IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

CORAM: LE GRANGE, J

Case number: 21897/15

In the matter between:

BLASTRITE (PTY) LTD	Applicant

And

MINERAL SANDS RESOURCES (PTY) LTD	First Respondent
MINERAL COMMODITIES LTD	Second Respondent
GMA GARNET (PTY) LTD	Third Respondent
GARNET INTERNATIONAL RESOURCES (PTY) LTD	Fourth Respondent
MRC TRADING (AUST) (PTY) LTD	Fifth Respondent
TORMIN MINERAL SANDS (PTY) LTD	Sixth Respondent
STEENVAS TRADING CC	Seventh Respondent
PIETER STEENKAMP	Eighth Respondent
JOHAN ANTON STEENKAMP	Ninth Respondent

Judgment Delivered: 09 October 2015

LE GRANGE, J

Introduction:

[1] At the heart of this application for final relief is the interpretation of clause 10 of a confidentiality agreement concluded between the Applicant (Blastrite) and the First Respondent ("MSR") on 13 June 2008. The substratum of Blastrite's case is that clause 10 of the confidentiality agreement properly interpreted imposes an obligation, albeit a negative one, upon MSR preventing it from dealing with third parties, other than Blastrite, in regard to the discussion of ideas, plans, products, formulations, packaging, processes and operational arrangements relating to any potential garnet at a mineral sand mine ("the Tormin mine") about 400 km from Cape Town on the West Coast in respect of which MSR has registered mining rights.

[2] The terms of clause 10 upon which Blastrite relies records the following:

> *"Neither Party shall be under any obligation to accept any offer or proposal related to the Project. However, the Parties undertake to deal with each other exclusively in relation to Project and immediately advise the other Party in writing of any approach from a third party which may be construed as being associated with the Project".*

[3] In terms of the contract "Project" is defined as follows:

> *"the discussion and consideration by Blastrite and MSR of ideas, plans, projects, products, formulations, packaging, processes and operational arrangements relating to any potential garnet and or other abrasive media resource that may be present in or on the beach deposit located within the Tormin mineral sands prospect."*

[4] Blastrite initially sought interim relief on an urgent basis against the Respondents. At the hearing on 19 December 2014, Blastrite withdrew the interim Application and tendered the Respondents' costs. Blastrite on the same founding papers re-enrolled the matter for final relief and the matter was by agreement set-down for hearing on 25 and 26 February 2015.

[5] On 25 February 2015, at the commencement of the hearing, Blastrite made an Application that certain issues be referred to oral evidence as the Respondents denied material allegations made by it. According to Blastrite, after having regard to the papers filed on behalf of the Respondents, in particular that of MSR, the Second Respondent ("MCL") the Fifth Respondent ("MRC Trading") and the Sixth Respondent ("Tormin"), which were collectively termed the MCL parties, it came to realize there are reasonable grounds to doubt the correctness of the allegations made by the MCL parties. The main grounds upon which Blastrite relied for the referral to oral evidence were encapsulated in its final replying affidavit where the following was recorded: *"In*

regard to the circumstances in which clause 10 and the agreement came into being, there is a dispute about whether Blastrite offered confidential information and valuable know-how to MSR. In regard to the extent, manner and timing of the discharge by the parties of their obligations, there are disputes about when the parties discharge their obligations in terms of the agreement (whether in 2008 or that they still were exchanging confidential information in 2014). In regard to the subsequent conduct of the parties, there are disputes about the effect of the MOU [Memorandum of understanding] on the agreement, and whether Blastrite somehow has lost its clause 10 rights. In relation to the MOU, there is also an issue whether or not MSR is or was a subsidiary of MCL, an issue which cannot be resolved without oral evidence". It was also averred that the version of the MCL parties is contradicted by the Seventh to Ninth Respondents ("the Steenkamps"). The Application for referral to oral evidence was opposed by the Respondents. After having heard argument the following issues were referred to oral evidence, namely:

5.1 whether MSR and MCL intended to generate revenue from garnet at the time at which they first were approached by Blastrite in 2008, and at the time of the conclusion of the contract to which Blastrite and MSR are party in June 2008;

5.2 whether the rationale for clause 10 of the contract was that Blastrite was to commit significant resources to the project, in return for which MSR was to keep disclosure made to it by Blastrite in confidence, and refrain from dealing with third parties in relation to garnet;

5.3 when confidential information most recently was provided by Blastrite to MSR; and

5.4 whether MSR is a party to the MOU, or estopped from asserting that it is.

The Parties:

[6] Mr. Andrew Lashbrook ("Lashbrook"), the erstwhile Chief Executive Officer of Blastrite, deposed to the founding and replying affidavits on behalf of Blastrite. Lashbrook, in citing the parties, recorded that Blastrite is a private company with its registered office in Cape Town. The main business of Blastrite was indicated as being the manufacturing, processing and distribution of granular abrasives commodities and it was described as owning three mineral processing facilities in South Africa, which mostly supply shipping, construction, mining and other industries with its products.

[7] MSR is a private company and has its registered office in Cape Town. In the founding affidavit it was recorded that MSR is a South African registered subsidiary company of the Second Respondent and holding a portion of the mining rights to Tormin mine. Lashbrook until September 2014 was also a director of MSR. In the first replying affidavit, Blastrite altered its position and asserted that MSR is not a subsidiary of the Second Respondent. A dispute arose between the relevant parties as to whether MSR is indeed a subsidiary of the Second Respondent. As the issues *in casu* unravelled, the question whether MSR is indeed a subsidiary became one of the determinant issues for consideration and I will return to it.

[8] The Second Respondent is ("MCL") a company registered and incorporated in Australia and listed on the Australian Securities Exchange. The Third Respondent is GMA Garnet Proprietary Limited ("GMA") and registered and incorporated in Australia. The Fourth Respondent is Garnet International Resources Proprietary Limited ("Garnet International"). Garnet International is a company registered and incorporated in Australia. The Fifth Respondent is MRC Trading (Aust) Proprietary Limited ("MRC Trading") and registered and incorporated in Australia. The Sixth Respondent is Tormin Mineral Sands (Proprietary) Limited ("Tormin"), a private company with its offices in Cape Town. According to the Blastrite founding affidavit, Tormin is a wholly owned subsidiary of MSR and the holder of the remaining mining rights to the Tormin mine. Despite the distinct mining rights, Tormin is being

operated as one entity by MSR and Lashbrook was until September 2014 a director of Tormin.

[9] The Seventh Respondent is Steenvas Trading Close Corporation ("Steenvas"), a close corporation, in terms of the Close Corporations Act 69 of 1984, with its registered address in Vredendal, Western Cape. The Eighth Respondent is Pieter Steenkamp ("Steenkamp"), and is associated with the Seventh Respondent. The Ninth Respondent is Johan Anton Steenkamp, the sole member of Steenvas, and the father of Steenkamp.

[10] According to Blastrite no relief is sought against MCL, GMA, Garnet International, Tormin, Steenvas, or the Steenkamps. They are cited insofar as they have an interest in this matter.

The relief sought:

[11] Blastrite seeks final interdictory relief. In the notice of Motion, Blastrite sought, before amending its relief, *inter alia*, an order against MSR to not deal with any entity or person other than Blastrite in relation to the discussion and consideration of ideas, plans, projects, products, formulations, packaging, processes and operational arrangements relating to any potential garnet and or other abrasive media resource that may be present in or on the beach deposit located within the Tormin mineral sands project. Blastrite further sought an order that MSR may not renew the written

garnet off-take agreement to which MSR and MCL (as seller), and GMA or Tormin (as buyer), are party ("the GMA agreement") for the period 1 July 2015 to 30 June 2016 or thereafter.

[12] According to Blastrite's founding affidavit the Steenvas CC and Pieter Steenkamp were cited because MSR has mooted the sale of garnet from its Tormin mine to them.

[13] Blastrite, in its first Replying Affidavit, amended the initial relief it sought and records that it now seeks an interdict, firstly to prevent MSR from dealing with anyone other than Blastrite in relation to garnet extracted from Tormin, save that the Ninth Respondent would be entitled to remove 600 tons of heavy minerals from Tormin and, secondly, that MSR is prevented from renewing its agreement with GMA.

Counsel:

[14] Messrs. L Kuschke, SC assisted by R Patrick appeared for Blastrite. Messrs. P B Hodes, SC assisted by L C Kelly appeared for the First, Second, Fifth and Sixth Respondents, also referred to as the MCL parties. Messrs. I Jamie, SC assisted by B Studti appeared for the Third and Fourth Respondents. Messrs. M Seale and H Jansen van Rensburg appeared for the seventh, eighth and ninth Respondent ("the Steenkamps). Comprehensive heads of argument were filed by Counsel, including

supplementary notes after argument was heard. I wish to extend my gratitude to Counsel in this regard as it was of great assistance in preparing the judgment.

Evidence:

[15] Lashbrook was the only person who gave *viva voce* evidence. He was extensively cross-examined by counsel, in particular by Mr. Hodes who appeared for the MCL parties. It was only counsel for the Steenkamps who elected not to cross-examine Lashbrook. Mr. Victor Caruso ("Caruso"), the executive chairman of MCL and director of MSR, MRC Trading and Tormin, deposed to the answering affidavits on behalf of the MCL parties. Mr. Torsten Ketelsen ("Ketelsen"), as group managing director of GMA and Garnet International respectively deposed to the answering affidavit. The opposing affidavit of the Steenkamps was deposed to by Mr. Pieter-Lens Steenkamp, the Eighth Respondent.

The Defences

[16] The Respondents raised a number of defences and contended that notwithstanding the leading of oral evidence by Blastrite the relief sought is without merit and ought to be dismissed. The main defences raised *inter alia* are as follows. Firstly, that clause 10 of the confidentiality agreement does not confer the right of exclusivity as contended by Blastrite. Secondly, the commercial relationship between Blastrite and the MCL parties changed significantly from June 2008 in that Blastrite and the MCL parties negotiated and ultimately concluded a memorandum of

understanding ("MOU") on 6 August 2012. According to the MCL parties, GMA and Garnet International, clause 19 of the MOU is fatal to Blastrite's case as it provides that all prior agreements, which would include the confidentiality agreement, are superseded by the MOU. Thirdly, the Steenkamp Respondents contended they had pre-existing rights to the mineral resources of which Blastrite was fully aware before launching these proceedings, and despite Blastrite's partial recognition thereof in its amended relief, its pre- existing rights prohibit the granting of the final relief sought. Furthermore, Blastrite's application is a thinly-veiled attempt at engineering and enforcing a restraint of trade where none is justified. Lastly, according to the Steenkamps, the confidentiality agreement relied upon by Blastrite only prohibits the divulging of confidential information, if anything, and not trade in garnet with Third Parties.

Background to the mining rights:

[17] Before dealing with the affidavits of Blastrite and the *viva voce* evidence of Lashbrook it is perhaps convenient to state the background to the mining rights of MSR and Tormin that was not seriously challenged and as recorded by Caruso in his affidavits:

[18] MCL is an Australian public company and is listed on the Australian Securities Exchange under ASX Code- MRC. [In certain documents the Second Respondent is also referred to as MRC. For ease of reference I will remain with MCL as reference to the Second Respondent]. MCL is, through a wholly owned South African incorporated company, MRC Resources (Proprietary) Limited ("MRCR"), the legal and beneficial owner of 100 ordinary fully paid shares in the capital of MSR, representing 50% of the issued share capital of MSR. The other 50% is being owned by Blue Bantry Investments 255 (Proprietary) Limited ("Blue Bantry"), the Black Empowerment Partner of MCL in the Tormin project.

[19] MSR was granted a mining right WC 162 MR. Tormin Mineral Sands (Pty) Ltd (Tormin), a wholly –owned subsidiary of MSR, holds mining right WC 163 MR to the Tormin mine. In terms of its mining rights and the environmental management programme dated July 2007, MSR mines and processes heavy minerals which include zircon, ilmenite and rutile. By-products of the processing of heavy minerals include tailings and concentrates containing garnet, ilmenite and zircon. MSR and Tormin have therefore the sole right to mine and process heavy minerals and garnet from the Tormin project.

[20] Caruso described the rights of the Steenkamps as follows. In May 2003 Steenvas CC ("Steenvas Corporation") entered into a written agreement with MSR ("2003 Agreement") pursuant to which the parties agreed that:

20.1 MSR may apply for a mining licence in terms of which it would be entitled to mine in an area which is the subject of an existing mining right held by Steenvas Corporation;

20.2 the Steenvas Corporation would be entitled to continue the removal of up to 600 tons per annum of heavy minerals mined in an area between the high water mark and low water mark of the sea without paying any consideration therefor except the royalties payable on such heavy minerals to the Government of the Republic of South Africa; and

20.3 the Steenvas Corporation would have the *sole and exclusive right to extract and remove an amount of tailings containing garnet* from the MSR plant subject to MSR's environmental management plan.

[21] In September 2005 the Steenvas Corporation was converted into a private company, Steenvas Proprietary Limited ("Steenvas Company"). On 12 December 2006 MSR, the Steenvas Company and others entered into an addendum to the 2003 Agreement, updating and amend it ("the 2006 Agreement"). In particular it was agreed that:

21.1 MSR would acquire 100% of the issued share capital of the Steenvas Company;

21.2 MSR granted to Anton Steenkamp, the Ninth Respondent, the right to continue uninterruptedly and indefinitely thereafter to remove up to 600 tons of heavy minerals per annum without consideration; and

21.3 Anton Steenkamp would have the sole and exclusive right to extract and remove an amount of tailings containing garnet from the MSR plant to be established by MSR.

[22] On 27 November 2008 the Department of Minerals and Energy ("DME") converted the mining licence of the Steenvas Company in terms of item 7 of Schedule ll to the MPRDA (Mineral and Petroleum Resources Development Act 28 of 2002) into a mining right, which was registered on 12 October 2011. The name of the mining right holder was also changed from the Steenvas Company to Tormin.

[23] On 27 November 2008 the DME granted the MSR Mining Right.

[24] A legal opinion was also sought of the Steenkamps' rights in respect of the 2003 and 2006 Agreements between MSR and Tormin to remove up to 600 tons of heavy minerals per annum from the Tormin mine. According to the opinion the Steenkamps' rights in terms of the agreements were confirmed.

Testimony of Lashbrook:

[25] Lashbrook testified at length regarding the events leading up to the signing of the confidentiality agreement on behalf of Blastrite, the MOU and to certain subsequent conduct of the parties that ultimately resulted in Blastrite instituting these proceedings. Reference was also made to a multitude of e-mails and other correspondences between the relevant parties. The testimony of Lashbrook with reference to Blastrite's founding affidavit, briefly stated, was the following. Lashbrook was admitted in 1993 as an attorney. He soon left the legal profession to start his own business in the shoe manufacturing industry. He sold that business and joined Rand Merchant Bank as an investment Banker in mergers and acquisitions and worked there for approximately five years. Thereafter he was involved with other successful business ventures until he joined Blastrite in 2007. He confirmed the contents of the affidavits he deposed to in this matter. He confirmed Blastrite's dealings with MCL which began in 2008. According to Lashbrook, garnet is heavy mineral sand, commonly found amongst other valuable mineral sands such as zircon, rutile and ilmenite. He approached MSR as Blastrite needed a supply of garnet in the conduct of its business. According to Lashbrook at the time he approached them in

2008 MCL and Tormin considered garnet a by -product with no value. As a result MCL and Tormin had no plans at the time to extract garnet, produce a garnet concentrate and or to generate revenue from the garnet, although according to Lashbrook 'there were obvious synergies'. Lashbrook testified that Blastrite had the know-how of considerable value and facilities to produce a finished garnet product from garnet concentrate and the Tormin mine offered Blastrite the opportunity to source a garnet off-take from it.

[26] Blastrite and MSR concluded the confidentiality agreement on 13 June 2008. Blastrite was represented by Lashbrook and MSR by John Barnes ("Barnes") – the general manager of MCL's interests in South Africa at the time, in concluding the agreement. According to Lashbrook the rationale for the agreement was that Blastrite would make available to MSR its expertise in yielding a revenue stream from the garnet. Blastrite anticipated committing significant resources to the project, for the prospect of the garnet off-take. Blastrite, in return for its commitments, required the assurance that MSR, at the very least, would keep disclosures made to it in confidence, would not make the garnet off-take available to any other person, and for a period of five years after the agreement had been terminated for any reason.

[27] Lashbrook testified that after the conclusion of the confidentiality agreement, further discussions and negotiations of potential opportunities took place between the parties. Nothing concrete came of these discussions. Lashbrook also referred to

an e-mail he forwarded on 9 July 2009 to Steemsen of the MCL parties about concerns that unlawful mining activities were occurring at Tormin mine and recorded in the email [letter] that he wanted to protect Blastrite's position in the garnet industry and make sure no one else obtained garnet in priority to Blastrite. He further referred to a proposal whereby Blastrite wanted to acquire the Tormin mine from the MCL parties via an entity referred to as NewCo. The NewCo discussions collapsed during 2010 when Lashbrook was advised by Caruso that the deal was not acceptable and there would be no need to engage on the issue further.

[28] In November 2010, however, MCL accepted a proposal from Blastrite to project manage the permitting process for the Tormin mine. Blastrite assumed management of this aspect of the project in January 2011, and obtained the necessary regulatory approvals for the Tormin mine in August 2012. This resulted in Blastrite, represented by Lashbrook, and MCL, represented by Peter Torre, concluding a written memorandum of understanding on 6 August 2012 ("the MOU") to regulate the next stage of their relationship. According to Lashbrook the MOU was intended to be a precursor to a comprehensive written agreement in terms of which MSR would supply garnet emanating from the Tormin mine to Blastrite exclusively. Lashbrook stated that in obtaining the regulatory approvals for the Tormin nine, the board of MCL had appointed him as Chief Executive of MCL in late 2012. According to him until he became executive there was never any direct relationship between Blastrite and any of the MCL`s subsidiaries. He further stated that he played a leading

role in raising the necessary capital to develop the project and, with the Blastrite team, managed the construction of the mine in 2013.

[29] According to Lashbrook the MOU provided that it lapsed on 11 September 2013 unless otherwise agreed and given the focus at that time was on the construction of the Tormin mine, the parties indeed agreed otherwise. Lashbrook stated the parties continued, after 11 September 2013, in the same manner in which they previously had done, tacitly extending the period of the MOU and continued to negotiate comprehensive written agreements well into 2014. Lashbrook states that at the official opening of Tormin on 21 March 2014 Caruso confirmed to the chair of Blastrite, John Haldane, that "the garnet is yours". According to Lashbrook, Blastrite had no doubt that the conclusion of a comprehensive written agreement, conforming to the provisions of the MOU, would be a mere formality. However, negotiations, to conclude a comprehensive written agreement dealing with the supply of garnet to Blastrite, shortly thereafter, came to an impasse. Lashbrook in the founding affidavit recorded that the main reason for this impasse was that MCL and or MSR proposed terms that did not conform to the MOU, such as those terms to do with limitations on the term of the agreement, and an annual re-negotiation on key elements, including the sale price of the garnet. As these terms did not conform to the MOU, Blastrite was unwilling to accept them and Lashbrook on 4 July 2014 at a meeting in Cape Town withdrew all offers in relation to the purchase of garnet concentrate.

Lashbrook testified that he first became aware of the MCL parties' intention to conclude the GMA agreement on or about 26 June 2014.

[30] In the founding affidavit Lashbrook attached an organogram of the company structure of MCL and stated that MSR is a subsidiary of MCL. This was done with reference to the resolution by Blastrite to institute legal proceedings against MCL and all its subsidiaries. Blastrite in its first replying affidavit changed its position and in paragraph 29.3 records that *"MSR is not named in the MOU as a party. Nor does the reference to subsidiaries include reference to it. It is not a subsidiary of MCL, because it is only 50% owned by MCL's subsidiary MRC Resources, and is only 50% controlled by the MCL parties."*

[31] Lashbrook, to affirm the contention that MSR was not a party to the MOU, also made reference to discovered documents by the MCL parties which illustrate that the shareholders' agreement, which gave MRCR control of MSR, was only concluded on 26 September 2014, after the conclusion of the MOU and that MSR registered its Memorandum of Incorporation after the signature of the MOU.

[32] Lashbrook further attested that, in April 2014, MCL and MSR became aware that heavy minerals can be exported via the Saldanha Port in South Africa whereas previously the garnet concentrate needed to be processed in South Africa at a process plant such as Blastrite. Furthermore, Blastrite found out that on 14 July 2014

MCL and its subsidiary company MRC Trading had concluded the GMA agreement with GMA and or Garnet International. The agreement is a non-exclusive supply agreement of garnet, as it makes provision for the supply of 60 000 tons of the product to Blastrite.

[33] Lashbrook also gave evidence regarding a letter written by the MCL parties' attorneys, Hogan and Lovells, on 26 November 2014. According to Lashbrook, Blastrite understood from the letter that MSR was not a party to the MOU and this resulted in Blastrite not bringing a winding up application against MSR and MRCR. Lashbrook further testified that Blastrite suffered prejudice in that it has thus far spent millions of rand in legal fees.

[34] Lashbrook further gave evidence that a marketing agreement was concluded to give effect to the sale of MSR's garnet concentrate by MRC Trading pursuant to the GMA agreement and that Tormin is a party to the marketing agreement. Lashbrook also stated that in early December 2014 he was informed by Pieter Steenkamp that the Steenkamps and or Steenvas would acquire the right to 1000 tons per month of garnet concentrate from MSR.

[35] In the founding affidavit, Lashbrook recorded that there had been breach of clause 10 of the agreement in that "*..MSR has not dealt with Blastrite exclusively.*

MSR did not advise Blastrite in writing when it was approached by GMA and or Garnet International, or Steenvas and or the Steenkamps."

[36] In cross- examination a number of e-mails and other correspondence between the MCL parties and Blastrite were shown and put to Lashbrook to, *inter alia*, demonstrate: firstly, that MSR is for all intent and purposes a subsidiary of MCL Trading; and secondly, that the factual matrix within which the confidentiality agreement was concluded was with the purpose of protecting MSR's confidential information whilst Blastrite and MSR explored the possibility of a future commercial relationship; and, finally, that Blastrite, prior to the launch of this application, gave no consideration to the right of exclusivity but believed it had a claim that was enforceable against the MCL parties under the MOU, until it consulted with its legal representatives when it was established that it had no rights under the MOU.

[37] Lashbrook drafted the confidentiality agreement and signed it on behalf of Blastrite. In cross-examination he confirmed that as an ex-investment banker and a trained lawyer he was 'acutely aware of public sensitive information'. He further confirmed that the confidentiality agreement was prepared in order to progress forward and that sensitive public information regarding studies in terms of the assessment of garnet, products and production techniques of MSR needed to be protected. Lashbrook was also cross-examined regarding an e-mail he wrote in his capacity as CEO of Blastrite to Barnes of MSR in April 2008. In this e-mail the

confidentiality agreement was attached for signature, and the following was recorded by Lashbrook:

> *"..As a bit of background, I have made the document quite tight and legalistic on the basis that MSR forms part of a larger, listed entity and that it would therefore be more important to carefully safeguard any information previously divulged to us or may be provided to us through visits to the beach or through discussions with Batemans, etc. The major rationale for the document in its current form is therefore my best effort to ensure that you and MSR feel you are protected than any other devious intention of mine."*

[38] Lashbrook confirmed that pursuant to the abovementioned e-mail, on 3 June 2008 (prior to the conclusion of the confidentiality agreement), Blastrite's Chairperson, John Haldane, e-mailed Caruso of MCL in relation to the confidentiality agreement and referred to the need of a feasibility study and formal testing of a sample at the Tormin mine. Haldane also stated that Blastrite was *"keen to enter into a formal agreement with you on a win–win situation for the mining, processing and marketing of Garnet abrasives purposes'*. He further confirmed that Caruso responded in a follow-up e-mail on 4 June 2008 wherein it was recorded that only upon the conclusion of the confidentiality agreement would a report of a company named RSV, who did work for the MCL parties, be released to Blastrite in order to

"..understand the processing objectives and deliverables with a view to present a proposal to process this material.'

[39] It was further conceded by Lashbrook that pursuant to the conclusion of the confidentiality agreement on 13 June 2008, the MCL parties released various expert reports to Blastrite for consideration, which included, amongst others, the feasibility study report by Batemans in respect of the Tormin Project and information from a firm named MSP Engineering.

[40] Lashbrook was also cross-examined regarding correspondence between Blastrite and the MCL parties that had taken place, since August 2010, including correspondence prior to the launch of the application. In these e-mails which largely emanates from Blastrite no assertion or reliance was placed by Blastrite on the confidentiality agreement and the purported right to exclusivity. In this regard various correspondences were put to Lashbrook. Reference was made to an e-mail of 13 August 2010 wherein Blastrite offered certain services to MCL after establishing MCL intended to develop the Tormin mine. An email on 9 June 2014 was delivered, when Blastrite discovered that the MCL parties were negotiating the terms of a garnet off-take agreement with GMA. In this letter Blastrite recorded *inter alia* that it was their wish and objective to acquire all the garnet and attempted to compete with the pricing offered by GMA for the garnet product, and it tried to negotiate an outcome in terms of which it might purchase garnet from MCL in conjunction with

GMA. Lashbrook also conceded that as early as April 2014 he had been involved in discussions with the MCL parties regarding their intention to conclude a garnet off-take agreement with GMA. In an e-mail on 30 June 2014 Blastrite delivered a formally purported "without prejudice" letter regarding the garnet concentrate off-take. In this letter Blastrite highlighted the agreement as enshrined in the MOU. Similarly, on 19 August 2014 Lashbrook wrote a letter to the board of directors of MCL as a result of the conflict that had developed between MCL and Blastrite. In the letter it was recorded that any claim Blastrite may have against the MCL parties derived from the MOU.

[41] Lashbrook responded in different ways as to why no reference was made in the abovementioned correspondence to Blastrite's right to exclusivity. In one instance he replied that the letter to MCL's board of directors was to provide them with evidence that the economics did not necessarily stand in GMA's favour. In another instance he responded that the confidentiality agreement was not a living document in the way the MOU was between the parties. Lashbrook conceded that he understood Blastrite had rights under the MOU against the MCL parties and although the confidentiality agreement was taken to Blastrite's attorneys before the litigation it was not the one "he spoke about first". He also accepted a proposition put to him by Mr. Hodes that if he knew Blastrite had exclusive rights under the confidentiality agreement he would have said so.

[42] In cross-examination, Lashbrook accepted that he could not say whether Caruso was aware that garnet had value in 2008 or before, as he only met Caruso after the conclusion of the confidentiality agreement. He also conceded that Greg Steemson ("Steemson"), a geologist, who was involved with MSR, must have known that garnet could have value and could be used. Lashbrook further conceded that prior to entering into the confidentiality agreement, and by implication during the discussions which preceded it, with reference to an e-mail from Haldane dated 21 January 2008 to Barnes of MSR wherein it was recorded that, "*we need to get cracking with the 'garnet for abrasives' feasibility study"*, the understanding between Blastrite and the MCL parties must have been that the garnet had value. Lashbrook further conceded that when the confidentiality agreement was concluded the personnel of MSR was aware that garnet was present on the beach area.

[43] Lashbrook was also confronted in cross-examination with Blastrite's changed position in its replying affidavits where it is recorded that MSR is not a subsidiary of MCL and therefore not a party to the MOU. Lashbrook conceded in cross-examination that at all material time the MCL parties had managing responsibility for MSR. Lashbrook further confirmed that MCL was entitled to appoint half of the four directors of MSR and nominate the chairperson, who does have to a casting vote. Lashbrook accepted that as a director of MSR he signed its annual financial statement ending 31 December 2011 and therein it is recorded that MCL is the ultimate holding company of MSR. He further agreed that by signing as director of

MSR, readers of the annual financial statement will accept that he is confirming that MSR is a subsidiary of MRCR and that MCL is the ultimate holding company. Lashbrook also conceded that post August 2012 he considered MSR to be a subsidiary of MCL. Lashbrook further confirmed in a document dated 31 July 2013 which he had an input in crafting that MSR is referred to as a subsidiary of MCL. He accepted that in the document he and Caruso were telling the truth to the investing public in stating that MSR is a subsidiary of MCL. Lashbrook further conceded the attorneys Bowman and Gilfillan in October 2013 drafted a management agreement on his instructions and therein it is recorded that the MOU was concluded between MCL, which is the parent company of MSR, and Blastrite. Lashbrook also suggested that at the time of signing the MOU "in common parlance" it was understood that MSR is a subsidiary of MCL. Lashbrook was also referred to an e-mail dated 15 May 2014 regarding funding which he forwarded to the financial controller and financial director of MCL wherein he recorded that *'MRC controls MRCR 100% and by agreement (Shareholders, MOI and Mining Agreement), controls MSR"*. Lashbrook confirmed he meant what he recorded in the e-mail. He further confirmed that he understood the difference between share-ownership and control and understood that MCL had effective control of MSR.

[44] Lashbrook further testified in cross-examination that it was under advice of his attorneys that he had come to the conclusion that MSR was not a subsidiary of MCL. Moreover, at some stage shortly before the MOU was concluded, a discussion

between Torre, Caruso and himself took place where Torre made it clear that under no circumstances should MSR be a party to the MOU.

[45] In re-examination, Counsel pointed Lashbrook to three documents emanating from MCL for the proposition that the garnet was exclusively Blastrite's. The first document was MCL's half- year financial report of 30 June 2013. Under the heading 'Offtake Agreement' the following was recorded, 'As, previously reported, the Garnet concentrate will be sold to Blastrite for secondary treatment'. The second document was MCL's annual report of 2013 where under the heading 'Directors Report' the following was recorded, 'Delivery of the Garnet concentrate to Blastrite will commence in the first half of 2014 under the terms of the offtake agreement.' The third document related to MCL's annual general meeting in May 2014, where under the heading 'Sales and Marketing' the following was recorded. 'MRC will sell garnet concentrate to Blastrite for secondary treatment. Sale of garnet concentrate to Blastrite commenced in February 2014'.

[46] The evidence of Caruso, as recorded in the affidavits, briefly stated are the following: MSR and Blastrite had been in various non-binding and informal discussions in relation to the Tormin mineral sands project leading up to the confidentiality agreement in 2008. Furthermore, MSR was not in a position, directly or indirectly, to offer Blastrite or any other third party any rights to garnet product because although MSR had a mining right it did not have the environmental

management plan ("EMP") or the regulatory approvals to enable it to commence the development of the Tormin mineral sands project. Moreover, MSR at that time did not have the rights to extract garnet and did not require any local expertise or infrastructure to extract garnet and produce a garnet concentrate. According to Caruso the purpose of the confidentiality agreement was not to impose any restrictions on MSR's rights to deal with any third parties in relation to possible garnet, but to ensure that the parties dealt with each other exclusively in discussing and considering ideas, plans, products, formulations, packaging, processes and operational arrangements relating to any potential garnet. Furthermore, the purpose of the confidentiality agreement was solely to protect the confidential nature of the information provided to Blastrite by MSR in the consideration and discussion of ideas, proposals and processes in relation to any potential garnet or other abrasive media resources that may be present on the beach at the Tormin mine project.

[47] Caruso also stated that when MSR concluded the confidentiality agreement the personnel of MCL were also aware that there was garnet on the beach at Tormin.

[48] Caruso further recorded that MSR is a party to the MOU and was correctly cited in the founding affidavit. Furthermore, the MOU would be unworkable without the obligation of MSR to undertake certain matters referred to in the MOU. As such the confidentiality agreement was cancelled by clause 19 of the MOU.

[49] In the answering affidavit filed by Ketelsen, the relief sought by Blastrite was opposed on the basis that clause 10 of the confidentiality agreement properly interpreted does not support the relief sought. Moreover, even if it is capable of the meaning suggested by Blastrite, the confidentiality agreement was superseded by the MOU and or cancelled thereby.

[50] The Steenkamps in their opposing affidavit questioned Lashbrook's bona fides. The Steenkamps aver that Lashbrook is disingenuous to suggest in the founding affidavit that he only became aware on 3 December 2014 that they were about to sign an agreement with MSR. According to the Steenkamps Lashbrook has known long before December 2014 about their pre-existing rights to in relation to the Tormin mine and Garnet from MSR. In fact, according to the Steenkamps in terms of their rights, Blastrite at times has delivered Garnet Concentrate to them on behalf of MSR in fulfillment of MSR's obligation and during 2014 delivered between 20 and 30 tons of Garnet to them. The Steenkamps further aver that Lashbrook was personally involved long before December 2014 in extensive negotiations with the Steenkamps in relation to their mineral rights at Tormin mine. In so doing he was acting for both Blastrite and for MSR whilst employed by both companies. The Steenkamps also requested a punitive costs order against Blastrite due to the lack of candour displayed by Lashbrook.

[51] In the replying affidavits Lashbrook recorded that there are conflicting legal opinions as to the nature and extent of the Steenkamps rights. According to him the issues are complex and the Steenkamps rights remain uncertain. Lashbrook testified he indeed proposed a course that would have achieved certainty. Moreover, he is adamant that it is impermissible to permit MSR and the Steenkamps to achieve certainty in a manner that breaches the exclusivity obligation.

Argument:

[52] Blastrite's counsel argued that Lashbrook was a credible and reliable witness, withstanding the intimidating cross-examination by counsel for the MCL parties. There was also the suggestion that in certain instances counsel for the MCL parties overstepped the mark in cross-examination and treated Lashbrook unfairly. Counsel argued that the evidence advanced by Blastrite demonstrates that all four issues referred to oral evidence should be decided in its favour; particularly in the light of all relevant and admissible context including the circumstances in which the confidentiality agreement came into being. Moreover, the *quid pro quo* agreed upon by Blastrite and MSR was such that for everything that Blastrite has done, MSR undertook to deal exclusively with Blastrite in relation to the project, which effectively covered the broad scope of activities required to bring the mine to the point at which it was possible for MSR to monetize garnet. Mr. Kuschke also referred to a letter by Caruso in March 2014 to Lashbrook, wherein Caruso records that *'I am also required to notify you as to when effectively Garnet is available',* to give

credence to the argument that it could only be in reference to the confidentiality agreement. It was further argued that instead of MSR dealing exclusively with Blastrite it concluded an agreement with GMA, and the offer by MSR to Blastrite to meet the GMA terms after it started to deal with GMA manifestly discloses the breach. Moreover, Blastrite enjoys prior rights that cannot be trumped by the GMA agreement. In respect of the Steenkamps, Mr Kuschke argued there is no basis to disbelieve Lashbrook's version about the existence and extent of the Steenkamps' rights as the latter's counsel failed to cross-examine Lashbrook on these points and such evidence must accordingly be accepted by this Court. Moreover, the exclusivity for which Blastrite contends does not require it to disclose a protectable interest as a result of the order it seeks. It was also argued that the matter falls not to be decided on analogy with restrain cases. Furthermore, Blastrite indeed disclosed a business interest as referred to in Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) at para 40, and by doing so contends for an interpretation of clause 10 that is business-like and legally cognizable.

[53] Counsel for the MCL parties had an entirely different view on Lashbrooke. According to Mr. Hodes he was an unreliable and an unimpressive witness and was rightfully subjected to robust but fair cross-examination. According to him Lashbrook conceded that Blastrite, until it consulted its lawyers and prior to the launch of these proceedings, gave no consideration to the right of exclusivity for which it now contends. He argued that the factual matrix relating to the negotiations and

conclusion of the confidentiality agreement clearly demonstrates that the agreement did not confer on Blastrite the right to restrain MSR from dealing with third parties in relation to garnet at the Tormin mine. Furthermore, none of the four issues referred to oral evidence are relevant to the interpretation of clause 10 of the confidentiality agreement and the oral evidence tendered by Lashbrook rather served to reinforce why Blastrite's application must fail. It was also argued that Blastrite's belated reliance on the Everfresh case supra is misplaced.

[54] Mr. Jamie's principal submission was that Blastrite failed to establish it has a contractual right to justify the relief sought in paragraph 3 of the Notice of Motion for the following reasons. First, the confidentiality agreement was superseded by the MOU. Secondly, clause 10 does not support Blastrite's interpretation. Thirdly, even if clause 10 was capable of the interpretation sought by Blastrite, its scope is limited to only *"any potential garnet and or abrasive media resource.. within the Tormin mineral sands prospect";* whereas the GMA agreement to which paragraph 3 of the Notice of Motion applies provides for the sale of heavy mineral concentrate which not only includes garnet, but also other minerals. Lastly, the confidentiality agreement is at best no more than an agreement to negotiate because of the absolute discretion vested in the parties to agree or disagree.

[55] Mr. Seale argued that the evidence led by Blastrite on the four issues referred to oral evidence has done nothing to salvage the merits of Blastrite's application. According to him Blastrite conceded in reducing the ambit of its original prayer that the Steenkamps have pre-existing rights to the mineral resources at the Tormin mine, but inexplicably failed to take into account the full rights of the Steenkamps in terms of the 2003 and 2006 agreements between Steenvas and MSR wherein it is recorded that Steenkamp will have the sole and exclusive right to extract and remove an amount of garnet tailings containing garnet from the MSR plant. It was further contended that the confidentiality agreement does not prohibit trade but only the divulging of confidential information. Moreover, Blastrite failed to identify the confidential information which it purportedly disclosed under the confidentiality agreement in its founding affidavit and oral evidence that is worthy of protection in law. Furthermore, Lashbrook's evidence indicates that the information he gave during negotiations for garnet off-take was to the MCL parties and not to MSR. Moreover, Lashbrook failed to establish that the information given meets the requirements in law for it to be regarded as confidential as formulated in Experian SA v Haynes 2013 (1) SA 135 (GSJ) at 141 para [19] and other cases referred to therein.

<u>The approach regarding interpretation of contractual provisions:</u>

[56] The current approach to be adopted in interpreting contractual provisions and or documents has been pronounced upon by our Higher Courts in recent judgments.

In this regard see *KPMG Chartered Accountants (SA) & Another v Securefin Ltd* 2009 (4) SA 399 (SCA) at 409 para [39]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603 para [18] and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at 499 para [12].

[57] In the *Bothma* case supra at para 12, Wallis JA sums it up as follows:

> *'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.*

[58] In the present instance, given the fact that four issues were referred to oral evidence, it is also necessary to consider the approach to be adopted where evidence is led in matters of this nature. In KPMG supra at 409 para [39] the Court articulated four principles that are relevant to the leading of oral evidence to ascertain the meaning of a document. One, 'the integration (or parol evidence) rule remains part

of our law... If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning'. Secondly, 'interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses'. Thirdly, "the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent'. Fourthly," to the extent that evidence may be admissible to contextualize the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it conservatively as possible'."

[59] It is also settled law that where a matter is referred to oral evidence on limited issues, the affidavits filed of record stand as evidence, save to the extent that they deal with dispute(s) of fact referred to oral evidence. Accordingly all of the disputed issues other than those referred to oral evidence fall to be decided in accordance with the ordinary principles applicable to final relief sought by way of motion proceedings. In this regard see *Lekup Prop Co NO 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at 258 para [32]; *Trend Finance (Pty) Ltd & Another v Commissioner for SARS & Another* [2005] 4 All SA 657 (C) at 667 para [25].

Discussion:

[60] *In casu*, apart from the four issues referred to oral evidence, there are fundamentally two key issues for consideration in the present instance. The first is

the extent of the clause 10 obligation. The second is whether the clause 10 obligation remains extant. The relevance and importance of the second issue arises from the fact that the Respondents raised the effect of clause 19 of the MOU in opposition to Blastrite's claim. If it is determined that MSR is a subsidiary of MCL, and Blastrite failed to establish the requirements for estoppel, then it follows that clause 19 extinguishes the confidentiality agreement and with it Blastrite's purported right of exclusivity. Clause 19 reads as follows: *"19. **Supercession** (sic) – This agreement supercedes (sic) and cancels all previous agreements, understandings or arrangements, oral or written between the two parties referring to the Tormin project".*

[61] The issue whether MSR is a party to the MOU, or estopped from asserting that it is, has generated much debate in this matter. Although these are important considerations, the interpretation of clause 10 remains the ultimate issue for determination and will I deal with it firstly.

[62] In applying the stated principles and approach to the interpreting provisions at hand the starting point remains the words of the document. However, the process of interpretation does not stop at a perceived literal meaning of those words but remains one unitary exercise taking into account the relevant and admissible context, including the circumstances in which the document came into being.

[63] There was a suggestion by counsel for Blastrite that Lashbrook was on occasions subjected to hectoring cross-examination, treated unfairly and that his evidence should be 'assessed in that light'. I certainly did not get the impression that Lashbrook was intimidated or badgered in the manner in which he was cross-examined. Lashbrook was indeed subjected to robust cross-examination but was given ample opportunity to give his evidence. He confidently answered the questions put to him. Counsel for Blastrite, where necessary, objected to questions that may have been put unfairly to him. In my view there is no need to evaluate his evidence in a different manner.

[64] Lashbrook, however, after being exposed to cross-examination made material concessions on more than one occasion that made Blastrite's case fundamentally less plausible. He also contradicted himself in the founding affidavit and his evidence in chief. In this regard the following evidence of Lashbrook is relevant. He conceded the confidentiality agreement was entered into between MSR and Blastrite in order to progress forward; and that sensitive public information regarding studies in terms of the assessment of garnet, products and production techniques of MSR needed to be protected. In the e-mail of 4 April 2008, to which the confidentiality agreement was attached, and which was forwarded to Barnes of MSR for signature, Lashbrook, who drafted the agreement, confirmed the purpose of the agreement was as recorded in the mail. Therein, Lashbrook recorded the importance of safeguarding any information MSR may have provided to Blastrite. Moreover, he recorded that the

major rationale for the confidentiality agreement was to ensure MSR feels protected. This version materially contradicts the allegation in the founding affidavit wherein Lashbrook records the rationale for the confidentiality agreement as being *"that Blastrite would make its expertise in yielding a revenue stream from garnet available to MSR"*.

[65] On 3 June 2008, Haldane of Blastrite sent an e-mail to Caruso attaching the confidentiality agreement. In the e-mail Haldane made reference to the need of a feasibility study and formal testing of a sample at the Tormin mine. Soon thereafter Caruso responded and essentially confirmed that he would only release a report from RSV to Blastrite after the confidentiality agreement was signed. It is not in dispute that the RSV report would allow Blastrite to understand the processing objectives and deliverables and assist in it presenting a proposal to process the material. Lashbrook conceded that after the confidentiality agreement was signed by both parties, the MCL parties released various expert reports to Blastrite for consideration which included the RSV report. Lashbrook further conceded that the information released to Blastrite was indeed confidential information. The evidence up to this juncture clearly does not point to any discussions between Blastrite and the MCL parties of exclusivity being granted to Blastrite in relation to garnet at the Tormin mine. Rather, it shows that the confidentiality agreement came into existence as a precursor to negotiations and to protect confidential information provided by the MCL parties to Blastrite.

[66] It is not in dispute that after the conclusion of the confidentiality agreement circumstances changed. In July 2009 Blastrite and MSR unsuccessfully attempted to conclude a draft memorandum of understanding regarding the supply of garnet. Subsequently, Blastrite was involved in a proposal to acquire the Tormin mine from the MCL parties via an entity referred to as Newco. This deal collapsed in April 2010.

[67] In August 2010, Lashbrook, after he ascertained that MCL intended to develop the Tormin mine, sent an e-mail to Caruso to offer certain services to the MCL parties in the development of the mine. In this e-mail Lashbrook made no reference to the alleged right of exclusivity based on the confidentiality agreement but relied on their involvement in the Newco deal to indicate Blastrite's interest in the successful implementation of the Tormin project. Similarly, when Blastrite discovered that the MCL parties were negotiating the terms of a garnet off-take agreement with GMA, it made no reference to the right of exclusivity it now claims. Importantly, Lashbrook also conceded that as early as April 2014 he had been involved in discussions with the MCL parties regarding their intention to conclude a garnet off-take agreement with GMA which stands in direct contrast to his evidence in chief that he only became aware of it on or about 26 June 2014. Furthermore, Lashbrook conceded that the letter on 30 June 2014 which he wrote to MCL did not refer to the purported right of exclusivity but reference was made to the MOU to assert Blastrite's right to conclude an agreement for the supply of garnet. Similarly, the letter on 19

August 2014 written by Lashbrook made no reference to the confidentiality agreement. Lashbrook conceded the letter records Blastrite's belief that any claim it had against the MCL parties derived from the MOU. Moreover, Lashbrook conceded that Blastrite gave no consideration to the purported right of exclusivity for which it now contends until Blastrite consulted with its legal representatives prior to instituting these proceedings.

[68] In support of its purported rights under the confidentiality agreement Blastrite made reference to an e-mail from Lashbrook to Steemson in 2009 about illegal mining activities at the Tormin mine. Therein Lashbrook recorded that he did not want anyone else to obtain garnet in priority to Blastrite. Lashbrook testified in chief that the e-mail was sent with reference to the confidentiality agreement even though no reference was made to it. Lashbrook's evidence in this respect is highly improbable and it can safely be rejected as a fabrication in light of the concession he made during cross-examination that no such consideration was given to the purported right of exclusivity until Blastrite consulted with its legal representatives before instituting these proceedings. Blastrite also suggested that the e-mail from Caruso to Lashbrook in March 2014, in which Caruso recorded that, *"I am required to notify you as to when effectively the Garnet is available",* should be considered in reference to the confidentiality agreement and as such amounts to conduct that favours Blastrite's case. This contention is unfounded. Caruso in the same e-mail recorded that the parties have 'no signed agreements in place', notwithstanding their

relationship and that garnet will be available from 1 April. In response Lashbrook was silent about the confidentiality agreement. If Blastrite genuinely believed it had a right to exclusivity, as it does now, one would reasonably have expected Lashbrook to have raised there and then the issue with Caruso. Moreover, the only obligation on MSR under the confidentiality agreement was to notify Blastrite in writing when it received an approach from a third party in relation to the Project as defined. On a plain reading of the letter Caruso clearly did not purport to do this in the e-mail.

[69] The overwhelming body of evidence rather demonstrates that Lashbrook, and for that matter Blastrite, up until the stage it instituted these proceedings did not verbally or in writing mention or assert any of its purported exclusive rights under the confidentiality agreement in circumstances where it was reasonably expected to do so if Blastrite genuinely believed it had such a right to exclusivity. Instead the evidence is replete with examples of subsequent conduct of Blastrite that are at odds with its case. The most striking example is Blastrite's failure to assert the right for which it now contends when it realized the MCL parties intended to conclude an agreement with GMA. The factual matrix demonstrates rather that the confidentiality agreement was concluded with the purpose of protecting MSR's confidential information.

[70] The first three issues referred to oral evidence do not assist Blastrite's case. In respect of the first issue, according to Blastrite the significance of whether MCL or MSR intended to generate revenue from garnet in 2008 or not is a factor affecting the interpretation of a contract. According to Blastrite if indeed MSR regarded garnet as a valuable commodity when it concluded the contract, it would have been unbusinesslike to enter into such an agreement as it would have restricted the ability of MSR to monetise garnet other than through Blastrite. This contention is unsustainable. In the first instance the confidentiality agreement is silent about the intention of the parties in relation to generating revenue from garnet. Given that the body of the evidence thus far demonstrates the purpose of the confidentiality agreement was to protect MSR's confidential information at a time when the parties were exploring the possibility of a commercial relationship, this can hardly be regarded as unbusinesslike. Furthermore, Lashbrook admitted during cross-examination that the commercialization of garnet was a question of timing and that Haldane's e-mail to the MCL parties on 3 June 2008 evidenced that both parties appreciated that garnet had value when the confidentiality agreement was concluded. This issue can therefore not be resolved in favour of Blastrite.

[71] In respect of the second issue, namely, the rationale for the inclusion of clause 10 in the contract as already stated, the factual matrix relevant to the conclusion of the confidentiality agreement overwhelmingly establishes that the provision was to protect the MCL parties from the disclosure of confidential

information pertaining to the Tormin mine during negotiations. There was also no evidence by Blastrite as to the nature and extent of the significant resources it alleges were committed to the Project in exchange for MSR keeping disclosures made to it by Blastrite confidential, and for it refraining from dealing with third parties. In fact the evidence is that the MCL parties paid for the various expert studies, reports and engineering work necessary to develop the Tormin mine and that Blastrite made no investments in plant and equipment pursuant to the conclusion of the confidentiality agreement.

[72] In respect of the third issue as to when confidential information most recently was provided by Blastrite to MSR, Lashbrook gave a lengthy exposition regarding optimization of processes and product streams, prices and packaging details for garnet-based products amongst others. This information was however disclosed during negotiations for a garnet off-take agreement with MCL and not MSR and no evidence was advanced regarding the last occasion on which Blastrite allegedly disclosed confidential information to MSR in the furtherance of the project as defined in the confidential agreement. Moreover, Blastrite failed to advance plausible evidence that whatever information it disclosed was indeed confidential information relating to the project as defined that is worthy of protection. The mere *ipse dixit* of a person alleging information is confidential does not make it confidential. It is trite law that one cannot make something secret by calling it secret. In this regard see

Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson–Kasner & Others 1984 SA 850 (W) 858. This issue can therefore not be decided in favour of Blastrite.

Clause 10 of the confidentiality agreement:

[73] In my view on an examination of the confidentiality agreement, its express wording, read as a whole, and the context in which the agreement was concluded, one can only conclude that its purpose was solely to protect the confidential nature of the information provided to Blastrite by MSR for the purpose of Blastrite and MSR to consider and discuss ideas, proposals and processes relating to the project as defined in the agreement.

[74] Instructive as to the correct interpretation of the provision is the wording in the first section of the confidentiality agreement under the heading 'Background'. As background it records the parties are involved *'in discussions in anticipation of a possible business relationship'* and '*during these discussions the parties have given and received and shall give and receive Confidential Information which the Parties want to protect."*

[75] Confidential information is defined in clause 1.1 as *'..any and all information…of whatever nature…relating to the Project… disclosed by one Party…to…the other Party.* The 'Project' in clause 1.3 is defined and is limited by

definition. The 'Project' entails the *'discussion'* and *'consideration'* of issues pertaining to *'potential garnet and/or other abrasive media resources that may be present'* at the Tormin mine.

[76] In my view, properly construed the wording of clause 10 does not extend to encompass a right of exclusivity with respect to the sale of garnet product. The obligation as set out in clause 10 for MSR to deal with Blastrite exclusively with the Project, as defined, can only be read in conjunction with the verbs used in that definition, namely "discussion" and "consideration". The extent of the obligation on MSR was therefore to discuss and consider and certainly no more. The express wording of clause 10 in its proper context only entails an agreement to negotiate and imposed an obligation on MSR to advise Blastrite if it received an approach from any third party in relation to the project as defined in clause 1.3.

[77] The confidentiality agreement, in particular clause 10 thereof, is therefore at most an agreement that Blastrite and MSR will exclusively discuss and consider or consult with the aim of possibly concluding another arrangement.

[78] Moreover, and importantly, clause 10 further stipulates that *"Neither party shall be under any obligation to accept any offer or proposal related to the Project"*. Given the express wording in this regard, the agreement clearly vests in the parties an absolute discretion to agree or disagree and to deal with each other as such in

relation to the project. As a result of the absolute discretion vested in the parties to agree or disagree, the confidentiality agreement lacks enforceability. In this regard see *Premier of the Free State Provincial Government, and Others v Firechem Free State (Pty) Limited* 2000 (4) SA 413 (SCA) at 431 G-H.

[79] In certain instances in the context of agreements to negotiate our Courts applying the common law have adopted a liberal approach in an attempt to save terms seriously entered into between parties from invalidity. In this regard the Supreme Court of Appeal in *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) at 210 B - 211 A, referred with approval to *Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd* (1991) 24 NSWLR 1, where Kirby J alluded to three categories. The first category refers to contacts in which it is clear that the promise to negotiate is intended to be a binding legal obligation, to which the court will hold the parties, unless the contract is still deemed by the court to be illusory or unacceptably uncertain. The second category, which would be limited to a small number of cases, refers to situations in which the court might be able to add flesh to a provision which is otherwise unacceptably vague or uncertain. The third refers to cases in which the promise to negotiate in good faith will occur in the context of an arrangement which, by its very nature, context, other provisions or otherwise, makes it clear the promise referred to is too illusory, vague, or uncertain to be enforceable.

[80] In Southernport Developments, the Supreme Court of Appeal distinguished the preliminary agreement to negotiate in good faith, it was dealing with, from an agreement to agree of the type dealt with in Firechem, by virtue of the existence of a dispute resolution mechanism to which the parties had bound themselves, which provided that in the event of a dispute arising between the parties in respect of certain conditions, the dispute would be referred to arbitration, and the decision arising therefrom would be binding on the parties. The court held that such an agreement to negotiate was indeed binding as opposed to the type dealt with in Firechem.

[81] In the present instance, the confidentiality agreement clearly does not constitute one of the recognized exceptions to the general rule that an agreement to negotiate is unenforceable.

[82] For these reasons Blastrite's interpretation of Clause 10 is unsustainable and it does not purport to limit MSR's ability to conclude contracts with third parties in relation to garnet extracted from the Tormin mine.

[83] In view of the above the fourth issue referred to oral evidence has evaporated in importance and relevance. In any event and without necessary deciding the issue the bulk of the evidence does not support the contention that MSR at the time of concluding the confidentiality agreement was not a subsidiary of MCL.

[84] There was also evidence by Lashbrook that MSR does not have the right to sell garnet extracted from Tormin and that he was of the view that Blastrite indeed illegally acquired garnet from MSR. This evidence in my view is irrelevant to the determination of this application. In any event MSR has provided a letter from the Department of Mineral Resources dated 21 May 2015 which confirms the authority MSR requires to deal with garnet.

[85] Blastrite also relied on the principle of ubuntu as discussed in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) to motivate for the relief sought by it. Blastrite's professed reliance on *Everfresh*, supra and the principle of ubuntu is misplaced. In the first instance, Blastrite did not plead a constitutional cause of action, or a cause of action based on ubuntu, but more importantly there can be no basis to infuse clause 10 of the confidentiality agreement with the principle of ubuntu, given that the parties expressly agreed in that clause that neither of them was under any obligation to accept any offer or proposal from one another.

[86] In fact the evidence demonstrates the parties spent approximately 6 years negotiating with one another, which negotiations ultimately broke down. Blastrite is unable to reach an agreement with MSR. It now seeks to restrain MSR from deriving revenue from a productive asset and not because of any harm that may befall it or any expectation of claiming commercial advantage from such a course of action as it

has 60,000 tons of garnet in terms of the GMA agreement. The relief it seeks is therefore essentially hollow.

[87] Properly considered the effect of the 'negative' interdict sought by Blastrite can only be to the prejudice of MSR (and the MCL parties) and GMA. It would severely constrain MSR's commercial freedom by neutralizing MSR's ability to extract and process garnet from Tormin for no discernible benefit at all.

[88] To sum up, for all of the reasons set out above Blastrite has failed to establish that it is entitled to the relief it seeks. It follows that the Application must fail.

In the result the following order is made

1. The Application is dismissed with costs, such cost to include the costs occasioned by the employment of two counsel, all of the costs occasioned for the referral to oral evidence; the costs occasioned by the discovery Applications, including the costs occasioned by the MCL parties' discovery Application.

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LE GRANGE, J