diamonds for approval from other dealers. The appellant failed either to pay for these received diamonds or to return them. The appellant was sentenced to five years imprisonment however on appeal it was found that such a sentence was excessive particularly upon consideration of the fact that the appellant was a man of previous good character, who had also pleaded guilty. Interestingly the fate of the diamonds in this case was unknown even to the appellant as he himself had stated that he was awaiting payment for them.¹⁷⁴⁸

This case seems to be a classic case of a diamond thief who was subsequently robbed as well. It is submitted that the court was correct in being sympathetic in these circumstances. Further, in light of the statement by Muller AJ in *S v De Beer*¹⁷⁴⁹ it seems justified that a case by case basis for dealing with diamond thefts should be adopted in such cases as not all cases will justify a rigid consistent approach in order to find common ground or similar punishment to fit all cases of this nature. This means that an arrogant notorious diamond thief cannot be compared with a diamond thief, who has admitted his or her mistake when such a crime is brought before a court.

In the case of *Kay v Shauman*¹⁷⁵⁰ the English court took the view that is in agreement with South African law of delict and the law pertaining to goods entrusted for in storage. In this case a plaintiff diamond dealer had supplied some diamonds to the defendant who had a small retail jewellery business hoping to sell them to a customer. The diamonds were stolen. The plaintiff sued the defendant for the loss of the diamonds. An important established custom was

¹⁷⁴⁷ (1989) 11 Cr. App. R. (S.) 42.

¹⁷⁴⁸ 42 col. 2.

¹⁷⁴⁹ [1991] 4 All SA 207 (NmH).

¹⁷⁵⁰ 1954 WL 15791.

mentioned in this case which provides that it was customary among dealers and brokers of the London Diamond Bourse that a person who took goods on approval was responsible for them until they were paid for or returned. The plaintiff had not established that such a custom existed in this case because the defendant was a retailer, however, since there was an express oral contract that the defendant would be responsible for the diamonds, the defendant was liable.

In a case reported under the European Union case reports¹⁷⁵¹ the case of *Kamran Zabihi v Mahmood Janzemini, Yousef Massodipour, Alounak Kebab Limited*¹⁷⁵² decided by the High Court of Justice, Chancery Division, it emerged that in the case of alleged diamond theft in the form of jewellery handed over in pursuance of an agreement to sell such jewellery, in such a case, whatever damages that arise out of such an agreement will be assessed according to what was intended by the parties when entering such a transaction. In this case the court dismissed the claims for breach of terms of the agreement on the grounds that there was no proof that an agreement was entered into showing that the defendant had assumed responsibility for the safe custody of the jewellery in question or the sale proceeds.¹⁷⁵³ It emerges from this case that a court must naturally apply the laws of contract where necessary particularly if there has not been proof of the crime of theft of diamonds, no matter how common such thefts may be.

Under the Canadian Statute cited as the Railway Act¹⁷⁵⁴ liability for diamond loss is expressly provided for. It is submitted that because of the common risk of theft of commodities such as diamonds, that the Canadian law has to be explicit about the liability of the State and other companies with respect to traffic on the railway systems used by persons in such circumstances. This provision is of particular importance since there risk is often increased when goods of this nature are

¹⁷⁵¹ See Westlaw International for educational purposes.

¹⁷⁵² HC06C2426 [2008] EWHC 2910 (Ch).

¹⁷⁵³ Par. 311 of the judgment by Mr. Justice Blackburne 28 November 2008.

¹⁷⁵⁴ R.S.B.C. 1996, C 935.

being carried by State agencies or in the custody of State agencies or other companies to which the statute applies.¹⁷⁵⁵ The Canadian statute¹⁷⁵⁶ provides for exemption from liability but only where the company protected is aware, through its agent or servant of the diamonds to be carried and have taken responsibility for their safe keeping:

‘A company is not liable for any total or partial loss of gold or silver, diamonds...or precious stones...including every document forming the title or evidence of the title to any property of any kind, or articles of great value not being ordinary merchandise, by reason of any robbery, theft, removal or secreting of them, unless their true nature and value has, at the time of delivery for conveyance, been declared by the owner or shipper to the company or its agent or servant, and entered in the bill of lading or otherwise in writing.’¹⁷⁵⁷

With regard to law pertaining to the curbing of illicit diamond trading, EU legislation is clear on this matter as appears in the ‘Council Common Position of 29 October 2001 on combating the illicit traffic in conflict diamonds, as a contribution to the settlement of conflicts.’¹⁷⁵⁸ The Council Common Position of 29 October 2001 on combating the illicit traffic in conflict diamonds, as a contribution

¹⁷⁵⁵ See *Commissioner for SARS and Another v TFN Diamond Cutting Works (Pty) Ltd* [2005] 2 All SA 455 (SCA) 457 par. 5, 6 where it was established that the diamonds *in casu* were stolen while in State custody by an employee of the State.

¹⁷⁵⁶ Railway Act, 1996 R.S.B.C. 1996, C 935 section 198(3).

¹⁷⁵⁷ *Ibid.* The problem with this declaration is that the servants or agents of the company may very well steal the diamonds or other listed precious goods. This was the exact issue in the case of *Rex v Fourie and Another* 1937 AD 31 p 36 where the two accused in this case were charged and convicted of stealing a box containing a quantity of gold bullion belonging to the Standard Bank of South Africa. At the time of theft the gold bullion was in the lawful custody of the Administration of the South African Railways and Harbours. This was also the mischief in *Commissioner for SARS and Another v TFN Diamond Cutting Works (Pty) Ltd* [2005] 2 All SA 455 (SCA) 457 par. 5, 6.

¹⁷⁵⁸ EU: Common Position 2001/758/CFSP Celex No. 301E0758 Official Journal L 286, 30 October (2001) 2.

to the settlement of conflicts¹⁷⁵⁹ text provides very clearly that having regard to the Treaty of the EU¹⁷⁶⁰ the EU is aware that conflict diamonds fuel some of the bloodiest conflicts in Africa and therefore measures are adopted and deemed necessary to prevent and resolve such conflicts.¹⁷⁶¹ To make a contribution to the end of these conflicts the EU's common position takes cognizance of the KPCS resolutions supported by the UN.¹⁷⁶² Further in light of this the EU makes a commitment in law to prevent and resolve African conflict by promoting universal respect for embargoes related to the illegal exploitation off and trade in high value commodities.¹⁷⁶³ It is evident from this EU legislation that persons who act contrary to this Common position of the EU community, such persons will be subject to the criminal and civil sanction of EU law.

10.6 Conclusion

It has been established in this chapter that corruption, crime and other misconduct is a major national as well as international problem in diamond trade. These have been identified in the form of activities pertaining to illicit diamond buying, diamond theft (whether by individuals, State employees or syndicates), other diamond related misconduct such as failure to report a discovery of a diamond and illegitimate prospecting for diamonds. It is also clear that the police and the courts have been active in making sure that such activities are addressed with appropriate force.

This is crucial since the diamond industry must be protected in order to continue to support the economy of a particular country. It is therefore essential that the private citizens of a diamond producing country be made aware of the negative effects of diamond related crime on the economy so as to support the work of the

¹⁷⁵⁹ EU: Common Position 2001/758/CFSP Celex No. 301E0758 Official Journal L 286, 30 October (2001) 2.

¹⁷⁶⁰ Article 15 thereof which provides that, 'the Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.'

¹⁷⁶¹ Preamble section 1.

¹⁷⁶² Sections 4, 5, 6, 7.

¹⁷⁶³ Section 8.

State in the protection of the diamond industry. Further, it is proposed that whatever established measures that have been used by the industry to protect itself, such as registration of dealers and dealings with reputable diamond merchants and the use of advanced security measures to protect the industry. Such measures should be upheld by the international community and not overly criticized as they have proved to be effective and lawful over time. Ultimately diamond trade must be limited to those who will not pervert justice when trading in this precious commodity.

Chapter 11: Other Structures that are Relevant to South African Diamond Trade

11.1 Introduction

It is important at this stage to consider the workforce representative bodies in the form of mining and diamond Unions as well as other diamond related trade structures that contribute significantly to the diamond industry in South Africa.¹⁷⁶⁴

A study on diamond trade in South Africa is not complete without recognizing the voice and force of these bodies, particularly in light of the fact that they are Constitutionally protected bodies. As previously discussed in chapter 1 of this work, trade unions are bodies or associations that are often active in the diamond trading and mining in general, the Constitution provides expressly for the rights of forming such bodies.¹⁷⁶⁵ It is therefore a crucial part of the study to acknowledge the participation, influence and contribution union structures.

In the case of *DB Investments SA v De Beers Consolidated Mines Ltd & De Beers Centenary AG*¹⁷⁶⁶ which was brought before the Competition Tribunal, Unions were invited to participate in merger proceedings. The participation of the Union in this merger was a significant step forward in ensuring fair and equitable representation by and for workers in the diamond mining industry. This Union participation further assisted the court in obtaining a clear understanding of the public interest concerns of the mining operations industry in light of the proposed merger. The Unions representations in this case are crucial and appear in the indented text below. What one sees in these concerns is a strong drive to protect employment for workers. The merger was granted by the Tribunal on the basis of the certain public interest factors, all of which were fully appreciated and communicated to the Unions. The Unions were able to make submissions on the issues raised as demonstrated by the quote below taken from the proceedings:

¹⁷⁶⁴ For greater mineral industry perspectives see Bastida Elizabeth *International and Comparative Mineral Law and Policy: Trends and Prospects*, Kluwer International (2005).

¹⁷⁶⁵ Chapter 2, Bill of Rights Section 23(2) – (6).

¹⁷⁶⁶ Case Number: 20/LM/March 2001.

'Public Interest Considerations

35. Of the 33 trade unions notified of the transaction, only four contacted the Commission advising that they wished to participate in the merger proceedings.

NAWUSA,¹⁷⁶⁷ representing employees from the National Amalgamated Workers Union of South Africa; NUMSA,¹⁷⁶⁸ representing employees from the National Union of Metalworkers of SA; NUM,¹⁷⁶⁹ or the National Union of Mineworkers and FAWU¹⁷⁷⁰ or the Food & Allied Workers Union.

36. NUMSA and NUM expressed the concern that the proposed transaction might be part of a broader restructuring process, entailing job losses. They sought sight of a list of CHL subsidiaries to determine whether any fact they were active in any industries affecting the trade union members. They further sought undertakings from both De Beers and Anglo guaranteeing no future job losses in respect of their members. NUM also raised the concern that the merger might precipitate an outflow of funds from the country in the form of dividends and interest. Further, the fact that DBI would be an unlisted foreign company would raise transparency and accountability issues, affecting their employees in the long-term.

37. At the hearing, only FAWU appeared to make oral submissions. It represents members employed by Anglo's subsidiaries in the sugar and farming industries. FAWU's concerns were centered around Anglo's future

¹⁷⁶⁷See www.sabinet.co.za/sabinetlaw/gazindex/20071207.html 19 March 2010.

¹⁷⁶⁸www.numsa.org.za/ 19 March 2010.

¹⁷⁶⁹www.num.org.za/ 19 March 2010.

¹⁷⁷⁰www.fawu.org.za/ 19 March 2010.

restructurings, specifically if Anglo opted out of non-mining industries as it scaled down in favour of its core operations. They were anxious that this would lead to potential job losses. They also commented that the transaction would result in increased concentration and dominance, raising the risk of restrictive business practices arising.

38. The merging parties were prepared to offer an undertaking on behalf of DBI that the instant transaction would not result to any change in employment conditions or job losses post-merger in relation to De Beers's employees. This undertaking was accepted by the Attorneys for NUM and NUMSA. However, DBI contended it could not grant an undertaking in perpetuity, DBI would have to in the normal course of events, review employment levels from time to time. They pointed out that in any event, FAWU had no members employed by De Beers. The unions remained adamant that Anglo furnish an undertaking confirming that there would be no employment implications or changes to employment conditions post merger.

39. With regard to NUM's concerns, the parties contended that the Reserve Bank's prior approval of the transaction signified that the potential migration of funds outside the country was not a major concern.¹⁷⁷¹

It is crucial to understand the diamond trade organizational structures as an organization is not made only by management but is a co-dependency between these structures. In the past the voices of the workforce Unions were not as well protected in law as they are in the Constitutional dispensation. Therefore, it is important to acknowledge the contributions, the motivations and aspirations of

¹⁷⁷¹ *DB Investments SA v De Beers Consolidated Mines Ltd & De Beers Centenary AG* Case Number: 20/LM/March 2001 paragraphs 35 - 39.

these bodies as they represent a more organized method of negotiation¹⁷⁷² and communication between management and the workforce of the diamond industry.

In the same way it is important for this study to also acknowledge other trade related structures and bodies that make the diamond industry function efficiently. This is done by increasing friendly trade relations with neighboring States as emphasized in the Southern African Customs Union (SACU)¹⁷⁷³ agreement;¹⁷⁷⁴ the guardianship of international trade as provided for by the International Trade Administration Commission (ITAC)¹⁷⁷⁵ and the contributions to the diamond industry by the DTI.¹⁷⁷⁶ By studying these bodies in light of diamond trade, this chapter aims to complete the puzzle with regard to national structures that are significant in diamond trade laws in South Africa. This will be achieved by elaborating on the involvement of these relevant organizations and their role in aspects of diamond trade.

¹⁷⁷² See for example, *De Beers Consolidated Mines Ltd v National Union of Mineworkers and Another* [1998] JOL 3760 (LAC); [1998] 12 BLLR 1201 (LAC); *National Union of Mine Workers & Others and RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB).

¹⁷⁷³ This acronym must not be confused with that of the South African Communications Union.

¹⁷⁷⁴ Which is to be implemented in terms of section 4 of the International Trade Administration Act 71 of 2002.

¹⁷⁷⁵ As established in terms of the International Trade Administration Act 71 of 2002 section 1 definition. The preamble states as follows: 'To establish the International Trade Administration Commission; to provide for the functions of the Commission and for the regulation of its procedures; to provide for the implementation of certain aspects of the Southern African Customs Union (SACU) Agreement in the Republic; to provide, within the framework of the SACU Agreement, for continued control of import and export of goods and amendment of customs duties; and to provide for matters connected therewith.' See section 7 of the Act which provides for the establishment of the ITAC. The section provides that '(1) The International Trade Administration Commission is hereby established, and

(a) has jurisdiction throughout the Republic;

(b) is a juristic person; and

(c) must exercise its functions in accordance with this Act and any other relevant law.

(2) The Commission-

(a) is independent and subject only to-

(i) the Constitution and the law;

(ii) any Trade Policy Statement or Directive issued by the Minister in terms of section 5; and

(iii) any notice issued by the Minister in terms of section 6; and

(b) must be impartial and must perform its functions without fear, favour or prejudice.

(3) Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and carry out its functions effectively.'

¹⁷⁷⁶ www.dti.gov.za/ 19 March 2010. The DTI is involved in development initiatives such as Small business development, supplying documentation for BBBEE codes of good practice.

Whenever there are significant diamond industry related economic effects, it is not unusual to see the Unions raising their voices to represent the views of workers' rights.¹⁷⁷⁷ The views of the Unions are often captured significantly in the media especially when strikes are involved with an unfortunate disadvantage of negotiations by media and the fortunate advantage of creating some kind of transparency in the significant decisions that are taken by mine management in consultation with the mining Unions. The role of Unions will be even more significant in light of the recession and the vast loss of employment that is taking place in South Africa.

¹⁷⁷⁷ See Mail & Guardian, Business & Labour *De Beers Optimistic About Talks with Union* 24 July 2008 where it was reported that the world's top diamond producer De Beers was optimistic about wage negotiations with South Africa's largest mine Workers' union in a bid to avert a strike at its mines in the country. NUM was reported as representing 3 400 workers was negotiating for wage increases in light of the rising fuel, food and electricity prices coupled with a string of interest-rate hikes in housing. The effects of the recession on Botswana mining were also reported in the Mail & Guardian, Business & Mining *De Beers Halts Mining in Botswana* 24 February 2009. Once again the Botswana Mine Workers Union was active in the negotiations surrounding these difficult times for the industry. See also, Alex Duval Smith *Revealed; Cruel Fate of Miners who Found Perfect Blue Diamond*, The Observer 10 May 2009. It was reported in this newspaper report that the National Union of Mine Workers (NUM) was supporting complaints of racism and poor working conditions in Petra's management of the Cullinan mine in Pretoria. It is noted that the NUM in this case was also in negotiations with two other smaller Unions to address the problems of workers in the mine. It is also noted in the records of NUM that because of the recession an estimated 20 000 jobs have been lost to mine workers since October 2008 and the Unions are calling for State leadership to develop investor friendly policies to boost mining operations in South Africa. After all it is the workers who provide the necessary labour that produces these high quality diamonds from the mines. The management of the Cullinan mine were also given an opportunity to state their case and they confessed that while the Cullinan mine was a small mine by global standards, they were sure that it could stay in operation for at least forty years and in that time help the village to recover and be reborn as a tourist destination (example www.goldreefcity.co.za/ 21 March 2010, a South African tourist destination). They also stated that any racial imbalances in the mine were inherited from previous management, De Beers however it seems that the workers believe that conditions were far better when De Beers was in management. In another newspaper report, *The Citizen Union Threatens Diamond Core with Labour Court* Thursday, 21 May 2009 it was reported that Solidarity was threatening to approach the Labour Court if the retrenchments continued at African Diamond explorer, Diamond Core, at this time nearly 200 employees were retrenched. The Union's complaints are that the company was withholding its financial statements and this was said to be hampering the facilitation process and therefore it interpreted any further retrenchments as unfair dismissals which would be challenged in court if the retrenchments continue. It is clear that the Unions' role in diamond trade is to ensure that Workers' rights are respected. Obviously because of the recession the roles of all diamond stakeholders involved will be challenged.

11.2 Unions that are Relevant to the Diamond Industry in South Africa

The two most notable Unions in the diamond industry are the National Union of Mineworkers (NUM)¹⁷⁷⁸ and the South African Diamond Workers Union (SADWU).¹⁷⁷⁹ Solidarity (Diamond Export)¹⁷⁸⁰ is also another notable diamond industry Union. These Unions are not the only diamond relevant Unions there are others, for example, the Jewellers and Goldsmith Union (GU)¹⁷⁸¹ however for the purposes of this study the contributions of these two main diamond industry related Unions will be at the forefront (NUM & SADWU).¹⁷⁸² This is due to the fact that as diamond industry related Unions these bodies have been most active in litigation, negotiation and other work force representation in the diamond industry.¹⁷⁸³

Trade Unions are also often involved in development strategies such as national bargaining workshops in an effort to contribute to the development of best trade policies relevant to each particular industry. At a national Second Annual National Collective Bargaining Workshop held in Johannesburg on 29 to 30 May 2008 under the sponsorship of the National Labour and Economic Development Institute (NALEDI) and the Friedrich Ebert Stiftung, the National Union of Mineworkers (NUM) participated and a report was prepared on the development strategies that emerged from that workshop.

¹⁷⁷⁸ www.num.org.za/ 19 March 2010.

¹⁷⁷⁹ This acronym must not be confused with that of the South African Domestic Workers Union.

¹⁷⁸⁰ www.solidarity.co.za/ 19 March 2010.

¹⁷⁸¹ home.intekom.com/fedusa/affiliates/ 19 March 2010. See also www.labourguide.co.za/trade_unions.htm 19 March 2010.

¹⁷⁸² It is also important to mention at this stage that there is also the Federation of Unions of South Africa (FEDUSA) to which SADWU and GU are affiliated.

¹⁷⁸³ See examples of NUM's activities in the diamond industry. Mail & Guardian, Business & Labour *De Beers Optimistic About Talks with Union* 24 July 2008 where it was reported that the world's top diamond producer De Beers was optimistic about wage negotiations with South Africa's largest mine Workers' union in a bid to avert a strike at its mines in the country. NUM was reported as representing 3 400 workers was negotiating for wage increases in light of the rising fuel, food and electricity prices coupled with a string of interest-rate hikes in housing. The effects of the recession on Botswana mining were also reported in the Mail & Guardian, Business & Mining *De Beers Halts Mining in Botswana* 24 February 2009. Once again the Botswana Mine Workers Union was active in the negotiations surrounding these difficult times for the industry. *National Union of Mineworkers v De Beers Consolidated Mines Ltd* (1997) 18 ILJ 1442 (CCMA), *National Union Of Mineworkers & Others and RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB), *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* (2006) 27 ILJ 1909 (LC).

The report contributed to the development of not only the diamond industry but industry generally through an effort initiated by NALEDI to discuss, learn and share idea about ways in which Unions can adopt better methods to win demands from employers in their negotiations. This workshop was focused on, among other things, understanding the Consumer Price Index (CPI)/ Consumer Price Index excluding interest rates on mortgage bonds (CPIX) both concepts used to measure inflation in economics, reading and understanding the national budget information, analyzing company financial statements on the part of private sector Unions, skills and equity and particular demands relating to women all such factors are important to consider during bargaining grounds.¹⁷⁸⁴ It is reassuring to know that the Unions are engaged in development workshops that empower them to negotiate employee issues using realistic figures. With this knowledge¹⁷⁸⁵ around the efforts of Unions, this study will deliberate on some milestone legal contributions of diamond related Unions to the diamond industry.

11.2.1 National Union of Mineworkers (NUM)

NUM has been active and prominent in its position of representing mine workers' rights in South Africa. NUM has a track record of CCMA and Labour Court cases.¹⁷⁸⁶ For the purposes of this study there will be a brief consideration of NUM's Constitution which is freely made available in the public domain.¹⁷⁸⁷ There will also be a consideration of a reported diamond industry related labour court judgment in which NUM was specifically influential. The considerations of these

¹⁷⁸⁴ See Simon Kimani Ndungu *Collective Bargaining Workshop Report* (2008). Also available on www.naledi.org.za. 17 July 2009.

¹⁷⁸⁵ This is in line with the Promotion of Access to Information Act 2 of 2000.

¹⁷⁸⁶ See some of the reported cases, for example, *NUM v Freegold Consolidated Gold Mines (Operations) Ltd (President Steyn Mine) & another* [1998] 11 BLLR 1147 (LC), *East Rand Proprietary Mines Ltd v UPUSA & others* [1997] 1 BLLR 10 (LAC), *National Union of Mine Workers v East Rand Gold and Uranium Co Ltd* [1992] 4 All SA 78 (AD), *NUM & others v Alexkor Ltd* [2005] 1 BLLR 28 (LC), *BHP Billiton Energy Coal South Africa Ltd v CCMA & others* [2009] 7 BLLR 643 (LC), *NUM / St Helena Gold Mines* [1999] 3 BALR 317 (IMSSA), *De Beers Consolidated Mines Ltd v National Union of Mineworkers and Another* [1998] JOL 3760 (LAC); [1998] 12 BLLR 1201 (LAC); *National Union of Mine Workers & Others and RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB).

¹⁷⁸⁷ www.num.org.za/ 19 March 2010.

aspects of NUM in the diamond industry will give sufficient insight with regards to the important role of this Union within the diamond industry. It is also submitted that the brief consideration of the Union's Constitution sets the tone for understanding exactly what the mandate of the Unions are in industry generally.

In terms of its Constitution NUM by nature is a separate legal persona tasked with the mandate of representing workers interests in the mining industry.¹⁷⁸⁸ It sustains its financial activities by means of member subscriptions paid to it. The structure of the Union consists of Shaft Stewards and Shaft or Workplace, Branch, Regional, Regional conference, National Executive (NEC), Central committees and National Congress.¹⁷⁸⁹ The aims and objectives of the Union are listed as follows:

‘to recruit and unite into a single labour organization all workers employed in the mining, energy, construction and allied industries in order to enhance their economic and social welfare, to improve wages, salaries and terms and conditions of employment of members through collective bargaining and other lawful means, to protect members’ job

¹⁷⁸⁸ This is in line with the purposes of the Labour relations Act 66 of 1995 sections 22, 23, 24, 25 and 26 and Constitution of the Republic of South Africa Act, 1996 section 23 which provides as follows: ‘(1) everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right-

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).’

¹⁷⁸⁹ Constitution of NUM. Part 1, Character of the Union.

security, to advance employment prospects of members.¹⁷⁹⁰

The aims of NUM also include, the fostering of unity and co-operation among workers in mining, construction, energy industries and other industries; the establishment of contacts and relationships with other trade Unions, trade federations and labour organizations nationally and internationally for the benefit of members and to do other lawful things which are in the interest of the Union and its members and which are consistent with the Constitution.¹⁷⁹¹ The Constitutional values not only serve as an acid test for lawfulness of Union activities but they have also empowered Union structures to act in a manner that will enable them to achieve societal goals such as the protection of dignity for workers and the achievement of equality before the law for all South Africans. This is in line with Constitutionally protected governmental objectives.

With regards to litigation in a diamond industry related case where NUM was involved, one may refer to *National Union of Mineworkers & Others v BKH Mining Services CC t/a Dancarl Diamond Mine & Others*.¹⁷⁹² This case involved an application for committal of the members of Dancarl CC mine into prison for contempt of court. The facts of the case show that the applicants were dismissed by the respondent close corporation after engaging in an industrial strike action. The matter was referred to the CCMA where a subsequent deed of settlement was entered into and made an order of the court. The settlement provided that the employees would be re-employed through certain labour brokers under previous terms and conditions of employment. The employers failed to re-employ

¹⁷⁹⁰ *Ibid.*

¹⁷⁹¹ *Ibid.* The remained of the NUM Constitution sets out procedures for election of officers, attainment of quorums and other incidental Union related business, however it is clear from the Union's Constitution that the aims and objectives of the Union is to protect the employee. This is important particularly in a country where the consequential imbalances of past discrimination still continue to exist.

¹⁷⁹² (1999) 4 LLD 249 (LC).

the applicants and they in turn sought an application as aggrieved parties to have the employer members committed for contempt of court.¹⁷⁹³

The court held that an aggrieved applicant may apply to court to enforce a penal order for contempt of court by way of notice of motion. The success of the application will be dependant on whether he or she can satisfy the court beyond a reasonable doubt that the respondent is guilty of the offence of being in contempt of court. The applicant must prove four things, first that a court order was granted, second that the respondent was aware of the order and its terms, thirdly that the respondent was in fact in breach of that order and finally that the respondent's failure to comply with the order was willful.¹⁷⁹⁴

The four elements of contempt above were proved by the employee applicants. Therefore the court came to the conclusion that an appropriate penalty must be given with an objective of promoting effective resolution of labour disputes. In this case effective resolution would be in the form of the re-employment of the employees at Dancarl. The court accordingly sentenced the three close corporation members to 15 day's imprisonment without the option of a fine which would be suspended on condition that the employees were re-employed within 14 days at Dancarl.¹⁷⁹⁵

The judgment above before Grogan AJ was effective in protecting employee rights particularly in view of the fact that the Dancarl employers had agreed and submitted themselves to court process with regards to the re-employment the applicants. Hence it was not in law open to the employers to ignore the court process thus making the order of the court arbitrary in the circumstances. It is difficult to guarantee that the employees would have had this kind of success without the assistance of the Union in this case.

¹⁷⁹³ 250.

¹⁷⁹⁴ *Ibid.*

¹⁷⁹⁵ 251.

11.2.2 South African Diamond Workers Union (SADWU)

The consideration of the South African Diamond Workers Union ('Diamond Workers' Union') for the purposes of this study will also be limited to the contribution it made in the development of a report that was presented to a Commission of inquiry into the South African diamond industry by reviewing the adequacy of the supply of rough diamonds to the local market. These submissions were made together with other industry stakeholders. This report allowed for significant amendments¹⁷⁹⁶ to be made to the then existing South African diamond laws. The submissions made by the Diamond Workers' Union, which were 34 in total assisted in the shaping the current Diamonds Act.¹⁷⁹⁷ To further understand the role of the Diamond Workers' Union in litigation, a milestone labour court judgment involving the Diamond Workers' Union will also be considered.

In the 'Report of the Task Team Appointed by the Minister of Minerals & Energy to Analyze the Memoranda and Evidence Laid before the Commission of Inquiry into the South African Diamond Industry,' the Diamond Workers' Union made some pertinent submissions when asked to comment on the subject of 'the supply of rough and unpolished diamonds to the local processing industry.' One of the submissions made by the Union was that De Beers had a near monopoly of 95 per cent of the total rough diamond production and it believed that that the State had partnered with De Beers in ensuring that the *status quo* remained and thus not renewing or benefiting the local diamond any manner. This according to the union this was a departure from the principle of free enterprise.¹⁷⁹⁸ This submission has been addressed by the Diamond Export Levy (Administration) Act¹⁷⁹⁹ and is also regulated by the SADPMR.

¹⁷⁹⁶ See Michael O Dale *Mining Law Annual Survey*, Juta (2004) 438; 439.

¹⁷⁹⁷ 56 of 1986 www.polity.org.za/polity/govdocs/reports/diamonds/chap5.html 17 October 2009.

¹⁷⁹⁸ Report of Task Team Appointed by the Minister of Minerals & Energy to Analyze the Memoranda and Evidence Laid Before The Commission of Inquiry into the South African Diamond Industry, 20 December (1999). Chapter 5. www.polity.org.za/polity/govdocs/reports/diamonds/chap5.html 17 October 2009.

¹⁷⁹⁹ 14 of 2007.

With regard to sales or 'sights' as commonly referred to in the industry, the Diamond Workers' Union made a submission that it did not approve of allocating rough diamonds through Sight holders. The Union preferred the old diamond sales system where rough diamonds were allocated directly to cutters or tool makers through the Diamond Board. This meant that under the old system every cutter had a sight and every cutter had an allocation of rough.¹⁸⁰⁰ The provisions of the Diamonds Act¹⁸⁰¹ as amended have dealt with the issue of enhancing local beneficiation. Clearly the Diamond Workers' Union is an active body which was used by the lawmakers in this case to give advice on the appropriate changes in law.

In litigation, the Diamond Workers' Union was also influential in the landmark judgment of *South Africa Diamond Workers' Union v The Master Diamond Cutters' Association of South Africa*.¹⁸⁰² In this case the Union had approached the industrial court for a decision on whether or not there was an unfair labour practice in the diamond cutting industry. The matter was extensively considered and deliberated on before President Parsons and Deputy President Ehlers who each in turn passed judgment in the matter. Although the judgments were approached differently in some respects there was agreement by both judges that unfair labour practice was taking place in the diamond cutting industry of South Africa, particularly with regards to grade 1 employees.¹⁸⁰³

These incidents complained of *in casu* were couched in the *Government Gazette* agreements published on 5 August 1977.¹⁸⁰⁴ These agreements were made in

¹⁸⁰⁰ Report of Task Team Appointed by the Minister of Minerals & Energy to Analyze the Memoranda and Evidence Laid Before The Commission of Inquiry into the South African Diamond Industry, 20 December (1999). Chapter 5. www.polity.org.za/polity/govdocs/reports/diamonds/chap5.html. 5.4.2 of the Report. 17 October 2009.

¹⁸⁰¹ 56 of 1986.

¹⁸⁰² (1982) 3 ILJ 87 (IC).

¹⁸⁰³ 113E.

¹⁸⁰⁴ GG 5701.

accordance with the provisions of the Industrial Conciliation Act¹⁸⁰⁵ and were entered into by the Diamond Cutters' Association of South Africa as employers of the organization and the South African Diamond Workers' Union as the trade Union or employees. The agreements were recorded as 'The Main Agreement,' 'Sick Pay Benefit Fund Agreement,' 'Demarcation Agreement,' 'Termination of Employment Agreement,' and 'Sick Benefit Agreement.'¹⁸⁰⁶

The unfair labour practice which the Diamond Workers' Union complained of in the agreements in the form they were in was that the agreements excluded compulsory keeping of records. This provided for an unfair labour practice as it assisted the employer to escape from the provisions of the agreement. Further, grade 1 employees were being progressively undermined out of the industry by employers through short-time, dismissal and other subterfuges in that included misrepresentation of the short-time provisions in the 'The Main Agreement' and the 'Termination of Employment Agreement' to dismiss employees and of the applicability of the 'Termination of Employment Agreement' to employees who have retired but who continue in employment or who have been re-employed.¹⁸⁰⁷

There were further complaints of unfair labour practice in that by the employers allowing grade 1B employees to perform work in the designation in which grade 1 employees were qualified either in the same establishment or by employing only grade 1B employees in a different company circumvented the spirit of the agreement. Further, by presenting one cheque to an employee in respect of wages due and a month's pay in lieu of a notice in an attempt to claim acceptance of termination of the contract of employment was also an unfair

¹⁸⁰⁵ 28 of 1956 prior to repeal by the Labour Relations Act 66 of 1995. The Industrial Conciliation Act is purposed to 'consolidate and amend the law relating to the registration and regulation of trade unions and employers' organizations, the prevention and settlement of disputes between employers and employees, and the regulation of terms and conditions of employment by agreement and arbitration; to provide for the establishment of a National Manpower Commission and to define its functions; to provide for the establishment of an industrial court and to define its functions; to provide for the establishment of a labour appeal court and to define its functions; to provide for the control of labour brokers and the registration of labour brokers' offices; and to provide for incidental matters.'

¹⁸⁰⁶ 92E.

¹⁸⁰⁷ 91F.

labour practice. Further, by giving a misleading notice to grade 1 employees that the factory will be closing down for an indefinite period, whereas the notice was explained to be a notice of short-time also constituted an unfair labour practice.¹⁸⁰⁸

Further, there was also an unfair labour practice complained of in the exclusion of surprise inspections and refusal to cooperate to ensure proper control and inspection by the designated agent of the council owing to extensive security control procedures. Further, it was also alleged that it constituted an unfair labour practice for The Master Diamond Cutter's Association to continue to support the employers when they were aware of the employer's contraventions that were taking place.¹⁸⁰⁹

The court dealt extensively with the complaints raised above by the workers and came to the conclusion that in the circumstances the dismissals constituted unfair labour practice and the affected employees were reinstated with retrospective effect. Further, the demarcation agreement had to be altered to provide for a more equitable demarcation between skilled and unskilled employees. Further, the court also found that failure to agree to the keeping of records, notification of the council for short time and provision for the surprise inspection by designated agents constituted unfair labour practice.¹⁸¹⁰ Certain areas or the whole diamond industry in South Africa had previously been accustomed to abuses of worker's rights which could not be addressed until the Constitutional dispensation. This case illustrates the manner in which the court was able to protect the rights of the employees through Union representations and efforts.¹⁸¹¹

¹⁸⁰⁸ *Ibid.*

¹⁸⁰⁹ 92F.

¹⁸¹⁰ 87 C – D.

¹⁸¹¹ Unions are active in the diamond industry in an effort to protect worker rights. See *Botswana Mining Workers Union v Debswana Diamond Company (Pty) Ltd* Court of Appeal Civil Appeal No. CACLB-047-08, Industrial Court Civil Case No. I.C.491-05.

11.2.3 Other Structures

Apart from the Unions, in diamond trade there are other significant structures and bodies that relate closely to the diamond industry in South Africa. This list is not in any way exhaustive but these additional diamond trade structures also make significant contributions to the diamond industry. This includes structures such as associations for valuers, the Government Diamond Valuator (GDV),¹⁸¹² jewellery associations for example, Jewellery Council of South Africa (JCSA),¹⁸¹³ the Jewellers Association of South Africa (JASA),¹⁸¹⁴ Jewellery Council of South African Direct Membership,¹⁸¹⁵ Jewellery Manufacturers Association of South Africa (JMASA)¹⁸¹⁶ the Master Diamond Cutters Association of South Africa,¹⁸¹⁷ the Diamond Merchants Association of Southern Africa (DMA),¹⁸¹⁸ the South African Diamond Board,¹⁸¹⁹ the Diamond Bourse of South Africa,¹⁸²⁰ the Rough

¹⁸¹² www.info.gov.za/speeches/1999/990423224p1003.htm 19 March 2010. See also

www.sadpmr.co.za/UploadedFiles%5Cabab4237f67241f48c2cf9f768423313.pdf 19 March 2010.

¹⁸¹³ <http://www.jewellerysa.com/> 19 March 2010.

¹⁸¹⁴ JASA is a member organisation of the JCSA. See

http://www.moneybiz.co.za/my_business/jewellery_industry.asp 19 March 2010.

¹⁸¹⁵ *Ibid.* Jewellery Council of South African Direct Membership is also a member organisation of the JCSA.

¹⁸¹⁶ *Ibid.* JMASA is also a member organisation of the JCSA. See

<http://www.goldinsouthafrica.com/pdfs/GLOSSARY.pdf> 19 March 2010.

¹⁸¹⁷ www.diamond.co.za/ 19 March 2010.

¹⁸¹⁸ <http://www.mbendi.com/orgs/co58.htm> 19 March 2010.

¹⁸¹⁹ www.sadb.co.za 15 August 2009.

¹⁸²⁰ See moving parliamentary speech, held 30 May 2007.

http://beta.parliament.gov.za/live/commonrepository/Processed/20090223/68634_1.doc. 16 October 2009.

‘The department has continued to roll out its support to the development of small-scale mining and, for the first time this year, extended this support to jewellery fabrication projects as they are easily portable. Both these interventions have made an immense contribution to the second economy.

Regarding beneficiation, we are developing skills in the jewellery sector for our people to be able to take leadership roles and for the provinces to be able to play a supporting role when we start implementing the Diamond Amendment Act, the Second Diamond Amendment Act and the Precious Metals Act. These amendments will usher in a more representative SA Diamonds and Precious Metals Regulator to replace the SA Diamond Board. The Diamond Exchange and Export Centre that will be introduced will monitor the export of diamonds whilst the State Diamond Trader will make diamonds available solely to the diamond beneficiaries.

All these institutions will be in place when the President promulgates these pieces of legislation, which promulgation is expected to be not later than August this year. Hon members should be aware that the State Diamond Trader will initially open in Johannesburg but, with time, it will move permanently to Kimberley, making Kimberley the real diamond hub of South Africa. I would

Diamond Dealer's Association,¹⁸²¹ South African Women in Mining Association (SAWIMA),¹⁸²² industrial diamond associations and other smaller trade Unions and chapters, to name a few.

11.3 International Trade Administration Commission (ITAC)

It is important at this stage to study the law concerning the creation of the International Trade Administration Commission.¹⁸²³ This law is contained in the

also like to thank De Beers for offering the services of Diamdel to the State Diamond Trader and also express appreciation to the Diamond Bourse of SA for offering its facilities to be used as the Diamond Exchange and Export Centre. This shows the co-operative way in which we work in this country in a true public-private partnership.

As we celebrate the 10th anniversary of women in mining, I would like to introduce to the House a woman who has taken full advantage of this new dispensation: Angelina Nofolovhodwe. I want you to listen carefully as I relate her story. Angelina is 50 years old, she only passed Standard 4, she is a rural mother of seven, and she is well on her way to becoming South Africa's first self-made female mining magnate. Only a few years ago, this Limpopo businesswoman was jobless, with grim prospects. Acting on a dream she had of holding gold in her hand, she decided to go into mining in 2002. True to her dream, she soon won her first licence for a gold mine, but things continued to be tough until 2005. Today, she is a happy mother and humble businesswoman who has offices in Sandton, and travels the world. She is wanted in Canada and in Zimbabwe. Actually, she has licences for mines in Zimbabwe.

Our efforts to pursue and consolidate gender empowerment in the mining industry have culminated in the revitalisation of the SA Women in Mining Association and the official launch of their national offices in Johannesburg. Women empowerment is duly assured when women's organizations are placed on a sound administrative and financial footing. We shall continue to do this with all women's organizations.'

¹⁸²¹ Contactable on admin@jewellery.org.za 23 March 2010. See www.greendale-diamonds.co.za/trade-associations.asp 23 March 2010.

¹⁸²² www.sawima.co.za/ 23 March 2010.

¹⁸²³ International Trade Administration Act 71 of 2002 section 7 provides for the establishment of the ITAC and its general functions are set out in section 15 of the Act as follows: '(1) The Commission must carry out the functions assigned to it in terms of this Act, any other Act or by the Minister.

(2) The Commission must carry out any function that arises out of an obligation of the Republic in terms of a trade agreement, if the Minister has assigned that function to the Commission.

(3) The Commission may, to the extent required or permitted by the SACU Agreement, refer matters to any institution constituted by or in terms of the SACU Agreement, and may appear before such an institution.

(Date of commencement of this subsection to be announced)

(4) The Commission may, subject to section 14 (5), assign any of its functions to:

(a) a member of the Commission;

(b) a committee established in terms of section 14;

(c) a member of the staff of the Commission;

(d) a person referred to in section 23; or

(e) any combination of persons referred to in this subsection.'

International Trade Administration Act¹⁸²⁴ of South Africa, together with regulations applicable under it. This law forms an important statutory contribution to all areas of international trade industry in South Africa and therefore is it directly relevant to the diamond industry in South Africa. The International Trade Administration Act¹⁸²⁵ practically provides and ensures that local markets are protected from potential market disrupting behavior or flooding of local markets with foreign goods which have the potential of harming local markets in the context of global trade. This is defined in the International Trade Administration Act¹⁸²⁶ as dumping.¹⁸²⁷

The purpose of the International Trade Administration Act¹⁸²⁸ is to establish and provide for the ITAC.¹⁸²⁹ The International Trade Administration Act¹⁸³⁰ was also created to enable the implementation of certain aspects of the SACU as per SACU Agreement¹⁸³¹ in South Africa for the purpose of controlling the importation and exportation of goods, the amendment of customs duties and other matters connected to such economic activity.¹⁸³² In order to understand the International Trade Administration Act's¹⁸³³ provision for the implementation of the SACU agreement,¹⁸³⁴ it is important to briefly outline what SACU is as described by its own founding documents.¹⁸³⁵

¹⁸²⁴ 71 of 2002.

¹⁸²⁵ 71 of 2002.

¹⁸²⁶ 71 of 2002.

¹⁸²⁷ For the definition of dumping see section 1 of International Trade Administration Act 71 of 2002. It is referred to as 'the introduction of goods into the commerce of the Republic or Common Customs Area at an export price contemplated in section 32(2)(a) that is less than the normal value, as defined in section 32(2) of those goods.' Section 32 of the Act deals thoroughly with the provisions that are considered when an alleged dumping is taking place.

¹⁸²⁸ 71 of 2002.

¹⁸²⁹ Preamble.

¹⁸³⁰ 71 of 2002.

¹⁸³¹ http://www.sacu.int/main.php?include=about/what_is.html&menu=menus/leftmenu.html 30 October 2010.

¹⁸³² See introductory paragraph of the International Trade Administration Act 71 of 2002.

¹⁸³³ 71 of 2002.

¹⁸³⁴ International Trade Administration Act 71 of 2002 section 4.

¹⁸³⁵ <http://www.sacu.int/> 23 March 2010. See 'What is SACU?'

'The SACU consists of Botswana, Lesotho, Namibia, South Africa, and Swaziland. The SACU Secretariat is located in Windhoek, Namibia. SACU was established in 1910, making it the world's oldest Customs Union. Historically SACU was administered by South Africa, through the 1910 and 1969 Agreements. The customs union collected duties on local production and customs duties on members' imports from outside SACU, and the resulting revenue was allocated to member countries in quarterly installments utilizing a revenue-sharing formula. Negotiations to reform the 1969 Agreement started in 1994, and a new agreement was signed in 2002. The new arrangement was ratified by SACU Heads of State. The Economic structure of the Union links the Member states by a single tariff and no customs duties between them. The Member States form a single customs territory in which tariffs and other barriers are eliminated on substantially all the trade between the Member States for products originating in these countries; and there is a common external tariff that applies to nonmembers of SACU.'¹⁸³⁶

The structure of the International Trade Administration Act¹⁸³⁷ shows that it is a clearly drafted technical piece of legislation that sets about to record South Africa's trade policy in the most express manner. The technicalities of the terms of the Act are explained in the definition section in a satisfactory manner with the Minister of Trade and Industry and the Minister of Finance being called to task by the provisions of this International Trade Administration Act.¹⁸³⁸ What emerges from the International Trade Administration Act¹⁸³⁹ immediately is that it captures

¹⁸³⁶ *Ibid.*

¹⁸³⁷ 71 of 2002.

¹⁸³⁸ 71 of 2002.

¹⁸³⁹ 71 of 2002.

into South African law the inter-governmental cooperation with neighboring States who form the Common Customs Area¹⁸⁴⁰ and these States are member States of SACU. This illustrates an African based unity that allows SACU States to be able to support one another in trade first and foremost before seeking to look to the developed worlds.

The SACU Agreement to which the SACU member States have adopted is captured in the schedule 1 of the International Trade Administration Act¹⁸⁴¹ and is made easily accessible to all areas of trade and industry in the Republic to ensure that the provisions of the agreement are not contravened.¹⁸⁴² The SACU Agreement is contained in a relatively concise document.¹⁸⁴³

The International Trade Administration Act¹⁸⁴⁴ sets out the South African Trade policy in chapter 2 of the Act. This chapter provides with reference to the implementation of the SACU agreement as the basis of the national trade policy. The policy also prescribes that the Minister is the head representative of the Republic to the SACU council.¹⁸⁴⁵ Further, in terms of the trade policy, the Commission may exercise the right of the Republic to grant rebate of customs and duties.¹⁸⁴⁶

¹⁸⁴⁰ Section 1(2).

¹⁸⁴¹ 71 of 2002.

¹⁸⁴² In terms of the Chapter 5 of International Trade Administration Act 71 of 2002 there is a provision for a strong set of legal sanctions for the contravention of the trade principles of this Act. See for example section 55 of the Act which prescribes the amount of fines or terms of imprisonment for certain offences. Further, there is an intelligence force that can be used to quash the criminal efforts of this law with informants being given statutory protection to keep confidentiality when engaging in an act of blowing the whistle on offences taking place, section 33.

¹⁸⁴³ 2002 SACU Agreement. It must be well understood that SACU was established in terms of the SACU Agreement 1910, which has been superseded by the SACU Agreement 1969 and then the SACU Agreement of 2002 (current) which was ratified by South Africa in 2004. The International Trade Administration Act 71 of 2002 provides in schedule 1 of the Act as follows: 'the SACU Agreement is to be inserted pursuant to its final conclusion and to the relevant constitutional requirements pertaining to international agreements having been met.' This means that the SACU Agreement is essentially a work in progress. See <http://www.sacu.int/main.php?include=docs/legislation/2002-agreement/part8.html> 24 March 2010.

¹⁸⁴⁴ 71 of 2002.

¹⁸⁴⁵ Section 4(1).

¹⁸⁴⁶ Section 4(4). This right may be exercised in terms of Article 20(3) of SACU Agreement.

The International Trade Administration Act¹⁸⁴⁷ also clearly provides in chapter 3 for the structure of the International Trade Administration Commission. This chapter sets out the law on the Constitution of the Commission, the appointment of officers serving on the Commission, the conduct of such officers and the meetings to take decisions by this body. The International Trade Administration Act¹⁸⁴⁸ provides for the general functions of the Commission and this includes *inter alia* functions set out by the Act¹⁸⁴⁹ or other functions section assigned by the Minister. These functions must be at all times carried out with the intention of achieving the goals and objectives of the SACU Agreement. Further and most importantly to enhance trade, the Promotion of Access to Information Act¹⁸⁵⁰ is given importance under the International Trade Administration Act¹⁸⁵¹ to encourage information sharing among SACU institutions and other SACU member States.¹⁸⁵²

The Promotion of Access to Information Act¹⁸⁵³ mentioned above illustrates the practical aspects of this welcomed intergovernmental cooperation. Such cooperation cannot be achieved without necessary information sharing. It is commendable to acknowledge the Constitutional dimension of interaction of States in such trade matters in the form of accessing State held information.

11.4 Southern African Customs Union (SACU)

It has been submitted that SACU is a body that has allowed for a deeper integration of member States by abolishing tariffs and most quantitative trade restrictions pertaining to its member States. This SACU goal is accompanied by

¹⁸⁴⁷ 71 of 2002.

¹⁸⁴⁸ 71 of 2002 section 15.

¹⁸⁴⁹ Section 26, for example, the receipt of applications for permits and adjudicating on matters in terms of the Act.

¹⁸⁵⁰ 2 of 2000.

¹⁸⁵¹ 71 of 2002.

¹⁸⁵² Section 19.

¹⁸⁵³ 2 of 2000.

grand plans to harmonize, for example, competition, industrial and agricultural policies among others.¹⁸⁵⁴

The SACU Secretariat has vivid goals and strategic intents it has listed in its mandate to achieve with reference to the SACU Agreement. These include economic policy co-ordination and harmonization, trade negotiation, trade facilitation, revenue sharing, strategic positioning of SACU, efficient and effective SACU Institutions and Secretariat Operational Excellence.¹⁸⁵⁵ Many of these goals have been realized to some extent. Further, there is ongoing input from member States and the international community to ensure that these goals are made a reality. Ultimately if SACU implements trade friendly policies, this will attract forms of revenue which are necessary for the development of Southern Africa as a whole.

It is evident that the work of SACU is not in vain as it has as recently as April 2009 achieved a milestone achievement in international trade policy development recognition. This took place when the 2002 SACU Agreement was recognized and formally considered by the WTO following its notification in 2007. The official notification of the 2002 SACU Agreement was followed by a factual review by the WTO and this was used as an opportunity to publicize SACU to the

¹⁸⁵⁴ For the common policies it is important to refer to Articles 38, 39, 40 and 41 of the SACU Agreement 2002 which provide for 'the industrial development policy (Article 38), i.e., '1. Member States recognise the importance of balanced industrial development of the Common Customs Area as an important objective for economic development. 2. Pursuant to paragraph 1, Member States agree to develop common policies and strategies with respect to industrial development.' Article 39 provides for the agricultural policy which provides that '1. Member States recognize the importance of the agricultural sector to their economics. 2. Member States agree to co-operate on agricultural policies in order to ensure the co-coordinated development of the agricultural sector within the Common Customs Area.' Article 40 provides for the competition policy which states that '1. Member States agree that there shall be competition policies in each Member State. 2. Member States shall co-operate with each other with respect to the enforcement of competition laws and regulations.' Article 41 provides for unfair trade practices policy and provides that 'the Council shall, on the advice of the Commission, develop policies and instruments to address unfair trade practices between Member States. These policies and measures shall be annexed to this Agreement.' Tsidiso Disenyana *SACU and Deeper Integration* Development through Trade Opinion (2008). See www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm.

¹⁸⁵⁵ www.sacu.int 20 October 2009.

rest of the international community.¹⁸⁵⁶ This is essential milestone development for African trade. This mention of SACU efforts to uplift Southern African trade contributes to the understanding of the contribution made by cogent economic and trade policies to the diamond industry, which continues to be important to Southern African States.

The challenge to the full implementation of the SACU Agreement is that to date several of the bodies under the SACU Agreement have not yet been established, this includes, for example the Tariff Board¹⁸⁵⁷ and the Tribunal.¹⁸⁵⁸ It is evident that without the establishment of these bodies, it means that ITAC is mainly responsible for all trade related investigations.¹⁸⁵⁹ The independence of ITAC is established in the International Trade Administration Act¹⁸⁶⁰ it is submitted that ITAC is dealing with all trade related matters without input from SACU as required in the International Trade Administration Act.¹⁸⁶¹ This means that South

¹⁸⁵⁶ See Tswelopele Moremi SACU Factual Review by the World Trade Organization (WTO), Committee on Regional Trade Arrangements (CRTA) 20 – 21 April 2009 Geneva Switzerland.

¹⁸⁵⁷ The Tariff Board is to be established in terms of Article 8. See

http://www.sacu.int/main.php?include=about/tariff_board.html 23 March 2010 where it is explained that ‘the Tariff Board is an independent institution consisting of experts drawn from the Member States.

The Tariff Board is responsible for making recommendations to the Council on the level and changes of customs, anti-dumping, countervailing and safeguard duties on goods imported from outside the Common Customs Area, and rebates, refunds, or duty drawbacks based on the directives given to it by the Council as provided for in Article 8 of the SACU Agreement. The terms of reference, policy mandates, procedures and regulations of the Tariff Board is determined by the Council in accordance with Article 8 of the SACU Agreement. The Tariff Board is yet to be established. It is anticipated that it will be operational by March 2009.’ To date such a body is still not established.

¹⁸⁵⁸ To date this *ad hoc* dispute resolution body is not established as required in terms of the SACU Agreement. <http://www.sacu.int/main.php?include=about/tribunal.html> 23 March 2010.

¹⁸⁵⁹ International Trade Administration Act 71 of 2002 section 7 which provides for ‘(1) The International Trade Administration Commission is hereby established, and-

(a) has jurisdiction throughout the Republic;

(b) is a juristic person; and

(c) must exercise its functions in accordance with this Act and any other relevant law.

(2) The Commission-

(a) is independent and subject only to-

(i) the Constitution and the law;

(ii) any Trade Policy Statement or Directive issued by the Minister in terms of section 5; and

(iii) any notice issued by the Minister in terms of section 6; and

(b) must be impartial and must perform its functions without fear, favour or prejudice.

(3) Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and carry out its functions effectively.’

¹⁸⁶⁰ 71 of 2002 section 7.

¹⁸⁶¹ 71 of 2002 section 4 and schedule 1.

Africa is acting *ultra vires* in its international obligations in continuing to unilaterally decide of the customs duty and rebate structure as contained in the SACU Agreement. On the other hand it is submitted that South Africa is showing initiative in leadership while SACU bodies are being established.

11.5. The Department of Trade and Industry (DTI)

For the purposes of this study it is important to highlight that the DTI¹⁸⁶² in South Africa upholds Constitutionally protected principles of clean and humane diamond trade. As one of the key structures that influences economic growth and trade development in South Africa, the DTI forms an important diamond industry. The DTI upholds and supports the practical aspects of economic empowerment of all South Africans, by supporting skills development, providing for BBBEE codes of good practice,¹⁸⁶³ application of trade friendly international treaties and agreements such as the respect for the KPCS in diamond trade.

¹⁸⁶² www.thedti.gov.za 27 January 2007. See http://www.dfa.gov.za/departement/report_2003-2004/part3.pdf 23 March 2010. The discussion of the document focuses on the partnership of the DTI, SACU and other relevant bodies and their contribution to clean diamond trade through the implementation of the KPCS. The document provides that ‘the SACU-US Free Trade negotiations are important both in the context of encouraging US support for economic development and co-operation and supporting the implementation of NEPAD. The talks have the potential to improve trade flows between the SACU region and the US significantly

and to contribute to regional economic integration and growth. During the period under review, a number of rounds of negotiations, preceded by internal SACU co-coordinating meetings, took place both in SACU and the US. Progress was on schedule, although certain problematical areas with the potential to delay the talks beyond the envisaged deadline of December 2004 were identified. The SACU-US FTA negotiations are led by the DTI and include the DFA. They are central to the SA-US bilateral economic relationship, as well as the regional customs union.’

¹⁸⁶³ <http://www.dti.gov.za/bee/Inside.pdf> 23 March 2010. The introduction to the summary of the DTI’s BBBEE provides in line with the Constitution of the Republic of South Africa Act, 1996 section 9(2) as follows: ‘this guide has been developed as an interpretation aide for individuals and entities seeking to gain further clarity and understanding of the Codes of Good Practice (‘the Codes’). Before the release of the Strategy on Broad-Based BEE1, there was no framework in existence for the measurement of broad-based BEE. The Strategy provided the outline of a broad-based scorecard, together with weightings, but did not contain detail on measurement principles and the application of the scorecard. By the beginning of 2004 when the BEE Act was promulgated, numerous sectors of the economy had drafted industry charters on BEE and transformation. Whilst some contained scorecards loosely based on the broad-based scorecard contained in the Strategy, others were merely written undertakings of commitment to transformation. In addition, several of these charters were drafted prior to the release of the Strategy and stakeholders therefore had little point of reference in terms of broad-based elements and weightings. Furthermore, it became evident that other pertinent issues surrounding the measurement of BEE needed to be addressed to further accelerate the transformation process.’

11.6 Conclusion

This chapter has provided insight on the importance of stakeholder cooperation in the diamond industry by looking at the contributions of other diamond related structures that make the industry work efficiently in South Africa. Further, this chapter has also considered the importance of encouraging trade friendly policies among States starting in Africa and then the international community. It is submitted that at a time when diamond trade is challenged there should be an even greater need for the stakeholders highlighted above to work together.

The role of Unions within the context of South African diamond trade has been captured and deliberated on to show that it is of core relevance to the diamond industry as they represent the mine workers who have built the economy in the tough conditions of mining. Therefore, it is essential that their rights are protected as well so that justice in diamond trade is not only done but seen to be done.

Chapter 12: Conclusions and Recommendations

12.1 Identifying a More Humane Diamond Trade

This study has been motivated by a need to make a unique contribution to the study of law and to add to the extension of the knowledge of the law pertaining to international trade focusing particularly on international diamond trade and diamond regulations in South African law. What has emerged in this study is that diamond trade in South Africa and in the international community has been influenced by recognition that trading in diamonds must be based on fair trading principles.

The principles of fair trade are motivated by the Constitution of the Republic of South Africa Act 108 of 1996 and are acceptable in so far as they enhance diamond trade that protects human dignity, equality and fairness. This movement is what this study would like to term 'the identification of a more humane diamond trade.' Part of having a more humane diamond trade means that conflict diamonds are never again going to be legitimately bought and sold with clean diamonds in the international community. Further, in South Africa transformation in the diamond industry will make sure that there will no longer be an unfair exclusion of certain persons from participating in South Africa's diamond resources because of unfair discrimination.

It is recommended that the principles of humane diamond trade as contained in the Constitution of the Republic of South Africa Act¹⁸⁶⁴ the United Nations international trade treaties, the Diamonds Act 56 of 1986 and the MPRDA 28 of 2002, among other equally relevant law, should be upheld by all diamond industry stakeholders in South Africa in order to ensure a sustainable and equitable diamond industry. Where existing challenges exist because of the criminal elements, these should be eradicated and dealt with in law for the benefit of all citizens of South Africa.

¹⁸⁶⁴ 108 of 1996.

12.2 Diamond Trade as an Important Economic Tool

It has been practically illustrated in this study that through legal participation of leading diamond producers such as De Beers South African diamond trade in the Constitutional dispensation has been ameliorated to enhance the South African beneficiation industry. This has been partly achieved through the South African State and the private sector participation. It is important to note that the State has made sure that 'charity does indeed begin at home' when dealing with a country's resources and raw materials. On the other hand it is also noted and appropriately so in this study that the De Beers Group not only has made a rich historical contribution to South African diamond trade and law (this is not to say they have been perfect as they too have in the past contributed to the economic imbalances fostered by the apartheid regime). De Beers still dynamically adds to the desirable upliftment of the socio-economic status of the South African diamond industry.

However having said that it is recommended that because of their commendable handling of the diamond resources in South Africa and their exemplary methods to achieve Constitutional goals in present day South Africa, they must be acknowledged for their valuable efforts. It is recommended that the future of the diamond industry will survive as long as there is cooperation among diamond stakeholders together with other important South African diamond industry players such as diamond producers include Trans Hex, Alexkor Ltd, Rex Diamond Mining, Messina Diamonds and Benguela Concessions and alluvial diamond diggers, to name a few, for their part in contributing to the development of the economy of South Africa through its mineral resources.

The diamond industry is also an important economic tool for South Africa in that it allows South Africa to participate and compete in a competent manner in international diamond markets. This means that notwithstanding the current global economic challenges that are impacting negatively on international trade

and commerce, trade and business in diamonds makes South Africa a competent trading partner.

Evident in the diamonds laws and other international trade law which South Africa subscribes to, the country is showing that it is a State that is able to act with the legal integrity and uniformity with other civilized States through the application of various treaties and rules pertaining to private international law. It is recommended that where treaties or other international instruments of international trade such as model laws are being considered for adoption into South African international trade laws, such reforms must be adopted without delay into South Africa so as to continue to make South Africa a desirable destination for potential trading partners and other diamond merchants particularly in times of the recession.

12.3 Having Due Regard to all Diamond Trade Stakeholders

It has emerged from this study that diamond trade in South Africa is not an independent or sole responsibility of a few managing directors of certain diamond producers. What has been unequivocally established is that diamond trade is an industry that can only be sustained by various stakeholders including Police agencies, Unions and supportive trade bodies of South Africa's neighboring States.

It is these stakeholders together with the State and producers who are the parties that contribute to a development of a diamond market that fosters friendly relations with neighboring States and the global community. In order to keep the various stakeholders motivated to perform well in their duties, it is recommended that they should be given due regard through certain appropriate incentives where possible including acknowledgment for a job well done. This international co-operation is in line with the UN efforts to bring international upliftment to all the citizens of the world through initiatives and international human development

projects such as 2015 Millennium Development Goals (MDG) identified in this study.

It is proposed in light of the findings of this study that a contribution which necessarily fills the knowledge gap on the latest developments in diamond trade law has been created. It is submitted that through the many lessons highlighted in this study, the South African diamond industry will continue to thrive. Further, with guidance and participation with the global community in trade, it is intended and proposed through this study to showcase South African diamond laws as exemplary and cogent for the rest of the diamond producing African States and other foreign countries even in developed worlds. South Africa's Constitutionally based diamond law provides a well of knowledge for nationalities, particularly in Africa to draw wisdom both in the practice and law pertaining to diamond production and trade.

12.4 Some Conclusions and Recommendations

It has emerged during the course of this study that as correctly identified in the hypothesis, that South African diamond laws have been significantly altered in their spirit and purport as a result of the emergence of the Constitutional dispensation. The provisions of the Constitution of the Republic of South Africa Act¹⁸⁶⁵ relate closely to the diamond industry as has been identified in this study as being motivated by the Bill of Rights. Therefore in the conclusions and recommendations of this study below, a succinct discussion of the impact of the analysis contained in this study will be discussed and linked to some recommendations to be made for further development of South African diamond regulations.

The impact of the analysis of this study has shown that South African diamond regulations from 1994 to 2009 there have been positively impacted to take into

¹⁸⁶⁵ 108 of 1996.

account the socio-economic concerns of the Republic of South Africa insofar as the diamond industry as a whole is concerned. The positive themes involve the protection of economic freedom and equal participation in the nation's mineral resources. The reasons for the success of the more positive laws is due to the partnerships between the South African State and private business in the achievement of broad based socio-economic empowerment goals.

In terms of the Constitution of the Republic of South Africa Act¹⁸⁶⁶ affirmative action measures, in terms of section 9(2) are part of the positive laws intended to address the systematic inequality that has long stained the fabric of South Africa's diverse society. It has been shown during the course of the study that all sectors of the South African State and private diamond producers as designated employers, all have participated in efforts to transform and become part of the development of laws that is taking place in South Africa. De Beers, as a case study example, has engaged in BBBEE through various projects and internal training and development projects while applying Employment Equity programmes in their policies. It is recommended that more training on diversity and empowerment be invested in by companies in order to have the best social cohesion in workplaces where transformation has taken place.

The positive socio-economic impact of the developed diamond laws of the last fifteen years also shows success that has also impacted on the international community through international efforts that also uphold human dignity in international diamond trade. The implementation of the Kimberley Process Certification Scheme, for example, is a tool that serves to uplift South African minerals policy a policy that advocates the protection of human rights in diamond trade. It is recommended that South Africa continues to uphold the values against illicit trading in conflict diamonds and any other corrupt activity that has the potential of creating a form of resource curse by fuelling inhumanely gained revenues in diamond trade. The police intelligence should be appropriately

¹⁸⁶⁶ 108 of 1996.

funded to ensure that illicit diamonds are eradicated together with the existence of black markets.

The positive influence of more developed diamond regulations in South Africa is also in line with the UN 2015 Millennium Development Goals (MDG) which has identified diamond trade to be a positive vehicle for achieving those goals. This is done by developing international initiatives to support artisanal diamond diggers to be able to obtain fair returns for their minerals trade. The UN 2015 Millenniums Development Goals are listed and discussed in the study and illustrate the support for Constitutional objectives that seek to support the upliftment of the quality of life for all the people of South Africa.

The structures such as the UN that enforce the international efforts for fair diamond trade in South Africa contribute positively to the impact of these laws. This allows South African diamond trade to be attractive for investors from civilized nations that respect equitable trade. In South Africa one of the positive aspects of positive diamond regulations is that it addresses in a fair manner the legal relationships between investing companies' interests, such as De Beers and the State Organs that seek to execute national diamond laws.

The crucial relationships in diamond trade as stated above are dealt with through principles of transparency and government accountability. This is clearly evident in the open manner in which certain questionable company activities in diamond trade are dealt with by the South African government. For example, in the matter involving the exportation of De Beers stockpile in 1992 without payment of tax, that matter is dealt with in the public domain and all parties are given a fair opportunity to establish their arguments in law. It is recommended that in matters of this nature, such public accountability concerning South African interests be addressed in a similar manner without fear or favoritism.

With regard to the tax regime as established in the recent Diamond Export Levy (Administration) 14 of 2007, it is submitted that though the regime is seen as harsh by some, it has had the desired effect of benefiting the local beneficiation market and also provided stable mining revenues for South Africa. The tax regime as provided for in the diamond regulations in the form of Diamond Export Levy (Administration) 14 of 2007 and the Diamonds Act 56 of 1986 in South Africa still poses significant hurdle to more external investment, however this is also an important disincentive to corporations that may seek to invest in the country without expecting to plough back tax revenues into South Africa.

With regard to the development of diamond industry activities as a tool for broad based socio-economic investment, it is recommended that in view of the socio-economic impact of this study that more emphasis needs to be placed on supporting sustainable, small scale mining such as established by the Diamond Development International Initiative whose activities have been summarized in chapter 1 of this study as follows:

The initiative taken on by the Diamond Development Initiative International (DDII) in partnership with ONESKY.¹⁸⁶⁷ Report 2007 it was reported that over a million African and South American artisanal diamond diggers live in absolute poverty. This is because most of their countries are recovering from the ravages of war and are also disadvantaged by working outside of the formal economy. One of the projects engaged in by the DDII among many other projects is to ensure that fair returns are promoted for artisanal diamond diggers in order to eradicate extreme poverty and hunger in those nations.¹⁸⁶⁸

¹⁸⁶⁷ www.ddiglobal.org/pages/projects-tclp.php 17 February 2010.

¹⁸⁶⁸ *Ibid.*

The DDII is concerned with projects around the development of diamond standards that are in line with the UN Kimberley Process Certification Scheme. It is concerned with investigation the fair pay for diamond trade from those areas of the informal diamond sector. It is concerned with using the use of artisanal diamond digging to empower women and to encourage environmental conservation and other initiatives that will support sustainable life after diamond mining. It is concerned with displaced children in areas of Sierra Leon and the DRC. Above all the DDII initiative is said to be aiming to achieve the global success of the KPCS when fully implemented.¹⁸⁶⁹

Many of South Africans live in abject poverty with limited prospects for employment opportunities and skills development. Through the support of small scale mining initiatives accompanied by State or private business skills development, poor communities can be given tools to help themselves in artisanal diamond mining. This will be done with all the principles of the Millennium Goals in mind. South Africa can only be benefited by these types of mining initiatives as it would contribute to social investment, environmental conservation, the improvement of health and achievement of education.

Even though there is an attempt to deal with small scale mining in South African law, as briefly mentioned in National Environmental Management Act.¹⁸⁷⁰ The regulations¹⁸⁷¹ under this Act provide that

¹⁸⁶⁹ *Ibid.* For example, the DDII initiative is running a project known as the 'DDII's Tukudimuna Project'. This project 'seeks to prevent and remove children from working in the diamond mines in the Mbuji-Mayi region of DRC; to understand the dynamics and the political economy of child labour in artisanal diamond mining; and to find sustainable and replicable methodologies to end this practice.'

¹⁸⁷⁰ 107 of 1998.

¹⁸⁷¹ GN 435 of 23 February 2001.

‘Government encourages and facilitates the sustainable development of small-scale mining in order to ensure the optimal exploitation of small mineral deposits and to enable this sector to make positive contributions to the national, provincial and local economy. In this regard, a National Small-Scale Mining Development Framework has been developed to assist first-time small-scale mining entrepreneurs to overcome constraints facing initial development.’¹⁸⁷²

It is submitted that at present the laws are much more concerned with readily established diamond entities and the plight of small scale miners is not sufficiently supported in legislation. It is only addressed as a wide objective or ideal with no other statutory structural implementation of this ideal. More research support and study into the development of small-scale mining in South African law needs to be addressed.

It is recommended that a South African State appointed task team should identify ways in which small scale alluvial diamond diggers can be assisted to make their contributions count within the formal economy. This survey must engage in taking into account the need to develop national diamond industry skills. This task team should identify potential artisanal talent and train such talent to be on par with international benchmarks in diamond beneficiation. This task team must also look into equitable ways of allowing access to mineral rich areas. This will allow previously dependant or disadvantaged people from stressing South African State welfare and cause such capable persons to be able to work for themselves. The most important theme in developing national diamond laws in this manner must be sustainability.

¹⁸⁷² 2.1 Minerals and Mining.

Sustainability of mining activities must also be balanced with sufficient research into efforts about what ought to happen once the lifespan of a mineral deposit is exhausted. Initiatives to educate communities about life after diamonds must be in-built with every project of developing minerals utilization at all levels from the biggest mining giant to a small scale miner. Regular workshops and information sharing activities must be held to support and create awareness concerning the need for sustainability in mining practices. This will allow the country to be able to move away from seeing diamond trade as a scheme to get rich quick without any concern for future sustainability and conservation.

With regard to the granting of mineral rights and licenses in terms of the Diamonds Act¹⁸⁷³ it has been identified that while licensing is easier to obtain for new entrants, there are insufficient tools to effectively conduct successful mining operations. It is recommended that a survey of these technical limitations be investigated so that transformation and empowerment in the diamond industry can be ameliorated through certain potential investments. Failure to do this will result in many shelf diamond entities that look as if they are active on paper and showing more transformation yet are unable to participate meaningfully in the formal national diamond industry not to mention being able to participate in international markets.

It is also recommended that the South African State organs that are responsible for implementing diamond regulation should follow a decentralized structure of administration rather than a deconcentrated scheme of administration. This will serve to allow State organs to be very clear as to the administrative powers they possess and the different organs will serve as internal checks and balances by acting in a manner that is more independent. This will be useful since the laws are very clear on the issues of application. Further the regulations themselves together with the Constitution of the Republic of South Africa Act¹⁸⁷⁴ provide sufficient

¹⁸⁷³ 56 of 1986.

¹⁸⁷⁴ 108 of 1996.

provisions that will prevent unfair administrative action. Failure to adopt a decentralized model of administration will allow for a type of subtle unchecked dictatorship in the regulation of diamond laws. It is with this submission in mind that a recommendation is made to amend the deconcentrated model of public administration as illustrated in section 103 of the MPRDA.

With regard to the international law that has been considered in this study, particularly with special reference to the UN CISG, 1980 and other developmental Conventions, it is recommended that such instruments if not already part of South African law, should be ratified into South Africa. This must be done in order to create a trade friendly diamond merchant market that will increase demand for the nations output of diamonds which will serve to bring more revenue into South Africa. International law as it stands is concerned with the plight of developing nations, under the NIEO regime which calls for increasing of global interaction by upholding principles of comity and harmonization of international law and the protection of human rights. These ideals are at the core of the developed diamond regulations and therefore are essential for South Africa to participate more meaningfully in the implementation of these identified international laws.

It is submitted that this study not seek to recommend an arbitrary greater output of diamonds and an over saturation of the local beneficiation industry with diamonds it cannot handle. What the study does seek is to ensure that the Constitutional objectives of freely participating in the economy of the country is extended in pursuance to the empowerment objectives that will lead to sustainable mining in South Africa and create a cogently regulated diamond industry that truly benefits the nation in accordance with State policy. There must be an encouragement of fair capitalism and an investment into human capital. It is submitted that all these benefits applied together will cause South Africa to be a strong economy with all is people engaging in industries with short term visions that are equally balanced with long term objectives of sustainable participation in diamond markets.

TABLE OF APPENDICES

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APPENDIX A



ZA 000000

HS CODE	Carat mass	Value (US\$)
7102.21		
7102.31		
7102.10		

Number of Parcels: _____

Date of Issue: _____

Date of Expiry: _____

Name of Exporter: _____

Signature of Inspector: _____

Name of Importer: _____



ZA 000000

HS CODE	Carat mass	Value (US\$)
7102.21		
7102.31		
7102.10		

Number of Parcels: _____

Date of Issue: _____

Date of Expiry: _____

Name of Exporter: _____

Signature of Inspector: _____

Name of Importer: _____

Exporter's Copy



REPUBLIC OF SOUTH AFRICA

ZA 000000

SOUTH AFRICAN DIAMOND BOARD

KIMBERLEY PROCESS CERTIFICATE

Issued in terms of Regulation 1(1)(f) of the Diamonds Act, 1986 (Act No. 56 of 1986)

HS CODE	Carat mass	Value (US\$)
7102.21		
7102.31		
7102.10		

Country of origin: _____

Number of Parcels: _____

Seal of SA Diamond Board

SAMPLE

It is hereby certified that the unpolished diamonds in this consignment have been examined in accordance with the provisions of the Kimberley Process International Certification Scheme for unpolished diamonds

Date of Issue: _____ Name of Exporter: _____ Address of Importer: _____

Date of Expiry: _____ Name of Importer: _____

Signature of Registering Officer: _____



ZA 000000

Name of Importing authority: _____

Date of Receipt by Importing authority: _____

Signature of Importing official: _____

Seal of Importing authority: _____

Buyer's Confirmation: This is a copy of the original consignment accompanied by this Certificate from registered for...
verified in compliance with the Kimberley Process Certification Scheme for Unpolished Diamonds.

FORM KPC(i)
KIMBERLEY PROCESS CERTIFICATE
 [Form KPC(i) inserted by GN R1361 of 1 November 2002]

Minimum requirements of the Kimberley Process Certificate in terms of subregulation 1(1) (f) :

REPUBLIC OF SOUTH AFRICA



KIMBERLEY PROCESS CERTIFICATE

Issued in terms of Regulation 1(1) (f) of the Diamonds Act, 1986 (Act 56 of 1986).

ZA and NUMBER:

SOUTH AFRICAN DIAMOND BOARD

It is hereby certified that the unpolished diamonds in this consignment have been handled in accordance with the provisions of the Kimberley Process International Certification Scheme for unpolished diamonds.

Country of Origin: Number of Packets:

Name of Exporter:

Address of Exporter:

Fax no. and e-mail:

Name of Importer:

Address of Importer:

Fax no. and e-mail:

HS CODE	Carat Mass	Value (US\$)
7102.21		
7102.31		

Issued on:/...../..... Expires on/...../.....

Signature of registering officer

Stamp of Diamond Board

It is hereby verified that the content of the container accompanying this Kimberley Process Certificate corresponds with the Certificate.

..... ! (Perforation)
.....

Importing authority: Date:/...../.....

IMPORT CONFIRMATION

This is to certify that the unpolished diamonds accompanied by Republic of South African Kimberley Process Certificate No were imported into and verified in compliance with the KPCS for Unpolished Diamonds. Copy of certificate to accompany confirmation.

Date of receipt by importing authority:/...../.....

Importing authority:

Date

Signature

FORM KPC(ii)
EXPORT DECLARATION FOR UNPOLISHED DIAMONDS
[Form KPC (ii) inserted by GN R1361 of 1 November 2002]

DIAMONDS ACT, 1986 (ACT 56 OF 1986)

EXPORT DECLARATION FOR UNPOLISHED DIAMONDS
(In terms of Regulation 1(1) (a))

A PARTICULARS OF EXPORTER

Name / Company Name:

Identity Number/ Company Registration No.....

Address:
.....
.....

B CHARACTERISTICS OF DIAMONDS

GEM	Carat Mass / Weight	Value US\$
INDUSTRIAL		
TOTAL		

C COUNTRY OR TERRITORY OF ORIGIN / PROVENANCE OF CONSIGNMENT:

C DECLARATION

[sic]

I hereby declare that the unpolished diamonds mentioned above have been acquired in a lawful manner and will be exported within 10 working days from the date of release; and

the prescribed register in terms of section 57 of the Diamonds Act, 1986, confirming substantiation of such acquisition has been submitted to the South African Diamond Board / is attached hereto.

Signature: -----

Date: -----

APPENDIX B

Invoice



Page: 1 of 1
 Invoice #:
 Customer #:
 Document #: 404889
 Date: 08/07/2006
 Due Date: 11/05/2006

ALWAYS YOUR BEST SOURCE DIAMONDS AND DIAMOND JEWELRY

Bill To:
 WATERVILLE ME 04901
 Ship To: SAME AS BILL TO

Terms: Net 90 Ship Via: FED EX P.O. #: 37551
 Salesperson: Attention:

Memo #	Order #	Pricing type	SKU #	SZ	Description	Qty	Price	Amount
1	236832	G652.25 F 1.341.0 <small>(unconditional return)</small>	MSCH18HEB-Y	6.50	18 CT TW YELLOW GOLD 6 STONE LADIES RING	2		
2	236832	G652.25 F 1.341.0 <small>(unconditional return)</small>	MSCH20HEB-Y	0.30	18 CT TW YELLOW GOLD 8 STONE LADIES RING	2		
						4		

The diamonds herein invoiced have been purchased from legitimate sources not involved in funding conflict and in compliance with United Nations resolutions. The seller hereby guarantees that these diamonds are from areas that are free of conflict, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds.

Shipping:
 Grand Total \$:

THANK YOU FOR YOUR BUSINESS

APPENDIX C

United Nations A/RES/55/56

General Assembly Distr.: General

29 January 2001

Fifty-fifth session

Agenda item 175

00 56275

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/55/L.52 and Add.1)]

55/56. The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts

The General Assembly,

Expressing its concern over the problem of conflict diamonds fuelling conflicts in a number of countries and the devastating impact of these conflicts on peace, safety and security for people in affected countries,

Understanding conflict diamonds to be rough diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments,

Recognizing that the vast majority of rough diamonds produced in the world are from legitimate sources,

Recognizing also that the legitimate trade in diamonds makes a critical contribution to economic development in many countries worldwide,

Acknowledging that the problem of conflict diamonds is of serious international concern, and that measures to address the problem should involve all concerned parties, including producing, processing, exporting and importing countries, as well as the diamond industry,

Recognizing the need to address the problem of rough diamonds originating from territories of diamond-producing countries under military occupation by another country,

Emphasizing that these measures should be effective and pragmatic, consistent with international law, including relevant trade provisions and commitments, and should not impede the current legitimate trade in diamonds or impose an undue burden on Governments or industry, particularly smaller producers, and not hinder the development of the diamond industry,

Recalling all the relevant resolutions of the Security Council, including its resolutions 1173 (1998) of 12 June 1998, 1295 (2000) of 18 April 2000 and 1306 (2000) of 5 July 2000, as well as resolution 1304 (2000) of 16 June 2000,

A/RES/55/56

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Highlighting the additional important initiatives already taken to address this problem, in particular by the Governments of Angola and Sierra Leone and by other key producing, processing, exporting and importing countries, as well as by the diamond industry and civil society, including the creation by the industry of the World Diamond Council,

Welcoming with appreciation the initiative by the African diamond-producing countries to launch an inclusive consultation process of Governments, industry and civil society, referred to as the Kimberley Process, to deal with the issue,

Taking note of the ministerial statement issued at the conclusion of the meeting on diamonds held in Pretoria on 21 September 2000,¹

Also taking note of the communiqué issued by the London Intergovernmental Meeting on Conflict Diamonds, held on 25 and 26 October 2000,²

1. *Calls upon* all States to implement fully Security Council measures targeting the link between the trade in conflict diamonds and the supply to rebel movements of weapons, fuel or other prohibited materiel;
2. *Urges* all States to support efforts of the diamond producing, processing, exporting and importing countries and the diamond industry to find ways to break the link between conflict diamonds and armed conflict, and encourages other appropriate initiatives to this end, including improved international cooperation on law enforcement;
3. *Expresses* the need to give urgent and careful consideration to devising effective and pragmatic measures to address the problem of conflict diamonds, the elements of which would include:
 - (a) The creation and implementation of a simple and workable international certification scheme for rough diamonds;
 - (b) Basing the scheme primarily on national certification schemes;
 - (c) The need for national practices to meet internationally agreed minimum standards;
 - (d) The aim of securing the widest possible participation;
 - (e) The need for diamond processing, exporting and importing States to act in concert;
 - (f) The need for appropriate arrangements to help to ensure compliance, acting with respect for the sovereignty of States;
 - (g) The need for transparency;
4. *Welcomes* the offer by the Government of Namibia to convene a workshop of the world's leading diamond processing, exporting and importing countries, continuing the momentum of the Kimberley Process to consider technical aspects pertaining to the envisaged international certification scheme for rough diamonds;
5. *Encourages* the countries participating in the Kimberley Process to consider expanding the membership of the Process in order to allow all key States

¹ A/55/638, annex.

² A/55/628, annex.

A/RES/55/56

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with a significant interest in the world diamond industry to participate in further meetings, and to move ahead with the intergovernmental negotiating process to develop detailed proposals for the envisaged international certification scheme for rough diamonds, in close collaboration with the diamond industry and taking into account the views of relevant elements of civil society;

6. *Requests* the countries participating in the Kimberley Process to submit to the General Assembly, no later than at its fifty-sixth session, a report on progress made;

7. *Decides* to include in the provisional agenda of its fifty-sixth session the item entitled "The role of diamonds in fuelling conflict".

79th plenary meeting

1 December 2000

APPENDIX D
UNGA Resolution 56/263

on February 6, 2002



RESOLUTION ON THE ROLE OF DIAMONDS IN FUELLING CONFLICT

Breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts

Recognizing that the trade in conflict diamonds is a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of armaments, especially small arms and light weapons;

Further recognizing the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts;

Noting the negative impact of such conflicts on regional stability and the obligations placed upon states by the United Nations Charter regarding the maintenance of international peace and security;

Recognizing therefore that urgent action to curb the trade in conflict diamonds is imperative;

Recognizing the positive benefits of the legitimate diamond trade to producing countries, and that provision of assistance to the developing producing countries should be encouraged to further develop their production capacity and markets for their diamonds and to encourage competitive, diversified and open markets for trade in rough diamonds;

Underlining the need for urgent international action to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a critical contribution to the economies of many of the producing, exporting, and importing states, especially developing states;

Recalling all the relevant resolutions of the United Nations Security Council under Chapter VII of the United Nations Charter and determined to contribute to and support the implementation of the measures provided for in these resolutions;

Recalling United Nations General Assembly Resolution 55/56 (2000) calling on the international community to develop detailed proposals for a simple and workable international certification scheme for rough diamonds based primarily on national certification schemes and on internationally agreed minimum standards;

Believing that the opportunity for conflict diamonds to play a role in fuelling armed conflict can be seriously reduced by introducing a certification scheme for rough diamonds and that such a scheme would help protect the legitimate trade and ensure the effective implementation of the relevant resolutions of the United Nations Security Council containing sanctions on the trade in conflict diamonds;

Emphazing that the envisaged certification scheme for rough diamonds should be effective and pragmatic, should not impede the present legitimate trade in diamonds or impose an undue burden on Governments or industry, particularly smaller producers, and not hinder the development of the diamond industry;

Acknowledging the important initiatives already taken to address the problem of conflict diamonds, in particular by the governments of Angola, the Democratic Republic of Congo, Guinea and Sierra Leone and by other key producing exporting and importing countries and encourage those governments to continue these initiatives;

Welcoming the important contribution made by the Kimberley Process, an inclusive consultation process of Governments, industry and civil society initiated by the African producing countries, towards developing proposals for such an international certification scheme for rough diamonds;

Welcoming the important contribution made by the diamond industry, in particular the World Diamond Council, as well as civil society, to assist international efforts to stop the trade in conflict diamonds;

Welcoming voluntary self-regulation initiatives for the diamond industry announced by the World Diamond Council and recognising that a system of such voluntary self-regulation will contribute to ensuring the effectiveness of national systems of internal controls for rough diamonds;

Recognizing that an international certification scheme for rough diamonds will only be credible if all participants have established internal systems of control designed to eliminate the presence of conflict diamonds in the chain of producing, exporting and importing rough diamonds within their own territories, while taking into account that differences in production methods and trading practices as well as differences in institutional controls thereof may require different approaches to meet minimum standards;

Emphazing the importance of ensuring that the measures taken to implement the international certification scheme for rough diamonds are consistent with international law governing international trade;

Noting with approval that the Kimberley Process has pursued its deliberations on an inclusive basis, involving concerned stake-holders including producing, exporting and importing states, the diamond industry and civil society;

Recognizing that state sovereignty should be fully respected and the principles of equality, mutual benefits and consensus should be adhered to;

Welcoming important progress by the Kimberley Process to date, in particular the development of a Working Document containing the Essential Elements of an International Scheme of Certification for Rough Diamonds, with a view to breaking the link between armed conflict and the trade in conflict diamonds.

1. Notes with appreciation the report by the Chair of the Kimberley Process submitted further to Resolution 55/56 and congratulates the Kimberley Process participants on their achievements thus far;

2. Calls for the full implementation of existing Security Council measures targeting the role played by the illicit trade in rough diamonds in fuelling conflict;

3. Welcomes the detailed proposals agreed at the Ministerial meeting in Gaborone, Botswana on 29 November 2001, towards an international certification scheme for rough diamonds developed by the participants in the Kimberley Process and presented in the form of Kimberley Process Working Document 9/2001 (as amended) “Essential Elements of an International Scheme of Certification for Rough Diamonds, with a view to breaking the link between armed conflict and the trade in rough diamonds”, dated 29 November 2001, notes that the measures proposed are reasonable and proportionate and that they include regular review of the certification scheme;

4. Urges the implementation of the certification scheme as soon as possible, recognising the urgency of the situation from a humanitarian and security standpoint;

5. Welcomes the extension of the mandate of the Kimberley Process until such time as an international certification scheme is adopted and its simultaneous implementation by participants begins;

6. Encourages the Kimberley Process to resolve outstanding issues including verification measures, administrative considerations and the nature of a possible international instrument covering the certification scheme;

7. Underlines the need, as an essential tool for the successful implementation of the international certification scheme, for the collation and dissemination of statistical data on the production of, and international trade in, rough diamonds;

8. Stresses that the widest possible participation in the proposed certification scheme is essential and should be encouraged and facilitated;

9. Welcomes the offer by the Government of Canada to host the next meeting of the Kimberley Process in Ottawa, in order to achieve further progress in addressing outstanding issues, and towards implementation of the envisaged certification scheme at the earliest possibility;

10. Requests the countries participating in the Kimberley Process to present to the General Assembly, no later than its 57th session, a report on progress made;

11. Decides to include in the provisional agenda of its 57th session the item entitled "The role of diamonds in fuelling conflict."

APPENDIX E

M.A.27003 Mineral Demarcation Mining Concession Area
PART C - SECTION 2: Statutory Requirements

DEPARTMENT OF MINERALS AND ENERGY
MINING LICENCE
(Minerals Act, 1991: Section 9(1) read with 9(3)(e))

40 00E

License No. **ML 27003**
Office reference **NCS 502813**

Authorization is hereby granted under and subject to the provisions of the Minerals Act, 1991, to full name, **DE BEERS CONSOLIDATED MINES LIMITED**

identity or registration number **18837008077006**
(hereafter referred to as 'the holder')

P.O BOX 616
KIMBERLEY
NAMIBIA
TEL: 063 839 4111 FAX: 063 839 4210

to mine for (name of mineral) **DIAMONDS**

on (full name of farm and subdivision) **PORTIONS OF STA. AREA NOS 20, 26, 40, AND 50**

No. **XXXXXX** Magisterial District **NAMQUALAND** Region **NORTHERN CAPE**
as indicated on the attached sketch plan No. **NCS-502813**
approved by the Director, Mineral Development on **10 JANUARY 2003**

Full name of the holder of the right to the said mineral **REPUBLIC OF SOUTH AFRICA**

Unless this licence is suspended, cancelled or abandoned or lapses it shall be valid for a period (more than two years) which shall extend from the date of issuing until **31 DECEMBER 2015** or until the mineral the mining of which is hereby authorized can no longer be mined economically by the holder of the land concerned. (If a specific date is inserted delete the words that follow this date.)

M.A.27003 Mineral Demarcation Mining Concession Area
PART C - SECTION 2: Statutory Requirements

40 00E

This licence does not exempt the holder from the requirements of any provision of any other law or from any restrictive provisions or conditions contained in the title deed of the land concerned, nor does it encroach upon the rights of any person who may have an interest in the land or things contained or the mineral rights in respect of such land or things.

Signed at **KIMBERLEY** this **10TH** day of **JANUARY 2003**


Acting Director, Mineral Development
Northern Cape Region

*Delete the words "in respect of things" if they are not applicable.

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