CASE NO.: SA 3/94

IN THE SUPREME COURT OF NAMIBIA

In the Civil Appeal of:

MOLY-COPPER MINING & EXPLORATION COMPANY (SWA) LIMITED — Appellant

and

IMCOR ZINC (PTY) LTD — First Respondent
SOUTH AFRICAN IRON & STEEL INDUSTRIAL CORPORATION LIMITED — Second Respondent

CORAM: MAHOMED C.J., DUMBUTSHENA A.J.A. and LEON A.J.A.
Delivered on: 8/12/1994

J U D G M E N T

LEON A.J.A. :

On 11 October 1993, the Appellant brought an urgent application before Teek J. in the High Court of Namibia in which a rule nisi was granted against the two respondents and four others in the following terms:

"2. *That a rule nisi do hereby issue calling upon the Respondents to show cause ..... on Friday 12 November 1993 why: -*

(a) they should not be interdicted from causing notice to be sent in the name of Imcor Zinc (Pty) Limited "Imcor Zinc" to creditors of Imcor Zinc stating Imcor Zinc is unable to pay its debts or otherwise caus-

ing Imcor Zinc to commit an act of insolvency or to intentionally precipitate winding-up proceedings against itself.

(b) *alternatively to sub-paragraph (a) why a temporary interdict should not be granted in the terms of sub-paragraph (a) pending the final determination of the disputes among the First, Fifth and Sixth Respondents as adverted to below.*

(c) *Declaring that, in terms of the agreements entered into between the First Appellant and the Second Respondent (or their predecessors), the Second Respondent is obliged to provide funds to carry on the business of Imcor Zinc and/or is precluded from calling up loans advanced by it to Imcor Zinc.*

(d) *Declaring that in terms of the agreements entered into between the First Applicant and the Second Respondent (or their predecessor) the cost plus provisions covering Imcor are still binding and of force.*

(e) *granting the applicants further or alternative relief*

(f) *Ordering the respondents to pay the costs of this application jointly and severally or making such other order as to costs as may be just.*

3. *Pending the return day, paragraph 2(a) above of this order is to operate as an interim interdict.*

4. *In order to confirm jurisdiction against the Second Respondent the shares of the Second Respondent be attached by the Sheriff of this Court."*

Paragraph 5 relates to service of the order. Diane Lidchi was the Second Applicant in the application, for reasons which were not clear, but the point was not taken and need not be mentioned further.

After hearing argument on the return day, **HANNAH J.** discharged the temporary interdict which had been ordered in terms of paragraphs 2(a) and (b) of the Rule Nisi and postponed the hearing in respect of paragraphs 2(c), (d) and (f) of the Rule Nisi to a date to be arranged with the Registrar ordering the applicants to pay the costs in respect of prayers 2(a) and (b) of the Notice of Motion.

The Registrar assigned the 22nd November for the hearing and on that date an application to amend the Notice of Motion was granted, the amendment comprising a prayer for an additional declaratory order. During the course of argument, a further amendment in the form of an alternative to prayer (c) of the Notice of Motion was sought and obtained. In consequence of the amendments, the final relief sought by the applicants, excluding the interdict which had been disposed of was as follows: -

C(1) Declaring that in terms of the agreements entered into between the First Applicant and the Second Respondent (or their predecessor), the Second Respondent is obliged to provide funds to carry on the business of Imcor Zinc and/or is precluded from calling up loans advanced by it to Imcor Zinc.

alternatively -

(c) Declaring that, in terms of the Agreements entered into between the First Applicant and the First and Second Respondents, the Second Respondent is:

(i) obliged to provide to the First Respondent sufficient funds to pay any debts contracted by the First Respondent other than liabilities to Iscor as long as the First Respondent is under the control of Moly-Copper and Iscor directors;

(ii) not entitled to call up its loan except to the extent that the First Respondent has cash resources available for this purpose; and;

(iii) Obliged either

(aa) to provide sufficient funds to enable the First Respondent to maintain production at a minimum of 50,000 tons of ore per month, or

(bb) to cause the First Respondent to abandon mining operations, in which event the provisions of clause 9(d)A of the prospec-

tors agreement (as substituted) will be of application.

(d) Declaring that, in terms of the agreement entered into between the First Applicant and the Second Respondent (or their predecessors), the cost plus provisions covering Imcor are still binding and of force.

(e) It is hereby declared that -

(i) the refusal by Second Respondent to provide funds for mining operations constitutes an unlawful repudiation of the obligations of Second Respondent to First Applicant;

(ii) such repudiation and/or abandonment of mining operations has the consequence that in terms of clause 9(d)B of the prospecting contract as amended by the notarial agreement at "D2 23" to the founding affidavit, Second Respondent is obliged to procure that the First Respondent offer its assets to First Applicant for sale as prescribed in such clause.

(f) Granting the Applicants further or alternative relief.

(g) Ordering the Respondents to pay the costs of this application jointly and severally or making such other order as to costs as may be just.

All the relief, as amended, was refused. The rule nisi

still in operation was discharged and, in consequence, the order attaching the shares of the Second Respondent to found jurisdiction was discharged. Save for the costs relating to an affidavit by one George Kahan and its annexures, the applicants were ordered to pay the costs of the respondents, jointly and severally.

This appeal is against that Order.

The factual background to this matter as well as the relevant clauses of the agreements which have to be considered are conveniently and accurately (save for the correct clause 10(b)(ii) which I have inserted) set out in the judgment as follows: -

" The First Applicant (Moly-Copper) was the holder of a prospecting grant over certain land in the District of Luderitz. In 1965 it granted Industrial Minerals Exploration (Pty) Ltd., (Imex), a wholly-owned subsidiary of the Second Respondent, (Iscor), the sole and exclusive right to prospect for all minerals, except precious stones, in the grant area. The agreement entered into by the two parties provided, inter alia, that if Imex elected to mine the grant area, an operating company would be formed in which Imex would hold 51% of the shareholding and Moly-

Copper 49%.

In March 1966, Imex elected to proceed with the mining of the grant area and in September of that year the operating company, Imcor Zinc (Pty) Ltd., (Imcor-Zinc), the First Respondent to this application, was incorporated. Also in that year, Imex changed its name to Industrial Minerals Mining Corporation (Pty) Ltd. and, for convenience sake, I shall refer to this company as Imex-Imcor.

Imcor-Zinc went into production as a mining company and, in the years which followed, Imex-Imcor and Moly-Copper amended their original agreement from time to time. In all there were three amending agreements. Then, in 1981, Imex-Imcor, Moly-Copper and Iscor entered into an agreement whereby Imex-Imcor transferred its shareholding in Imcor-Zinc and its loan account with that company to Iscor. Imex-Imcor also ceded all its rights and delegated all its obligations under the four agreements to Iscor.

I now come to those provisions of the various agreements which are of relevance to the matter now before me. References to "Lorelei" in the provisions are references to Lorelei Copper Mines Ltd., an associated company of Moly-Copper. The original agreement,

otherwise referred to by the parties as the "prospecting agreement", contained inter alia clauses dealing with the funding and financing of the operating company, the sale of minerals by that company and the minimum rent payable to Moly-Copper and the distribution of profits. Clause 8, dealing with the funding and financing, save in one quite minor respect to which I shall come, remains unaltered, but clause 9, dealing with the sale of minerals and part of clause 10, dealing with minimum rental and distribution of profits were substituted with new clauses by the later agreements. What is set out below are those clauses as substituted.

Clause 8 provides as follows: -

> "*8. <u>Funds and Finances of Operating Company</u>*
>
> *(a) Imex will lend to the Operating Company sufficient funds to enable the Operating Company to establish machinery, plant and equipment with a minimum capacity of 50 000 tons of ore per month and sufficient working capital to enable the Operating Company to go into production, and to maintain production. Imex shall have the right to arrange for alternative, similar financing facilities. (It is recorded that the parties have in mind an amount of the order of R500 000 in respect of the proposed operating loan by*

Imex. This figure shall, however, be subject to adjustment by mutual agreement between the parties hereto.)

(b) The Operating Company will take over such of the plant, equipment and facilities of Moly-Copper and Lorelei as it requires, at a value to be agreed upon.

(c) In the event of Imex exercising the option set out in Clause 6 hereof, the Operating Company shall also reimburse Moly-Copper and Lorelei in respect of expenditure in prospecting the Grant Areas of Moly-Copper and Lorelei, and their establishment of facilities thereon to date hereof. It is agreed that the amounts due as a refund of prospecting expenditure are R15 000 to Moly-Copper and R185 000 to Lorelei, as certified by the auditors of the respective companies. These amounts so credited to Molly-Copper and Lorelei will stand as loans to the Operating Company, which loans Imex hereby guarantees as surety.

(d) The Operating Company shall likewise reimburse Imex in respect of expenditure in prospecting the Grant Area, as certified by Imex's auditors, and the amount so credited to Imex will stand as a loan to the Operating Company.

The subsequent alteration made to this clause was made by an agreement entered into in 1974 whereby the words

"which loans Imex hereby guarantees as surety", as set out in the last line of paragraph (c) were deleted.

Clause 9 provides as follows: -

" *(a) The Operating Company (which is now IMCOR ZINC) undertakes to sell the whole of the zinc concentrates produced from mining operations carried out - (pursuant to this prospecting contract and the subsequent cession of the Grant to IMCOR ZINC to ZINC CORPORATION OF SOUTH AFRICA LIMITED - [ZINCOR]) - at a price to be calculated in accordance wth the particulars set out in Annexure "A" hereto - (hereinafter referred to as "the said price");*

(b) THE SOUTH AFRICAN IRON AND STEEL INDUSTRIAL CORPORATION LIMITED - (ISCOR) - shall guarantee as surety and co-principal debtor in a form of Deed of Suretyship reasonably acceptable to MOLY-COPPER all the obligations of ZINCOR to IMCOR ZINC.

(c) All minerals and/or concentrates other than the aforesaid zinc concentrates mined or produced by IMCOR ZINC shall be disposed of in the open market in the ordinary course of business;

(d) If the said price of zinc concentrates, calculated in accordance with the particulars set out in Annexure A hereto, over any financial year of IMCOR ZINC's costs of producing zinc concen-

trates during such a year (an example of the method of calculating such costs is attached hereto as Annexure "C" plus 10% (Ten Per Centum) of such costs (hereinafer referred to as "cost plus 10%), INDUSTRIAL MINERAL MINING CORPORATION (PROPRIETARY) LIMITED - ("IMCOR") - shall have the right to -

A. *demand that IMCOR ZINC proceed with the sale of the zinc concentrates to ZINCOR at the said price, provided that in such event IMCOR shall be obliged to pay to IMCOR ZINC for every year that the said price is less than cost plus 10%, the difference between cost plus 10% and the said price. In such event, the minimum rent payable to MOLY-COPPER in terms of Clause 19 hereof shall be calculated on the said price plus the additional amount paid by IMCOR as aforesaid; or, alternatively, to -*

B. *request IMCOR ZINC to abandon mining operations, in which event IMCOR ZINC shall be obliged, in the first instance, to offer its assets for sale to MOLY-COPPER on the following terms and conditions: -*

   (i) *The offer shall remain open for acceptance by MOLY-COPPER or its nominee for a period of twelve (12) months from the receipt of the offer;*

(ii) The purchase price shall be the lesser of the book value of the assets in the cessionary's books after having depreciated such assets on the customary basis, or the cost of acquisition of such assets; provided, however, that for all purposes the purchase price of the mineral deposits shall be R1.00;

(iii) In the event of MOLY-COPPER not accepting the offer hereinbefore contained, and IMCOR ZINC receiving a written offer for the purchase of these assets which it is prepared to accept, it shall forward a copy of such offer to MOLY-COPPER. For a period of thirty (30) days from the receipt of such copy, MOLY-COPPER shall be entitled to purchase the said assets on the same terms and conditions as are contained in the written offer.

(iv) If IMCOR ZINC should dispose of its plant and other movable property, but retain the mineral rights it may have in respect of the area defined in Grant No. M4/4/70, MOLY-COPPER shall be entitled to purchase all such mineral rights for R1,00 (One Rand);

(v) The purchase price of the said assets

shall be payable to the Cessionary in cash against delivery and/or due registration of the grant and other assets into the name of MOLY-COPPER."

Clause 10 provides as follows: -

"10 Minimum Rent and Distribution of Profits

(a) There shall be payable to MOLY-COPPER at the end of each calendar month a minimum rent equal to 9% of the sale value, at the mine, of all minerals despatched during the previous month and the minimum rentals so paid shall at the end of each year be added back to net profit for the purpose of arriving at distributable profit referred to in paragraph (b) of this clause.

(b) Notwithstanding the provisions contained in Clause 6 relative to Share Capital contribution, the profits of the Company shall be dealt with as follows: -

(i) Where in any one year 49% of the distributable profit is less than the minimum rent paid in that year, no dividend will be payable to MOLY-COPPER and the total nett. profit, if any, shall in the form of dividend be payable to IMEX.

(ii) Where in any one year 49% of the distributable profit is less than the

minimum rent paid in that year, no dividend will be payable to MOLY-COPPER and the total nett. profit, if any, shall in the form of dividend be payable to IMEX.

(iii) Where in any one year the accounts of the Operating Company reflect a nett. loss, no dividend shall be payable to either MOLY-COPPER or IMEX and such loss shall be carried forward until liquidated and offset against profits, or added to losses, made in the next and succeeding years.

Examples of how this sub-clause (b) shall operate are set out in "Annexure D" hereto.

(c) IMCOR and MOLY-COPPER undertake to procure that, subject to paragraph (a) of this clause, all cash resources of the Operating Company available for distribution shall, before payment of dividends, be applied by the Operating Commpany in the redemption of loans advanced to it, in the following order of preference -

(i) the loan of R700 000 advanced by IMCOR, in respect of the opening up and mining of the "B" ore body,

(ii) thereafter, after redemption of the above loan, the loans arranged in terms of clause 8(a) hereof and the amounts due to MOLY-COPPER and LORELEI in terms of clause 8(b) and (c) hereof. Payments in reduction of these loans shall be split as to

50% to MOLY-COPPER and LORELEI combined and 50% to all other parties combined, until such time as the loans of MOLY-COPPER and LORELEI shall have been redeemed, and thereafter the full payments shall be applied towards the redemption of all other loans until such time as they have been fully liquidated.

(d) Interest on loans advanced by IMEX or MOLY-COPPER or any other party, shall unless otherwise decided by the Operating Company be on bank overdraft rate applicable to the Company from time to time.

(e) No loan shall be repayable to any party except in terms of this clause."

It will be seen that clause 10(c), which was substituted for the original clause 10(c) by the 1974 agreement, refers in paragraph (i) thereof to a loan of R700 000 advanced by Imex-Imcor in respect of the opening up and mining of a further ore body. The advance of this loan was the principal subject of the 1974 agreement and it is clear that it comprised additional funding as contemplated by clause 8(a).

I have not set out clause 6 of the agreement but the effect of that clause is that the Board of Directors of Imcor Zinc was to consist of five directors of whom

> Imex would have the right to nominate three, one of whom would be the Chairman, and Moly-Copper would have the right to nominate two. Also, Imex was to act as manager and secretary of the company, Effect was in fact given to this clause in the original articles of Imcor Zinc and although an amendment was made to the articles in 1982, the amended Article 30 made it clear that Iscor, who by then had replaced Imex-Imcor, would always have a majority of one Director on the Board."

Iscor's loan account in Imcor Zinc, according to Lidchi's affidavit, which is not disputed, presently stands at R43 million. The financial problems of Imcor Zinc appear on the papers to have been caused by a dramatic fall in the world price of zinc in 1992. In September of that year, Iscor expressed concern to Imcor Zinc regarding future fundings at a time when its loan account was close to R28 million.

Another letter on the same topic followed in June 1993 when Iscor indicated its reluctance to continue funding Imcor Zinc in view of the fact that it was unlikely that Iscor would recover its loan account which had then increased to R36 million.

On 30 July 1993, the Chairman of Imcor Zinc wrote to both Iscor and Moly-Copper informing them that Imcor Zinc was

running at a loss of over R1 million per month and that "the company will ..... not be in a position to either service or to repay Iscor's loan account for the foreseeable future". It also sought instructions as to whether the creditors wished to continue with the operating activities of the company as it was trading under insolvent circumstances.

On 4 August 1993 Iscor informed Imcor Zinc that it required payment of its loan account by the end of October of that year unless the shareholders had agreed by then to restructure the company in order to improve its financial position. However, it did express its willingness to provide further financing but subject to certain conditions. That letter came to the notice of Moly-Copper which set out its reaction in a letter dated 13 August. Inter alia it disputed Iscor's conditions claiming that that fell outside the agreement of the shareholders. It also stated that Iscor had no right to call up its loan account but was obliged to act in terms of clasue 9 of the Agreement. It repeated that attitude in a further letter towards the end of September 1993.

On 6 October 1993 Iscor informed Imcor Zinc that it had ceased the funding of the latter company with immediate effect. It had the effect of preventing Imcor Zinc from being able to pay its creditors. Imcor Zinc took the view

that it had a duty to inform its creditors of that fact which led to the application being brought which sought inter alia to prevent it from doing that. The denials by Iscor notwithstanding, it is submitted with some force by Moly-Copper that Iscor's conduct in refusing to fund Imcor-Zinc any further was intended to bring about the consequence that Imcor Zinc would be wound up by means of the loan account or by another unpaid creditor.

The Appellant's case in the Court a quo with regard to the first part of prayer (c) was based essentially on the first part of clause 8(a) which provides that : -

> ***"Imex will lend to the operating company sufficient funds to enable the operating company to establish machinery, plant and equipment with a minimum capacity of 50,000 tons of ore per month and sufficient working capital to enable the operating company to go into production, and to maintain production."***

The submission was that the provision created an obligation to provide sufficient funds to Imcor Zinc on a continuing basis to enable it to maintain production but it was conceded that the obligation could not be regarded as an indefinite or unlimited one and would only extend to provide sufficient funds to maintain production if it could be carried out on an economic basis. **Hannah J.** took the

view that the relief sought in the declarator was too wide and that the alternative relief must also be refused because it sought to read clause 8(a) as if the words "and to maintain production" were qualified by the words "as long as it is economic to do so". The learned Judge found that the only qualification to be found was in the express words of the clause itself. After providing that the loan to be made by Imex to enable Imcor Zinc to establish itself, go into production and to maintain production and that the sum would be in the order of R500 000, it expressly provides that : -

" ***This figure shall, however, be subject to adjustment by mutual agreement between the parties hereto.***"

The Court held that the words "and to maintain production" had to be qualified in some way but the qualification was that further funding was to be by way of mutual agreement, but there was no undertaking by Imex that Imcor Zinc would be kept free of debt and, if not, that Imex would discharge its debts.

The learned Judge then considered the second part of the relief sought in (c), namely a declaration that Iscor is precluded from calling up its loans to Imcor Zinc or alternatively from calling up its loans except to the extent that Imcor Zinc has cash resources for that purpose.

The first part of the relief was regarded as being too wide by the Court a quo. The alternative relief was based upon clause 10. Sub-paragraphs (a) and (b) create a method whereby the parties will in respect of each year share the distributable profit of Imcor Zinc in proportion to their respective shareholdings but subject to the earlier and preferential entitlement of Moly-Copper to payment of rent in terms of clause 10(a). Clause 10(a) provides that all cash resources must, before payment of dividends, be applied for the redemption of loans advanced to Imcor Zinc in a certain order of preference and clause 10(e) provides that : -

" ***No loan shall be repayable to any party except in terms of the clause.***"

The case for the appellants was that, when read as a whole and in the context of the agreement as a whole, the effect of clause 10(e) was that Iscor's loans to Imcor Zinc could only be repaid out of the cash resources of the company and that it was not open to Iscor to call up its loans unless there were cash resources to pay them.

The Court a quo rejected this argument. The introductory part of clause 10(c) makes it clear that the sub-clause deals with the order of preference in which cash resources available for distribution must be applied, and does not

deal at all with the situation where Imcor Zinc does not have cash resources. Clause 10(c) deals therefore with the sequence in which Imcor Zinc's cash resources are to be applied towards repayment of its various loans made by its shareholders and their subsidiaries. The Court a quo felt that the correct construction to be placed on sub-clause (e) was that the creditors referred to in sub-clause (c)(i) or (ii) are to be paid out of cash resources in the sequence set out leaving the remaining creditors to be paid out of the non-cash assets.

The Court a quo held that the applicants were not entitled to the declaration sought in prayer (c) or in the alternative thereto. It followed that the applicants were not entitled to a declaration as sought in prayer (e). In reaching the above conclusion **Hannah J.** stated that he had not overlooked certain other arguments advanced on behalf of the applicants which he regarded as being "convoluted in the extreme". The one argument related to clause 9 and the other arose out of the fact that Imcor Zinc was a "domestic" company, that is a partnershp or quasi-partnership trading in corporate form.

The argument based upon clause 9 was described by the learned Judge thus : -

" *For example, basing themselves on clause 9, the applicants say that it was the intention of the parties that if Iscor no longer wished to have a part in the exploitation of the mineral rights in question, Moly-Copper would be granted the option of acquiring those rights together with the assets of Imcor Zinc at an ascertainable price. Next, the applicants say that Iscor is therefore under an obligation to procure that effect is duly given to such option. Then it said that effect can only be given to such option if Imcor Zinc is solvent. Therefore it is implicit that Iscor must ensure both that the claims of all creditors of Imcor Zinc are discharged and that its own claims are waived, abandoned or subordinated to such an extent as may be necessary to give effect to the option.*"

With regard to the argument based upon Imcor Zinc being a domestic company, it was contended that Iscor being the dominant member of the partnership would be acting contrary to the fiduciary duties which it owes to Moly-Copper if it were to evade its responsibilities under the agreement and bring about a winding-up of Imcor Zinc. It must therefore keep the company free of debt and look to cash resources only for the repayment of its loans. With regard to that argument, the learned Judge said: "I cannot help but think that either the applicants route map has missed a turning or the turning was never there."

Finally the Court a quo refused the declaration sought in (d) because there was no dispute as to whether clause 9 was

stil binding and of force. There was nothing on the papers to show that there was a dispute between the parties as to whether or not clause 9 was still binding and of force. The only dispute was on the proper interpretation of the clause. At no time during the hearing was an application made to amend prayer (d).

On behalf of the appellant it is submitted that the Judgment in the Court a quo does not make commercial good sense and gives rise to inequitable results between the parties whose relationship to each other is one of quasi-partnership. With regard to this latter point, Moly-Copper does not rely upon such a relationship simpliciter as imposing a duty upon Iscor to keep Imcor Zinc free of debt and to look only to cash resources in respect of its loans. What Moly-Copper does submit is that, particularly in the light of such fiduciary relationship, the Court will not permit Iscor to evade its obligations by the expedient of precipitating a winding-up order.

It was also contended that the fundamental error of the learned Judge a quo was to adopt a piece-meal approach when interpreting clauses 9 and 10 of the shareholders' agreement which had induced a flaw in his reasoning approach and caused him to reach an erroneous conclusion with respect to the relief claimed in prayers 2(c), its alternative and

prayer 2(e) of the Notice of Motion.

With regard to the relief refused under prayer 2(d), it was submitted in the Heads of Argument that the prayer should be read in the context of the founding affidavit. From paragraphs 16 and 17 of the founding affidavit it is clear that the dispute which the Appellant wished the Court a quo to decide was whether the cost plus provisions still applied during the financial year ending 30 June 1993 and thereafter and that Iscor understood the Appellant's prayer in this regard. It is conceded in those Heads that there is a brief reference in the written Heads of Argument of Iscor in the Court below to the lack of a dispute on the relief sought, but it is far from clear what the grounds were for that submission. In the alternative, it is contended that the Court below should nevertheless have considered the dispute on its merits as it was fully canvassed in the papers and that an appropriate amendment should be allowed on appeal. All these contentions in respect of prayer (d) appear from the Appellant's Heads of Argument but no further argument was advanced on behalf of the Appellant on this prayer in this Court.

Mr. Selvan and Mr. Soggott argued the case for the Appellant, the former dealing with the interpretation of the agreement while the latter dealt with the cost plus provi-

sions referred to in clause 9 of the agreement. Both arguments are subject to criticism in certain material respects. Reliance was sought to be placed on the earlier "prospecting agreement" as a basis for interpreting the subsequent agreement. But no ambiguity in the subsequent agreement was or could be relied upon and it is clear that clause 9 and part of clause 10 were new clauses being substituted for the earlier clauses as appears from what I have set out above. No claim for rectification was ever made and no basis in law exists to support those arguments. Then it was suggested that the language of the agreement might have a meaning different from the language used because of what the parties probably had in mind. However, in the absence of a claim for rectification, the Court must have regard to the expressed intention of the parties. The arguments also tended to lose sight of the form of relief claimed

Before considering the relief claimed and the relevant clauses of the contract, there is one last matter to which I must refer. Mr. **Selvan** argued that one of the issues in the appeal was whether ISCOR was entitled to call up its loan on demand. There is no such issue. The facts, to which brief reference is made earlier herein show that ISCOR did not call up its loan on demand. On the contrary, anxiety was expressed by ISCOR regarding future funding as far back as September 1992 which was reiterated in June of

the following year. On 30 July 1993 the Chairman of Imcor Zinc stated that Imcor Zinc was unable either to service or repay Iscor's loan account which then stood at about R40 million. This caused Iscor to demand payment of its loan on 4 August 1993 giving Imcor Zinc more than two months to pay it unless the shareholders agreed before then to restructure Imcor Zinc to make it financially more viable. Moly-Copper was not prepared to do so and finally on 6 October 1993 Iscor informed Imcor Zinc that it had ceased funding it with immediate effect. In my view, the notice given by Iscor to Imcor Zinc was, in the circumstances, reasonable notice to pay and the contrary is not suggested either in the papers or in the grounds of appeal. The proper question then is not that contended for by Mr. Selvan but whether the Appellant is entitled to the declaratory orders as framed.

With regard to clause 8 of the agreement Mr. Selvan adopted a different approach from that of Mr. Swersky in the Court below. The latter made the concession that the obligation to provide sufficient funds on a continuing basis could not be regarded as an indefinite or unlimited one and would only extend to provide sufficient funds to maintain production if it could be carried out on an economic basis. Therefore the words "and to maintain production" were qualified by the words "as long as it is economic to do

so". Mr. **Selvan** made no such concession contending that the appellant was entitled to the relief claimed because of the express wording of clause 8: no qualification or implication was necessary.

I turn now to consider the relief claimed and the meaning of the clauses in question. Mr. **Selvan** conceded that the learned Judge was correct in concluding that once the relief sought in prayer (c), including its alternatives, fell to be refused, that prayer (e) must fail. It is thus not necessary for this Court to consider prayer (e). Prayers (c) and (d) remain to be dealt with.

The first part of prayer C and its alternative was a declaration that, in terms of the agreements, Iscor is obliged to provide funds in its proper discretion to carry on the business of Imcor Zinc or is obliged to provide Imcor Zinc sufficient funds to pay any debts contracted by Imcor Zinc other than liabilities to Iscor as long as Imcor Zinc is under the control of Moly-Copper and Iscor directors.

The obligation of Iscor to fund Imcor Zinc is set forth in paragraph 8(a) of the shareholders' agreement which was relied upon by counsel for the appellant in support of his contention. The stated obligation in paragraph 8(a), to

lend sufficient funds to the operating company is a twofold obligation, namely:

i) sufficient funds to enable the operating company to establish machinery, plant and equipment with a minimum capacity of 50,000 tons of ore per month, and

ii) sufficient working capital to enable the operating company to go into production and to maintain production.

The words in brackets which follow clause 8(a) refer to an amount of R500 000 which the parties had in mind in respect of the proposed "operating loan" make it clear, in my view, that the operating loan covered both the setting up of the operation and sufficient working capital for Imcor Zinc to go into production and to maintain production. Although the figure of R500 000 was what the parties had in mind it was in terms "subject to adjustment by mutual agreement between the parties thereto". The last words which I have placed in inverted commas make it clear that any further sums which were to be advanced were to be advanced by mutual agreement between the parties. And, in fact, there was such a further mutual agreement in 1974 when a further sum of R700 000 was advanced.

The argument of Moly-Copper is based upon a literal reading of "to maintain production" as an open-ended obligation irrespective of the circumstances, irrespective of what

losses might occur and irrespective of the amount advanced. On this interpretation, Iscor would be obliged to fund indefinitely even if the operating company was running at a loss and continuing to do so. It would be absurd to regard the obligation as an indefinite or unlimited one. That was why it was conceded in the Court a quo that if Imcor Zinc encountered a situation where it was producing at a loss, Iscor would not be obliged to provide funds to enable it to continue to produce at a loss. In these circumstances, I am of the view that the Court a quo was quite correct in holding that the obligation to fund must be limited in some way: it cannot mean to fund regardless. Finally I should add that the phrase "and to maintain production" cannot be interpreted as if it appears in splendid isolation but must be interpreted in the context of the clause as a whole.

In the context referred to above, the qualification which must be made to the funding is to be found (as the Court a quo found) in the express terms of the clause itself which contemplates any further funding beyond the initial sum which the parties had in mind to be determined by a further mutual agreement.

Reliance was also placed upon clauses 9 and 10 of the shareholders agreement in support of the interpretation

which Moly-Copper sought to place upon clause 8(a).

Clause 9 provides that Imcor Zinc will sell the whole of its production to Zincor and is **nihil ad rem** on the funding obligations of Iscor. That clause obliges Imcor Zinc to sell the whole of the zinc concentrates produced from mining operations to Zincor at a price to be calculated in accordance with the particulars set out in Annexure A thereto. Zincor is not a party to the shareholders agreement. Iscor guarantees all the obligations of Zincor to Imcor Zinc: apart from the abovementioned guarantee Iscor incurs no obligations under clause 9, but in certan circumstances (referred to by counsel as the "cost plus 10% provisions") is given the <u>right</u> to <u>demand</u> that Imcor Zinc do what is set out in clause 9(d)A or to <u>request</u> Imcor Zinc in terms of clause 9(d)B to abandon minining operations in which latter event Imcor Zinc shall be obliged to offer its assets for sale to Moly-Copper upon certain terms and conditions. As will be seen from the above, clause 9 has nothing whatever to do with Iscor's funding obligations which are spelt out in clause 8(a) but affords certain rights to it and also to Moly-Copper but in the latter case only in the event of Iscor requesting Imcor Zinc to abandon mining operations. The learned Judge a quo was quite right in castigating the reliance on clause 9 as supporting the funding obligation as being "convoluted in the extreme".

Clause 10 is headed MINIMUM RENT AND DISTRIBUTION OF PROFITS.

Clause 10(a) provides for a minimum rent of 9% of sales to be paid to Moly-Copper monthly. Clause 10(b)(ii) and (iii) deal with the manner in which the profits are to be distributed. Clause 10(b)(ii) deals with the situation where there is a nett loss; in such case no dividend shall be payable and the loss shall be carried forward until liquidated and offset against profits or added to losses. Clause 10(c) provides for the sequence in which the cash resources of the operating company (Imcor Zinc) are to be applied. Clause 10(d) deals with interest while clause 10(c) provides that: -

> " *no loan shall be repayable to any party except in terms of this clause*".

I shall deal more fully with clause 10 when I deal with the question as to whether Iscor was entitled to call up its loan. For present purposes it is sufficient to say that it is clear from what I have set out above that clause 10 is dealing with what its heading proclaims, namely the payment of rent and the distribution of profits. In order to achieve its objective it establishes an accounting regime to ensure that the shareholders will receive dividends, after Moly-Copper's rental has been paid, in proportion to their shareholding. The clause has nothing whatever to do

with Iscor's obligations to fund. Those obligations are expressly spelt out in clause 8(a) of the agreement. It follows that the Court a quo was correct in rejecting the declaration sought in the first part of prayer (c) and the alternative thereto.

The next question is whether the learned Judge was correct in rejecting the second part of the declaration sought in prayer (c), namely that Iscor was precluded from calling up loans advanced by it to Imcor Zinc and its alternative prayer C(ii) namely "not entitled to call up its loan except to the extent that the First Respondent (Imcor Zinc) has cash resources available for this purpose." The learned Judge, quite correctly, held that the first part of the relief is far too wide: if the loan was never repayable it would not be a loan at all.

Let me say at once that in my view the loan is not repayable on demand for, if it were, R500 000 could be lent on one day and demanded back the next, which would hardly be a way of maintaining production; moreover it would be a breach of its fiduciary duty as a quasi-partner. But that is not the issue raised by the declarator sought nor is it the issue which arises on the facts of this case.

The case for the appellant on this part of the case is that, read as a whole and in the context of the agreement

as a whole, the effect of clause 10(e) is that Iscor's loans to Imcor Zinc can only be paid out of cash resources of the company and that it is not open to Iscor to call up its loans unless there are cash resources available to pay them.

I am unable to accede to this argument. Clause 10 deals with Imcor Zinc as a going concern and not in a winding-up situation. Firstly the heading of the Clause is significant: "Minimum Rent and Distribution of Profits (my underlining). The clause in terms deals with the manner in which the cash resources are to be distributed [clause 10(c)], before payment of dividends. The sequence is that they must first be used to pay the loan of R700 000 to Iscor, then the loans arranged in terms of clause 8(a) (which contemplates borrowings from a source or sources other than Iscor), then the amounts due to Moly-Copper and Lorelei in terms of clause 8(b) and 8(c) of the agreement. Thereafter the cash resources must be used to repay all other loans and only after all that has been done may dividends be paid.

Counsel for the appellant relied strongly on paragraph 10(e) which provides that:-

" *no loan shall be repayable to any party except in terms of this clause.*" but this clause is the clause dealing with the manner and order in which cash

resources are to be deployed. It has nothing to do with the situation where there are no cash resources or where the company is insolvent. In these circumstances, the clause does not, in my view, preclude Iscor from seeking repayment if there are no cash resources available.

The above interpretation of clause 10 is in accordance with that adopted by Hannah J. in the Court below. In my opinion, there is a further reason why this prayer must fail. The case for the appellant is that Iscor is precluded from obtaining payment if no cash resources are available. The loan by Iscor stands at about R40 million. Clause 8(a) contemplated a further mutual agreement which would deal with further sums advanced beyond the initial R500 000. Nothing is said about that agreement in the papers and its terms (if any) are unknown. The onus is upon the appellant to establish the basis upon which the R40 million was lent but the papers are silent on the topic. There is nothing in the papers to sugggest that that sum was lent subject to the condition that it was repayable only if these were cash resosurces available to pay it. Had such a case been made, Iscor might have been able to meet it on the facts. By failing to make such a case, Iscor was denied that opportunity.

I turn now to the declarator sought in prayer c(iii) namely

that Iscor is obliged either

> (aa) to provide sufficient funds to enable the First Respondent (Imcor Zinc) to maintain production at a minimum of 50 000 tons of ore per month

or

> (bb) to cause the First Respondent to abandon mining operations, in which event the provisions of clause 9(d)A of the prospecting agreement (as substituted) will be of application.

The learned Judge took the view that the relief claimed under prayer c(iii) was far too vague to warrant a declaration being made. I agree with the learned Judge that the declarator sought is without substance. In effect, the prayer asks the Court to hold that Iscor was obliged either to fund Imcor Zinc or oblige it to cease operations and hand over the mine to Moly-Copper. Reliance is placed on clause 9 for this relief.

But clause 9 imposes no such obligations upon Iscor. I have set out the effect of this clause earlier herein from which it is clear that the clause gives Iscor certain rights but does not impose any obligations upon it unless it exercises its rights. Iscor has never exercised the rights given to it by the clause and Imcor Zinc's obligation to offer the mine to Moly-Copper only arises upon the exercise by Iscor of its rights. The jurisdictional fact

which would trigger the obligation to offer the assets to Moly-Copper has never occurred.

The appellant's case is in no better shape with regard to the final declarator sought, namely (d): -

> " ***Declaring that in terms of the agreements entered into between the First Applicant (Moly-Copper) and the Second Respondent (Iscor) or their predecessors the cost plus provisions concerning Zincor are still binding and of force.***"

At no material time has there ever been a dispute between the parties as to the continued existence of the share-holders' agreement including the cost plus provisions. In these circumstances, the learned Judge quite rightly declined to grant this relief as it was a matter of academic interest only. In order for a declarator to be granted there must be dispute between the parties on the issue which the declaraor seeks to address. There is no such dispute. During the argument, it was suggested by counsel for the appellant that this Court should grant some (unspecified) amendment to prayer (d) and then consider granting the amended prayer. Both at the commencement of the hearing and during the hearing, amendments were sought and obtained to the relief claimed. Iscor took the point in argument that there was no dispute between the parties on the question which prayer (d) sought to address.

Despite that point being taken, there was no application before the Court a quo to amend prayer (d) and I can see no reason why we should give Moly-Copper three bites at the cherry.

Moly-Copper may feel aggrieved at the result of this case and the consequences thereof. But this Court is obliged to give effect to the expressed intention of the parties and the form of relief claimed.

In my judgment, the appeal must be dismissed with costs, including the costs consequent upon the employment of two counsel.

LEON, A.J.A.

MAHOMED C.J. :

DUMBUTSHENA A.J.A. :

DATE OF HEARING:	7 October 1994
DATE OF JUDGMENT:	8 December 1994
FOR THE APPELLANT:	R.L. Selvan S.C. (with him, D.H. Soggott S.C. and A.J. Kraut)
INSTRUCTED BY:	Diekmann Associates
FOR THE SECOND RESPONDENT:	S.A. Cilliers S.C. (with him, A-M. Engelbrecht)
INSTRUCTED BY:	Fisher, Quarmby and Pfeifer