

SOUTH AFRICA / JUDGMENT

Corbett v Minister of Justice and Others (6715/2012) [2013] ZAWCHC 28 (22 February 2013)

[2013] ZAWCHC 28

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

6715/2012

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THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 6715/2012

In the matter between:

JAMES

CORBETTApplicant

and

THE MINISTER OF JUSTICE1st

Respondent

STATION COMMANDER

(Cape Town Central Police Station)2nd

Respondent

JOHAN FRANCOIS VAN DER MERWE3rd

Respondent

JUDGEMENT:

22 FEBRUARY 2013 BOZALEK, J:

- [1] In April 2012 the applicant, an Australian citizen and qualified gemmologist, launched an urgent vindicatory application against the Minister of Justice and the Station Commander of Cape Town Central Police Station, as first and second respondents, for an order declaring him to be the owner of a certain light fancy brownish pink diamond (“the diamond”) alternatively declaring him a person entitled to take possession of the diamond in terms of s31 of the Criminal Procedure Act. He sought further an order compelling the respondents to *and over thp diamond to him on production of his passport and certain ancillary relief. When the matter first came before Court it was ordered that a Mr Johan Van Der Merwe, who had a competing claim to the diamond, be joined as third respondent. In due course the first and second respondents filed a notice abiding -the decision of the Court and the third respondent filed a set of opposing affidavits.
- [2] On 12 June 2012 the matter was postponed for the hearing of oral evidence on the following issues:
- (a) whether there was a valid underlying principal agreement of sale between applicant and third respondent;
 - (b) whether applicant had pledged the diamond to third respondent.

In due course over five days in December 2012 and January 2013 oral evidence was led by the parties and argument delivered.

THE PARTIES CASES AS MADE OUT IN THEIR AFFIDAVITS.

- [3] In his founding affidavit applicant explained that he was a licensed gem stone dealer from Australia who was visiting South Africa to acquire “fancy diamonds” for investment purposes and that he had purchased the diamond in August 2011 in Cape Town. He annexed the relevant invoice and valuation

certificate and described meeting a Mr Kenneth Haroun Ryan (“Ryan”) in Cape Town, who in September 2011, advised him that he knew someone who had a potential buyer for the diamond. This person turned out to be third respondent who telephonically advised the applicant that he had a prospective purchaser, a farmer from Bloemfontein, and that applicant should give the diamond to Ryan to hand to him (third respondent) for a period of one week to make a sale. The diamond was duly placed by applicant in the possession of third respondent via Ryan, At around the same time Ryan told applicant that he could purchase other diamonds from third respondent at a purchase price R130 000 which applicant duly advanced .to Ryan. In due course applicant was shown a parcel of uncut diamonds (“the parcel”) by Ryan which he rejected out of hand. Despite months passing and regular demands by applicant neither his diamond nor the R130 000 which he advanced to Ryan were returned

to him. Ryan eventually explained to him that he, Ryan, owed third respondent R130 000, that the monies which the applicant had advanced to Ryan had been consumed by his overdraft and that he, Ryan, had in fact given third respondent applicant’s diamond as security for his (Ryan’s) debt.

- [4] Applicant emphasised that Ryan and the third respondent were no more than his agents to sell the diamond against a commission on the purchase price, that it had been agreed that the diamond would be given to them for a period of one week whereafter it had to be returned to him and that there was never any question of a pledge.
- [5] Various negotiations took place between parties but they came to nothing. These included a meeting when applicant first met third respondent at a cafe in Table View on 2 December 2011. Applicant subsequently laid criminal charges with the police against third respondent and/or Ryan and engaged the services of private detectives who began working with the police.

This culminated in a swoop upon a hotel room on 29 March 2012 when the police confiscated the diamond from third respondent and took it into their custody where it has remained ever since. Armed with proof of his purchase of the diamond and its registration papers, the applicant sought to persuade the police to release the diamond to him as its lawful owner. They declined to do so, however, fearing civil action in view of third respondent's competing claim to the stone by virtue of the pledge he relied on. In an effort to break the stalemate applicant then brought the urgent application.

- [6] In his opposing affidavit third respondent stated that in conjunction with two partners he had concluded an agreement with applicant and Ryan in terms of which he sold them a parcel of precious stones for R250 000. This agreement had been preceded by a meeting between himself and Ryan who had been introduced to him by a broker named Gautier. Third respondent stated he was told that the purchasers would need two weeks to pay the sum of R250 000 and that, in return for the parcel, Ryan had handed him the diamond as security advising that it belonged to his partner, the applicant. At the same meeting third respondent had telephoned applicant to confirm that he would hold the diamond in pledge for two weeks. At the same time applicant had asked if third respondent could market the stone for sale. Some weeks later Ryan had paid him R15 000 in reduction of the purchase price owing but no further monies had been forthcoming. At the meeting at the cafe in Table View, which he stated took place on 9 December 2011, third respondent was told by applicant and Ryan that the latter was busy obtaining a loan against the security of his properties to pay the outstanding balance and this applicant confirmed telephonically with the person who has said to be arranging this transaction, a Mr Errol Nourse. Notwithstanding these promises no further monies had been paid to third respondent and he had continued to hold the diamond as security for the balance of the debt owing to him by applicant and Ryan.

- [7] Ryan also filed a supporting affidavit in which he confirmed in broad outline the third respondent's version of events but with some significant differences. Firstly, he stated that the parcel constituted "poorly cut diamonds", that although he had been offered them by the third respondent for R250 000, he had in turn offered them to the applicant for R300 000 and, thirdly, that the issue of the third respondent selling the diamond only arose a week after the latter took possession of the diamond.

REFERRAL TO ORAL EVIDENCE AND THE EVIDENCE HEARD

- [8] Because of the sharp dispute between the parties as to the existence of an underlying agreement and the pledge agreement the matter was referred to oral evidence on the two questions set out above. The third respondent appeared in person, testified on his own behalf and called four witnesses, namely, Ryan, his partners, Messrs Geldenhuys and Louw, and the broker, Gautier. The applicant also testified but called no witnesses.
- [9] The testimony of the third respondent's "partners", Messrs LM Geldenhuys and WJ Louw, added little if anything to his case. They had no direct dealings with the applicant or Ryan and received only hearsay reports from the third respondent as to his dealings with the applicant and Ryan. Louw, a farmer from Malmesbury, testified that in September 2011 he had paid the applicant R180 000 by way of investing in the purchase of a parcel of diamonds. To date he had received no repayment or dividends from the third respondent.
- [10] Mr RW Gautier, who described himself as a commodities broker, testified that at his role was limited to introducing Ryan to the third respondent in connection with a parcel of diamonds that the latter wished to sell. He testified that at the first meeting Ryan did not have the cash to pay for the parcel so he went off and later produced the diamond as collateral for payment of the purchase price. He testified that Ryan stated he was in partnership with the applicant and that a contract was drawn up recording the purchase and pledge which he, Gautier, countersigned as a witness. He confirmed a telephone call made by Ryan to the applicant in the course of which the third respondent spoke to the applicant. Gautier described the parcel as consisting of "poorly cut" stones. Under cross examination he stated that the written agreement was to the effect that Ryan would purchase the parcel for R250 000, that it would be given for a certain period and that the diamond would be given as collateral.
- [11] The third respondent testified that he learnt during 2011 that one can buy uncertified "half cut" or "badly cut" diamonds from various cutters and diamond dealers, have them cut and sell them at a better price. He discussed this with Geldenhuys who was knowledgeable about diamonds and learnt that one apparently does not need a licence to deal in semi and uncut diamonds. Geldenhuys introduced him to Louw who undertook to finance such a transaction. After obtaining money from Louw, the third respondent bought the parcel of half cut and badly cut diamonds and contacted Gautier. This led to him meeting the latter and Ryan at his house in Table View. A purchase price of R250 000 was agreed and Ryan took the parcel away to have it assessed by his own cutter. At a subsequent meeting Ryan told him that he had a partner, the applicant, and that they would like to buy the parcel at the agreed

sum. Ryan then gave him the diamond as a security for the purchase price since “they” did not have the cash available to pay the purchase price. He asked Ryan who the owner of diamond was and insisted that Ryan phone applicant who telephonically confirmed (to the third respondent) the purchase price of R250 000 for the parcel and that he, third respondent, could keep the diamond until they paid for the parcel. A short written agreement was drawn up recording the main elements of the transaction which he, Ryan and Gautier then signed. He had since mislaid that agreement. Some weeks later Ryan visited him again, paid him R15 000 in reduction on account of the purchase price and advised that applicant was interested in third respondent finding a buyer for the diamond at an asking price of R18.mil in which event he, third respondent, could take a 10% commission thereof. Third respondent was agreeable to this and through Ryan obtained the diamond’s certification. He thereafter made various enquiries but had learnt that the diamond was worth nowhere near its alleged value or asking price of R1.8mil of US\$15 000 - US\$18 000 per carat.

- [12] Regarding the meeting in Table View in early December 2011 with applicant and Ryan, third respondent stated that was where he first met applicant who advised that he and Ryan still did not have the money to pay for the parcel and a Mr Nourse had been instructed to register a bond over certain fixed property belonging to Ryan and out of the proceeds third respondent would be paid. According to third respondent the meeting was cordial. He had raised the question of further compensation for himself because he had been waiting three months for the purchase price and he had indicated that he would require R600 000 in total to which applicant responded that this was “blood money”. Some time after the meeting he received telephone calls from police officials regarding the diamond and was eventually lured under false pretences to a meeting at the Cape Sun Hotel where the police unexpectedly arrived and confiscated the diamond which he had brought to the meeting. Third respondent testified that he was an attorney but had been removed from the roll of practising attorneys in 2002 at his own request because he became addicted to drugs. He stated that he had one previous conviction for fraud but this was unrelated to his removal from the roll.
- [13] In the broadest possible terms Ryan confirmed the third respondent’s evidence stating that what had been purchased was a parcel of “poorly cut diamonds” and the conclusion of an agreement that third respondent would be paid a deposit and given the diamond as collateral for the shortfall.

Applicant had given him R120 000 towards the purchase price but he only paid third respondent R15 000 thereof because the balance of the monies had been absorbed by his overdraft when he deposited the monies into his account. As I understood his evidence, at least initially, Ryan should have paid the full sum of R120 000 to third respondent and for some time had hidden from applicant the fact that he had in effect used the balance of the monies for his own personal benefit. According to Ryan the agreed price of the parcel was R240 000 but he gave a price of R300 000 to applicant so that he could make R60 000 on the side. At the same time, however, he

described himself and the applicant as “partners’ in the purchase of the parcel although he, Ryan would make no payment towards the purchase price. He confirmed that a written agreement was drawn up by third respondent and signed by him but could not remember the details. As regards the diamond he stated that the applicant had given it to him as collateral for the balance of the purchase price. According to Ryan he had the parcel recut and polished and handed the stones to applicant. As far as he knew they were still in applicant’s possession. Between two weeks to a month after the diamond first came into the possession of third respondent the latter asked if the stone was for sale and after he, Ryan, made enquiries with applicant, permission was granted to third respondent to find a possible buyer. He confirmed the meeting at the coffee shop at a shopping centre in December 2011 as being the first occasion when applicant and third respondent met but testified that the applicant had changed his mind about selling the stone and was angry that the third respondent was still holding the stone as security against payment of the balance of the purchase price for the parcel.

[14] In cross examination Ryan insisted that the original purchase price for the parcel was R240 000, that the applicant had agreed to purchase it for R300 000 and that he (Ryan) had taken the diamond initially (for transmission to third respondent) as collateral for the purchase price for the parcel. He testified that applicant’s intention was to sell the parcel of stones in Australia. He conceded, however, that it was not feasible for the parcel to be sold in Australia within a week. An acknowledgment of receipt of the diamond signed by Ryan made in a notebook belonging to applicant was put to the witness.

He conceded signing it but stated that he had not read it properly. The witness was uncertain about the terms of the written agreement he claimed to have concluded with the third respondent. He was unable to remember the quantity or sizes of the stones in the parcel but claimed to have taken them to a diamond cutter. The witness could show no documentation relating to this parcel at all. Nor could he explain why in his initial affidavit they had made no mention of receiving the sum of R120 000 from applicant. He adopted the same view as third respondent concerning the distinction between partly or badly cut diamonds stating that these could be legally dealt with without a licence but conceded that his information concerning the Diamond Act was hearsay. The witness testified that the fact that he received the diamond from applicant confirmed that his version of events regarding the use to which it was put but was not able to state why this confirmed his version of a pledge as opposed to applicant’s version that it was handed over solely for the purposes of a possible sale. Ryan claimed to have intended to apply for a loan of R650 000 in the short term to renovate his house and to make payment of the monies owing to applicant but said that this was a loan and not a bond. Ryan also testified that he had a conviction in Namibia for illegal dealings in diamonds some 25 years previously.

[15] Applicant testified that he was an Australian citizen, a practising gemmologist, diamond grader and valuator and had a small

manufacturing business. He thus regarded himself as qualified both technically and practically in the field. He testified that he had bought the diamond in late August 2011 for R220 000 and around that time Ryan had approached him asking whether he would be interested in buying other

diamonds. Ryan stated he knew a licensed dealer in Table View, namely, third respondent, and required R130 000 to secure a parcel of diamonds. The applicant then loaned these monies to Ryan as a short term loan to secure the parcel and he had him sign for these monies. Ryan thereafter brought the parcel of stones which he as a gemmologist recognised as uncut diamonds. He described the parcel as “native crystals”. He did not purchase or take possession thereof at any stage as he could not use them and were of no value to him because there is no diamond cutting industry in Australia. The diamonds were, furthermore, of poor quality. At roughly the same time as applicant gave Ryan the R120 000 he also gave him the diamond in a separate transaction for a possible sale by third respondent. He had a single phone call with third respondent in which the latter confirmed that he had a buyer in the form of a farmer from Bloemfontein who was down in the Cape on honeymoon. The sale to the Bloemfontein farmer never eventuated and applicant was fobbed off with various stories by Ryan. He denied that there was ever a partnership between him and Ryan who, according to applicant, always acted on his own behalf.

[16] Applicant relied on an acknowledgment of receipt of the diamond signed by Ryan when the latter took possession of the stone. He testified that there was never any question of a pledge of the diamond, it being far too valuable to pledge as collateral even if he had contracted to purchase the parcel which he had not. He had pressed Ryan for the return of the monies loaned and eventually the latter admitted that the bulk of the monies had been taken by his bank. Ryan also later admitted that he had a problem with third respondent in that he owed him money. It emerged at the Bayside meeting that third respondent was holding the diamond in pledge in respect of the balance of the purchase price of the parcel which applicant considered to be Ryan's obligation. Applicant denied that there was ever a phone

conversation with third respondent during which he confirmed that he was pledging the diamond to third respondent. He confirmed that he had never purchased any precious stones in partnership with Ryan. Under cross examination applicant stated that he valued the diamond at approximately R1 million, and regarded it as a bargain which he had picked up.

[17] Applicant testified that he had been a policeman in Australia for 25 years. He emphasised that he had been party to none of the meetings at which the alleged agreement regarding a purchase of the parcel and pledging of the diamond had been discussed or agreed. During cross examination he produced the notebook containing the original of notes signed by Ryan relating to various transactions. Applicant expressed the view that he had probably been conned by Ryan and third respondent, working together. In re-examination he stated that the parcel were completely uncut with no facets.

[18] The above recounting of the evidence is no more than a summary of the main points and more important aspects of the evidence given by the various witnesses. The evidence and cross examination of the witnesses particularly that of applicant, third respondent and Ryan ranged far and wide and no good point would be served by giving even a broad outline of much of that evidence.

THE LAW

- [19] Applicant's ownership of the diamond was undisputed and was proved by the documentation which he put before the Court. Third respondent's defence to the relief sought was based upon a pledge, namely, a limited real right which one person acquires to another person's movable property in order to secure payment of a debt which is created by delivery of the movable object, pursuant to an agreement between the parties.¹
- [20] The creation of a pledge has two stages, the first being when the parties enter into a valid and binding pledge agreement in terms of which the pledgor agrees to secure a valid underlying principal debt by pledging his movable property to the pledgee. No formalities are prescribed for a pledge agreement. The second stage involves the delivery of the pledged object. See the Principles of the Law of Property in South Africa. Silberberg. What must be emphasised is that a valid underlying principal agreement is essentially to the validity of the pledge or, as it is put in Wille's Principles of South African Law, "a pledge is dependent upon and accessory to a valid principal obligation". See also *Kilburn v Estate Kilburn* 1931 (AD) 501.
- [21] Applying these principles to the present matter, for the pledge upon which third respondent relied to be valid there had to be a valid underlying agreement of sale which gave rise to the debt in respect of which third respondent claimed to hold the diamond as security by way of the pledge agreement.
- [22] The onus of proving these two elements, namely, the valid principal obligation and the pledge agreement clearly rested upon third respondent in accordance with the maxim that "he who asserts must prove".
- [23] The Diamonds Act, 56 of 1986, according to its preamble, provides for "control over the possession, the purchase and sale, the processing, the local beneficiation and the export of diamonds; and for matters connected therewith". In terms of s19 no person shall sell any unpolished diamond unless he/she is a producer, has manufactured that diamond (i.e. it is synthetic), is a dealer or is the holder of permit. Third respondent did not contend that he fell into any of these categories but testified that he was lawfully permitted to sell the parcel which he claimed to have sold to the partnership comprising Ryan and the applicant because the diamonds in question were half cut or badly cut and as such did not fall within the parameters of the Act.
- [24] The pivotal element in s 9 is that of "unpolished diamonds" which are defined in the Act as meaning:
- “(a) diamonds in their natural state, as they occur in deposits or extracts from the parent rock;
- (b) diamonds simply sawn, cleaved, bruited, 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;

...”

[25] All the descriptions given by third respondent and his witnesses were extremely vague i.e. “half cut” or “badly cut” stones. Applicant, whose technical qualifications in the field appeared to be by far the strongest, described them as uncut diamonds. Third respondent was unable to produce even one solitary document describing these diamonds or indicating their provenance or history.

His evidence about how he acquired the diamonds was similarly vague in the extreme. He testified that he only commenced his dealings in diamonds in mid-2011 and the expertise of his “partner” Louw was similarly limited but at times third respondent testified as if he had long been dealing in diamonds. In my view third respondent failed singularly to prove that the parcel which he allegedly sold to applicant and Ryan fell outside the definition of unpolished diamonds. The result is that any sale agreement relating thereto was illegal and a nullity and, there being no valid principal obligation, any purported pledge accessory thereto was invalid and as such constitutes no defence to the relief claimed by applicant. For these reasons alone, I consider that third respondent has made out no case for successfully opposing the relief sought by applicant.

[26] Erring on the side of caution I propose to consider the evidence on its merits i.e. on the assumption that if a sale agreement were concluded it amounted to a valid principal obligation. Two sharply diverging versions on whether there was in fact a valid sale agreement and a pledge were presented by applicant and third respondent respectively and a closer analysis of their evidence and the probabilities is necessary.

[27] I did not form a favourable impression of the evidence of third respondent. Although he purported to give evidence with some detail and certainty, when pressed in cross examination he was obliged to concede that he had erred in various dates which he had furnished regarding significant events. A striking feature of third respondent’s evidence was the complete lack of any documentation relating to either the transactions concerning the diamond or the parcel of diamonds he allegedly sold to Ryan and applicant. Given his background as an attorney and the value and the importance of the sale and pledge agreement one would have expected third respondent to have ensured that the document was not mislaid or, at the very least, that copies were available. Similarly, in regard to the parcel absolutely no documentation appears to exist verifying its existence let alone their quality, description, weight etc. It is barely conceivable that third respondent would part with a parcel which, according to his version was valued at R240 000, to

someone he had met for the first time and about whose background and record he knew little if anything i.e. Ryan.

[28] Then there is the matter of the sale of the pledged diamond. Here I gained the distinct impression that third respondent was tailoring his evidence to tie in, at least partly, with that of applicant. Applicant testified that third respondent told him that he had a potential purchaser for the stone in the form of a farmer from Bloemfontein who was down in the Cape on honeymoon. This evidence, coming from an Australian, bore a ring of authenticity. Third respondent testified that there was never any such prospective

purchaser and that he had told applicant that the diamond was safe with him because he, third respondent, was “a farmer from Bloemfontein”. This statement, one presumes, was intended to carry the overtone that a simple farm boy would behave honourably. In the next breath, however, no doubt realising that he was anything but a farmer from Bloemfontein, this evolved into the statement that third respondent was “born on a farm in Bloemfontein”, This cameo illustrated, in my view, third respondent’s penchant to invent or tailor his evidence as the situation demanded.

[29] Since there were no face to face dealings between third respondent and applicant until well after the sale and pledge agreements had, according to third respondent, been concluded and since applicant was represented at all prior material points by Ryan, his alleged partner, Ryan was a vital witness for third respondent. As regard Ryan’s credibility it would be no exaggeration to state that he was one of a handful of the worst witnesses to have ever testified before me. His evidence on vital aspects changed constantly and he had no difficulty in asserting that what he had sworn was the truth a few minutes before was, upon consideration of some further aspect, incorrect and that what was actually correct was something diametrically opposed.

[30] Ryan created an overwhelming impression of a witness who had absolutely no respect for the truth and would testify as to whatever

suited his case. His complete lack of business ethics was revealed by the fact that he misappropriated at least R105 000 from the applicant for his own purposes and did not disclose this until he was forced to do so. Yet a further indication of Ryan’s untrustworthiness was his simultaneous description of himself as a partner with applicant in the alleged purchase of the parcel but also as someone making a secret profit of R60 000 from his so-called partner by inflating the purchase price of the parcel. Ryan was the alleged middle man in taking possession of the parcel. He testified further that he had extensive dealings in having these stones recut but could not produce a single document in substantiation thereof nor give any meaningful detail of the description and number of the diamonds involved.

[31] On his own account Ryan retained certain of these diamond sold them and used the proceeds for his own account. Ultimately I conclude, absolutely no reliance can be placed upon Ryan’s evidence and he thus offers no support for third respondent’s account of events. In my view Ryan’s evidence can only be relied upon to the extent it is confirmed by credible evidence from another source. He can provide no independent corroboration of any of the disputed elements in the matter, namely, the alleged purchase of a parcel by himself and applicant from third respondent or the simultaneous pledge of the diamond in respect of

that underlying obligation.

[32] By contrast applicant's version of events was generally more credible and was supported in important aspects by contemporaneous

documentation. In the first place his testimony that he loaned the sum of R120 000 to Ryan, which sum was used by Ryan to purchase the parcel for his own account, is partly borne out by a series of entries in the applicant's pocket book which record Ryan as receiving payments of R10 000, R20 000, R40 000, R20 000, R22 000 and R8 000 i.e. totalling R120 000 between 31 August 2011 and by way of "short term loans" to be repaid within a week. Ryan was not able to dispute the validity of these notes or his signature thereon. More significantly Ryan was not able to dispute a note in the self-same notebook recording that he had taken the diamond, duly described, "on short term on week to return". This note ties in fully with applicant's evidence that he handed the stone to Ryan, for onward transmission to third respondent, for the purposes of a sale and not for the purposes of pledging it as security for the balance of any debt owing on the purchase of any parcel. It is highly improbable that, had applicant indeed parted with possession of the diamond for the purposes of pledging it as security that he would have had the far-sightedness to incorrectly describe in a written note the basis upon which the possession of the diamond was being given to Ryan.

[33] Importantly, it was Ryan's evidence that from the first moment that he took possession of the diamond it was for the purposes of handing it over pursuant to a pledge agreed to in effect between third respondent and applicant. There is a further aspect to this which casts doubt on Ryan's version and, by extension third respondent's, and that is the period of one week referred to in the relevant note. Ryan testified in explanation of this period that the underlying purpose was that the parcel would be purchased, cut or recut and then sold within Australia for a better price. In the light of the evidence, it is, however, inconceivable that this could all have taken place within a period of a week. This is a further factor rendering it highly improbable that applicant parted with possession of the diamond for the purpose of pledging it as security for any alleged underlying sale transaction.

[34] A further improbability in the version proffered by third respondent and Ryan relates to the manner in which the alleged underlying sale agreement and the pledge transaction were concluded. Although the diamond was owned by applicant and, according to Ryan, applicant was to have been solely responsible for the payment of the purchase price in respect of the parcel, he was completely absent from the meetings when the agreements were concluded and when the agreement allegedly recorded in writing. Furthermore, notwithstanding his qualification as a gemmologist, the applicant allegedly undertook to purchase the parcel without any proper evaluation of their quality or dimensions of the stones.

[35] After hearing all the oral evidence one is left with an unmistakable impression of all the actors in this matter operating in the grey and murky world of dealing in precious stones other than through established outlets and without holding any licence or formal

qualification. Third respondent and Ryan's previous criminal convictions are yet further indications of their dubious records as is the description of some of the actors as "commodity brokers", a term vague and general enough to lend respectability to any manner of activity. Nor is applicant totally exempt from these observations.

Although in South Africa for an extended period of time his main activity appeared to be the pursuit of "investment opportunities" in the form of the purchase of precious and semi-precious stones which pursuit landed him in a number of questionable if not life-threatening situations.

[36] There are, furthermore, unsatisfactory features to applicant's evidence, not least his evidence that he simply loaned the sum of R120 000 against no security to Ryan, someone with a questionable character and occupation, and with whom he had had limited previous experience, to "secure" a parcel for his (Ryan's) own account but which parcel Ryan immediately offered for sale to him. Furthermore, applicant's initial evidence suggested that this money was loaned overnight in order that Ryan could secure the parcel whereas it later transpired that the money had been loaned in instalments paid over a month. One is left with the uncomfortable feeling that none of the parties to these dealings have fully disclosed exactly what went on between them over the relevant period and attempts to establish a definitive account of what took place are doomed to failure.

[37] That said, on the available evidence applicant is the undisputed owner of the diamond which is the subject of these proceedings and his version that there was no underlying sale agreement nor any pledge agreement is much more credible (and indirectly supported by documentation) than the countervailing version put up by third respondent and Ryan. Inasmuch as third respondent bears the onus of proving the underlying sale agreement and a valid pledge agreement he has failed to do so and his grounds for opposing the relief sought cannot be upheld.

[38] It appears to be common cause that the criminal charges preferred by applicant against third respondent and/or Ryan have come to nothing or are *rforibund*. Applicant himself testified that he no longer wished to press the charges and, in those circumstances, it would appear that s31 (1)(a) of the Criminal Procedure Act, 51 of 1977 is applicable. It reads as follows:

"If no criminal proceedings are instituted in connection with any article referred to in section 30 (c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it. "

[39] As mentioned earlier, first and second and respondents, being the Minister of Justice and the Station Commander of the relevant police station where the diamond is being kept, abide the decision of the Court.

[40] In the result! consider that applicant has made out a case for the relief sought. As far as costs are concerned I can see no reason why applicant should not be awarded the costs of the proceedings.

[41] In the result the following order is made:

1. Applicant is declared to be the owner of the 4.6750, pear shaped, light fancy brownish pink diamond with clarity grade VS1 and

measurements of 14.53mm and 9.59mm x 5.78mm, held under EGL certificate number SA100809359 and to be the person who may lawfully

take possession of such diamond;

2. Compelling second respondent to hand over the aforesaid diamond to applicant upon satisfactory proof of his identity;
3. In the event of second respondent failing to do so the Sheriff is authorised to seize the said diamond and hand same over to applicant;
4. The third respondent is ordered to pay the costs of this application.

BOZALEK, J

JUDGE OF THE HIGH COURT

¹Lawsa Vol 17 (2) at para [406],

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