109/96

REPORTABLE

Case No 412/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

NUCLEAR FUELS CORPORATION OF SA (PROPRIETARY) LIMITED — *Appellant*

v

ORDA AG — *Respondent*

CORAM : *HEFER, F H GROSSKOPF, HOWIE, MARAIS et PLEWMAN JJA*

HEARD : *19, 20 AND 21 AUGUST 1996*

DELIVERED : *25 SEPTEMBER 1996*

J U D G M E N T

HOWIE J A:

HOWIE JA :

Appellant, a South African company, contracted in writing to sell respondent, a Swiss corporation, a large quantity of uranium oxide. Performance of appellant's obligations would have involved exporting the material. At the relevant time disposal and export of such material were prohibited by the Nuclear Energy Act, 92 of 1982, ("the Act") except with the written authority of the Minister of Mineral and Energy Affairs ("the Minister") or his delegate, and contravention of the relevant provisions was an offence. Prior to the conclusion of the contract the Minister's delegate, the executive chairman of the Atomic Energy Corporation of South Africa Limited ("AEC"), granted authority for the sale and delivery of the material subject to certain conditions. When the parties entered into the contract their respective representatives were both under the impression that all the conditions imposed had been met. Subsequently, the required export authority was

refused and delivery could not lawfully occur.

Delivery never did occur. Appellant maintained that it was released from its obligations on the grounds of impossibility of performance but respondent regarded the failure to deliver as wrongful repudiation and sued appellant for damages in lieu of delivery.

The action was instituted in the Witwatersrand Local Division and tried by Schutz J. Despite appellant's raising various defences, among them impossibility of performance, the claim succeeded. Hence the appeal. There is also a cross-appeal. It arises in this way. The course of the trial was protracted ***inter alia*** by the fact that respondent, having closed its case, applied for a postponement and re-opening on an issue relative to the question of damages. The application was opposed but granted. The costs of it - essentially the costs of opposition - were reserved until the end of the trial.

When that time came, respondent was ordered to pay the costs of the application. The cross-appeal is against that order.

The appeal and the cross-appeal are before us with the leave of the learned trial Judge. The trial judgment is reported: see *1994 (4) SA 26 (W)*. I shall call it the reported judgment. Many issues were investigated and debated at the trial. They are comprehensively dealt with in the reported judgement in a careful and detailed analysis of the law applicable to the unusual and most intriguing facts of this case. The same issues were exhaustively canvassed in the appeal.

In the view I take of the matter it is unnecessary to discuss all those issues or to recount and analyse all the evidence. The vital questions now are whether it was impossible for appellant to perform and whether respondent made out the case advanced in its replication in answer to appellant's plea of impossibility.

It is appropriate at this point to summarise the allegations and contentions expressed and implied in the replication. They are the following:

(1) On a proper construction of the contract interpreted in the light of surrounding circumstances appellant guaranteed performance, alternatively assumed the risk that performance might become impossible.

(2) The refusal of an export permit was not lawful and thus did not make performance by appellant impossible.

(3) If such refusal was lawful, appellant, by concluding the contract, nonetheless guaranteed performance alternatively assumed the risk that performance might become impossible.

The evidence relevant to the cardinal questions, nearly all of which was not in dispute, emerges in the main from the testimony of three witnesses and the

correspondence which passed between them. Two of these men were called on behalf of respondent. They were Dr de Villiers, the executive chairman of the AEC and Mr Hugelshofer, the executive vice-president of respondent, who represented his company at all material times. His counterpart on appellant's side was Mr Sinclair-Smith, the third witness concerned, who was at such times appellant's general manager.

The contract was entered into in April 1985. The background and surrounding circumstances relevant to its conclusion were these.

Appellant was formed by a group of South African gold mining companies to effect international marketing of the uranium which was a by-product of their gold production. From its inception until the mid-1980's it was the Western world's largest single uranium supplier. The main thrust of its business comprised long term contracts to supply uranium to foreign nuclear power-generating utilities.

Respondent was incorporated in 1980 in order, as a Swiss subsidiary of the German Hempel group of companies, to handle ongoing uranium enrichment business which that group had with Soviet Russia and which for political reasons it was felt undesirable to carry on from Germany.

Hugelshofer became respondent's executive vice-president and chief operative from the outset. By the time the contract in question was concluded he had acquired substantial experience, both on his own and as representative of respondent, in brokering international deals. These had involved, ***inter alia***, transactions with the South African parastatal corporation, Armscor, to circumvent international trade sanctions then in force against this country.

The AEC was established by s.2 of the Act with the main objects of nuclear research, uranium enrichment and processing for purposes of the South African nuclear program. The Act has since been replaced by substitute

legislation but as its terms were the governing statutory provisions relative to nuclear matters at all times relevant to this case I shall, for convenience, refer to it in the present tense as if currently in force. The powers of the AEC, conferred by s.4, enable it to pursue those objects through a board of management provided for in s.5. In terms of s.12 the State is the only shareholder in the corporation. S.19 lays down that the AEC has the sole right to produce nuclear energy in South Africa and that it does so on behalf of the State. In terms of s.20 this right may be conferred under licence to other entities. In s.48 provision is made for uranium and other nuclear material mined and processed in South Africa to be acquired by the Minister and the ownership and control of such material vests in the AEC on behalf of the State.

Then there is s.49. Its relevant terms read as follows:

"49. 1) Except with the written authority of the

Minister, no person shall-

(a) be in possession of any source material unless he has come into possession thereof as a result of prospecting, reclamation or mining operations lawfully carried out by him, or unless he is in possession of such material on behalf of a person who-

(i) has so come into possession of such material; or

(ii) has lawfully acquired such material;

(b) dispose of or use any source material;

(c) enrich or re-process any source material or special nuclear material;

(d) import any source material into or export it from the Republic; or

(e) acquire, import or be in possession of or dispose of any restricted or special nuclear material.

(2) Any authority under subsection (1) may be given subject to such conditions as the Minister may, in his discretion, impose.

(3) The Minister may, subject to such conditions as he may determine, delegate such of the powers conferred upon him in subsections (1) and (2) as he may deem necessary, to the (AEC), or, after consultation with the (AEC), to the chief executive officer of the (AEC), or any other officer of the (AEC) designated by that officer, but he shall not be divested of any powers so delegated and he may amend or rescind any decision of the (AEC), the chief executive officer of the (AEC), or the said other officer."

As regards uranium supply to foreign buyers, the AEC

required that such supply be for peaceful non-explosive purposes in all instances. In addition, where the supply was to be to a non-nuclear weapon state (a state without nuclear weapon capability) it required compliance with safeguards laid down by the International Atomic Energy Agency ("IAEA") and, if the destination was a European Community country, compliance also with the Euratom Treaty and other provisions applicable within the European Community.

Turning from the nature and business of the corporations concerned to the events in which they became involved, it was in 1980 that Sinclair-Smith on the instructions of his predecessor, approached Alfred Hempel, chairman of the Hempel Group, enquiring about the possibility of the supply of uranium from South Africa to Soviet Russia. This was a matter of extreme delicacy as the earlier mentioned sanctions against trade with this country were in force and South Africa was intent upon

abiding by international nuclear non-proliferation treaties.

Consequently, any such deal had necessarily to be conducted clandestinely in strict confidence both from the Russian point of view and South Africa's. The Minister notified De Villiers that such a transaction could be proceeded with and appellant authorised another Hempel subsidiary to conduct negotiations with the Russians on appellant's behalf but no deal materialised.

Then, in 1983, respondent having come into the picture, Sinclair-Smith met with Hempel and Hugelshofer to pursue the idea. Hempel said that he had had a visit from the managing director of the appropriate Russian trading entity, Techsnabexport, who was prepared to appoint respondent as Russia's procurement agent for various commodities, including uranium.

This official had also intimated that the Russians were not concerned about the true source of these materials

and that they would regard Switzerland as the source seeing that respondent was a Swiss company. Hempel indicated that in the circumstances there were reasonable prospects that the transaction desired by appellant could be achieved. The three of them then discussed the matter in detail. Pursuant to the discussion Sinclair-Smith procured a draft agreement providing for sale by appellant to respondent, the intention being that the latter would then on-sell to Techsnabexport. The draft incorporated provision for the peaceful uses and IAEA and European safeguards referred to earlier, as also for appellant's entitlement to suspend delivery in the event of ***force majeure***. It also contained a condition that the agreement was conditional upon AEC authority in terms of the Act.

For a long time no progress was made. At long last, in 1985, on 21 February, Hugelshofer was able to notify Sinclair-Smith by telex that his "client" had committed "himself" to buy from respondent. On 26 February Sinclair-

Smith wrote to De Villiers, whom he had kept abreast of the position in the interim. His letter sketched the proposed sale to Russia via respondent in broad outline and concluded with a request for authority under the Act for the disposal of the uranium.

On about 22 March De Villiers informed Sinclair-Smith that in view of the very sensitive nature of the transaction the South African Government did not wish the transaction to proceed at that stage. Soon afterwards, however, the Government changed its mind. Nothing in the evidence explains or even suggests why. As a result, Sinclair-Smith and Hugelshofer signed a document in Zurich on 29 March. It is headed "Memorandum of Understanding" and records the following:

> "Nufcor and Orda shall within the shortest possible time enter into an agreement whereby Nufcor shall sell and Orda shall buy a certain quantity of U308 under the following terms and conditions:
>
> 1. the quantity of U308 supplied shall be 520 metric tons.
> 2. delivery of the U308 by Nufcor to Orda shall be

fob Durban port.

3. Ownership and risk shall pass from Nufcor to Orda upon delivery.
4. The price payable in respect of this U308 supply shall be US$ (US Dollars) 15 (fifteen 00/000) per pound.
5. Payment shall be made not later than 60 (sixty) days after delivery.

These arrangements are subject to approval by the Nufcor Board and the Atomic Energy Corporation of South Africa Ltd as well as by the third party to which Orda will sell the material."

On 2 April De Villiers, in his capacity as the Minister's delegate, wrote to Sinclair-Smith. He referred to the latter's request of 26 February for AEC authority and then said:

"It is assumed from the terms of your letter that NUFCOR will conclude an agreement of sale with Orda AG as the principal buyer and that Orda will in turn resell the material to Technabsexport. On this assumption and under the powers delegated to me by the Minister of Mineral and Energy Affairs, I hereby authorise, in terms of section 49(1)(b) of the Nuclear Energy Act 1982, the sale and delivery by NUFCOR to Orda AG in 1985 of 530 metric tons U308 in the form of uranium ore concentrates at a price of US $ 15 per lb U308 f.o.b. Durban.

This authority is given subject to the following conditions:

(a) Should the particulars of the transaction

finally negotiated with Orda AG differ in any respect from the particulars referred to above, details thereof must be submitted to this Corporation for consideration and approval before agreement thereon is finally concluded between the parties.

(b) Orda AG shall procure an undertaking in writing, given by the appropriate Soviet authority, that all uranium derived from ore concentrates to be supplied to Technabsexport by Orda will be used exclusively within the Soviet Union for peaceful non-explosive purposes.

(c) A certified extract from the agreement of sale concluded between NUFCOR and Orda covering the particulars of the transaction referred to in this letter must be submitted to this Corporation.

(d) Application should be made in due course for the necessary export authority in terms of section 49(1)(d) of the Nuclear Energy Act. Such application must be accompanied by the original version of the peaceful uses undertaking referred to in sub-paragraph (b) above."

When he received this, Sinclair-Smith already knew that respondent could not comply with conditions (b) and (d) in so far as the furnishing of a Russian undertaking was concerned. He telephoned De Villiers and told him so. Arising out of that conversation Sinclair-Smith wrote the following substantially contemporaneous note on his copy of

De Villiers's letter of 2 April:

> "Spoke to de Villiers - said ORDA precluded by Soviets from providing this documentation directly - he said he would as a substitute accept a written undertaking from ORDA to the effect that ORDA had obtained such an undertaking from the USSR - ORDA agreed hence my telex 3.4.85."

In evidence De Villiers conceded that Sinclair-Smith told him of respondent's inability to furnish an undertaking direct from the relevant Russian agency. He also admitted that he had informed Sinclair-Smith he would accept an undertaking by respondent such as is referred to in the note just quoted. However, he said that what he had had in mind was that an undertaking by respondent would not be in substitution for the Russian undertaking, it would merely be a "first step". He explained that by this stage the South African authorities (including himself) were worried that the uranium might not be destined for the Soviet Union at all but for a non-nuclear weapon country in circumstances possibly involving a breach by South Africa

of its non-proliferation commitments. As the conditions set in his letter of 2 April did not cover the possible delivery of the uranium to a non-nuclear state, he wished to be assured there would be no such delivery before he granted the necessary export authority. Accordingly he intended that if respondent declared that it had a Russian undertaking such as he required the next step would be that he would have to have sight of it.

De Villiers did not claim to have told Sinclair-Smith any of this. In fact, he conceded that Sinclair-Smith might understandably have gained the impression from their conversation that once the respondent's undertaking - the wording of which was dictated by De Villiers - was produced, there would be no problem in appellant's obtaining an export permit. However, said De Villiers, if that is what Sinclair-Smith had indeed thought, then there must have been a misunderstanding between them.

As far as the evidence of Sinclair-Smith is concerned,

he said that there was no question of a misunderstanding between himself and De Villiers. The effect of his evidence was that De Villiers had, without qualification, relaxed conditions (b) and (d) by allowing respondent's undertaking to substitute for the Russian undertaking; in other words, even in so far as obtaining an export permit was concerned. His note of 3 April was consistent with that position, he said.

What also happened on 3 April was that Sinclair-Smith wrote to the appellant's directors and he contacted Hugelshofer. To his directors he was pleased to report, he wrote, that the transaction would be proceeding and that he expected delivery to be effected f.o.b. Durban during May.

With Hugelshofer Sinclair-Smith made contact twice. He first established that Hugelshofer was willing to give the substitute undertaking and then he sent the following telex to Hugelshofer:

"As promised I give below the proposed wording to be

provided under an Orda AG letterhead:
Quote
I ..... In my capacity as ..... Of Orda AG hereby certify that I have received the following written undertaking from Techsnabexport namely that "all uranium derived from ore concentrates to be supplied to Techsnabexport by Orda AG will be used exclusively within the Soviet Union for peaceful non-explosive purposes".
Furthermore I hereby undertake that all uranium derived from ore concentrates to be supplied by Nufcor to Orda AG will be used for peaceful non-explosive purposes.
Unquote
I hope that this wording does not pose any difficulties for you."

Hugelshofer responded by way of a telex on 4 April. It read:

"Please confirm to me by telex that the undertaking as per your telex 280t, 3 April 1985, and that is going to be dispatched to you by courier after Easter, is going to be filed by you personally top secret, that it is only shown to the president of your organization, that no copies are taken and that the original is not physically handed over to anybody else."

Sinclair-Smith telexed the requested confirmation the same day.

Also on 4 April, Sinclair-Smith signed the contract on

behalf of appellant and then wrote to Hugelshofer forwarding two originals of it. The letter reads:

> "Herewith two originals of the contract between Orda and Nufcor, both signed on behalf of Nufcor. If they are acceptable to you please arrange for signature by Orda and return one original to me for our records. I also attach my letter in which I undertake to transfer the US$0,06/lb to your bank in Zug, upon receipt of payment by ourselves.
> I believe that this should complete all the documentation between us. You will find, I believe, that all the points discussed between us recently in Zurich are covered in the contract and its annexures. I have today instructed my Works Manager to begin preparation of the consignment and associated documentation i.e. the required markings in the drums, the drum numbering and that the documentation be prepared with no identification of Nufcor or SA as source (so you can use the same documentation without the need to reproduce it). You may wish to insert the name of 'Orda AG' on all documentation for purposes of presentation to your client.
> Good luck for 23/24 April - I hope to hear from you before 26 April on developments (I take off at 09h00 on 26 April)."

23 - 24 April was when, according to what Hugelshofer had told him, the on-sale agreement between respondent and the end-buyer would be concluded. (I shall call that "the third party agreement" and continue to refer to the

contract between the parties to the appeal as "the contract".)

As to the provisions of the contract, it was not made conditional upon the grant of AEC authority under the Act, as in the earlier Memorandum of Understanding, nor was there a ***force majeure*** clause as in the 1983 draft. Furthermore it embodied no peaceful uses clause or provision for international safeguards to apply. It did contain a risk clause but not one that has any bearing upon the present questions; all that it said was that the risk in each drum of the material would pass to the buyer on being loaded at Durban.

By letter dated 9 April Hugelshofer furnished an undertaking in the form of the certificate requested by Sinclair-Smith. It reached appellant on 11 April.

On 24 April, according to Hugelshofer's evidence, he and one Swyen, a director of the Hempel Group (who was available but not called as a witness) signed a written

agreement for the on-sale of the uranium to a third party.

Although Hugelshofer had certified on 9 April 1985 that the end buyer was Techsnabexport he refused, both in the pleadings, in pre-trial particulars and consistently in his evidence, to name either the third party or the person who contracted on behalf of that party. He also refused to answer any questions aimed at verifying what he had told Sinclair-Smith about the identity of the third party. Apart from his own averments as to the existence of the third party agreement, all he produced in evidence was a document purporting to be a copy of an agreement between respondent and a purchaser, in the text of which agreement there were numerous blank spaces. He testified that the original had been taken by persons representing the third party some time after the third party agreement failed (which was about a week after 15 May). Hugelshofer said he effected the deletions to prevent identification of the third party. He refused in evidence to say what the words

or names were that he had deleted. It is unnecessary for present purposes to set out or summarise the contents of this document.

On 25 April Hugelshofer, on behalf of respondent, signed the contract.

Sinclair-Smith sent De Villiers a certified extract of the contract by letter of 7 May.

In the meanwhile the parties proceeded with arrangements for delivery from appellant to respondent.

On 13 May Sinclair-Smith met with De Villiers. This was the first opportunity the latter had had to consider the terms of the contract as shown to him. He was also furnished with Hugelshofer's undertaking of 9 April. Arising out of that meeting Sinclair-Smith sent Hugelshofer a telex the same day reading as follows:

> "Dear Jack
> Further to our telephone conversation of this morning, I would be grateful if you could bring with you a further signed undertaking by yourself to the following effect:

Quote
Further to my letter of April 9, 1985 I confirm that in the event the uranium to be supplied by Nufcor is delivered to a non-nuclear weapon state, the sale of the material to such state shall be subject to the relevant safeguard provisions as prescribed by either the IAEA or Euratom as is appropriate
Unquote
I confirm that this undertaking will be filed by me personally as top secret and will not be shown to anyone other than the chairman of the Atomic Energy Corporation. I confirm also that no copies of the document will be taken and that the original will not be handed over to anyone else."

On his copy Sinclair-Smith endorsed the following note:

"Sent at the request of Dr de Villiers in order to close the proliferation issue. Hugelshofer advised this is acceptable."

Hugelshofer confirmed in evidence that he was prepared to give this further undertaking.

The even tenor of the parties' dealings thus far was gravely disturbed when, on 15 May, Sinclair-Smith received the following letter from De Villiers:

"URANIUM SALE : TECHNABSEXPORT
I refer to your letter dated 7th May and to our discussion on 13 May concerning the sale of uranium ore concentrates to Orda AG. It is noted that the

terms and conditions of the sale agreement concluded between NUFCOR and Orda **do not embrace all of the particulars on the basis of which formal approval of the proposed transaction** was given by me in my letter dated 2 April 1985. Specifically no mention is made of the requirement that the material is to be sold to Orda for the sole purpose of resale by Orda to Technabsexport and subject to the procurement by Orda of a written undertaking given by the appropriate Soviet authority that the uranium supplied by Orda will be used within the Soviet Union for peaceful non-explosive purposes. Both of these aspects are **fundamental to the aforementioned approval and the transaction ought not to proceed unless they can be complied with.**

In the circumstances, may I suggest that a revised agreement be concluded between NUFCOR and Orda in place of the existing agreement dated 25 April or that the parties enter into a supplementary agreement in which Orda undertakes not to dispose of the material supplied by NUFCOR otherwise than by way of resale to Technabsexport **and to procure the required peaceful uses undertaking.**

May I also point out that your application for authority to export the uranium ore concentrates in question must be accompanied by an original copy of the peaceful uses undertaking given by Technabsexport to Orda."

Sinclair-Smith immediately telephoned Hugelshofer and then sent the following telex:

"Further to our telephone conversation of this morning, this telex serves to formally advise that my

authorities have now requested that, prior to the issue of an export permit by the South African Atomic Energy Corporation, the following further documentation is required:

1. An undertaking in writing from your client that the material will be used in the client's country for peaceful non-explosive purposes, and
2. A supplementary agreement be entered into between Orda and Nufcor wherein it is expressly acknowledged that the material is to be consigned by Orda to the client in the country.

I regret this last minute request, but without such documentation or acceptable alternate documentation, which we would treat as highly confidential, I fear than Nufcor will be unable to obtain the necessary export permit from my authorities. I earnestly request you to consider ways and means of providing this documentation or its equivalent."

Hugelshofer's swift telex response was this:

"This is to acknowledge receipt of your telex message advising us of the fact that your authorities insist once again on the same conditions that we were obliged to refuse already twice, the last time some weeks ago and prior to your signing a corresponding contract with us that consequently in no way foresees such conditions as your authorities are trying now to impose.

Our position remains what it was right from the beginning of our contract negotiations, i.e. that such conditions cannot be met by us and this for reasons that were explained to you and that you accepted. In contrast to this, the position of your authorities has been highly inconsistent, letting us go ahead twice

> and calling us back twice.
> You will no doubt agree that the last call-back of today came clearly too late for being acceptable to us. In addition to a signed contract we already received from you invoice, packing schedules, quantity and quality certificated for the agreed-upon consignment. We have on our side fully committed ourselves to our client and have already chartered a ship that is now on way to the port of loading.
> We regret our having to reply to you in this way but we have to hold your organization responsible for damages."

Sinclair-Smith's immediate answer, repeated in later telexes, was to assert that appellant had been prevented by "***force majeure***" from complying with its contractual obligations. That assertion was steadfastly disputed by Hugelshofer who declared that respondent was entitled to damages.

This review of the relevant documentation may conclude with a subsequent note which Sinclair-Smith appended on 20 May to the letter from De Villiers of 15 May:

> "This development new despite Dr de Villier's agreement over the telephone and at the meeting of 3 May to accept Hugelshofer's undertaking regarding peaceful use."

(The date 3 May is obviously incorrect and must have been intended to read 13 May.)

Turning to aspects of the oral testimony that require recounting, De Villiers said that the suspicion that he and the Minister had harboured throughout that the end-user of the uranium would not be Russia but a non-nuclear state, had strengthened with the passage of time. Between 13 and 15 May he was in consultation with the Minister whose attitude was that without sight of the original Russian undertaking referred to in Hugelshofer's certificate of 9 April an export authority would not be granted. This explained the adherence in his letter of 15 May to the conditions set in the written authority of 2 April. When it was learnt that the parties' communications on and shortly after 15 May would not achieve production of the Russian undertaking required by the authorities, the Minister advised De Villiers that export of the uranium would not be allowed.

De Villiers conceded, however, that he did not raise his or the Minister's concern with Sinclair-Smith when they met on 13 May. It is, one may observe, entirely consistent with this concession that on that date De Villiers's only additional requirement was the international safeguards undertaking. He also conceded, euphemistically, that when, on 15 May, he insisted on compliance with the conditions in his letter of 2 April, Sinclair-Smith was "not very pleased". The latter's evidence was that De Villiers's change of attitude had infuriated him.

The oral evidence further discloses that Hugelshofer, accompanied by Swyen, came to South Africa in June 1985 for discussions in an endeavour to enable the contract to be implemented. In this period De Villiers, who was kept informed of the situation and involved in some of the discussions, offered to assist the parties by himself, or his delegate, going to Switzerland to view the Russian undertaking which Hugelshofer had said he possessed. That

offer was refused. The "resuscitation" talks failed in their purpose and the refusal of an export authority remained in place.

So much for the evidence.

The trial Court examined the evidential conflict between De Villiers and Sinclair-Smith concerning their telephone conversation of 3 April and dealt with this subject at 75 C-I of the reported judgment. Although the learned Judge said there it did not seem necessary to resolve this credibility issue he went on to indicate, at two places in this passage, that he considered Sinclair-Smith to have been correct in his account of what he says De Villiers conveyed.

On the question of impossibility of appellant's performance, the Judge's reasons appear at 82C - 85A of the reported judgment. He found on the evidence that absolute impossibility had supervened after the conclusion of the contract but that this did not relieve appellant of its

obligations.

Before discussing the findings as to impossibility it is logical to dispose of the point in the replication earlier designated as (2). This is that the refusal of the export authority was not lawful. That contention, to go by what appears in the Judge's reasons, was not pursued on behalf of respondent in the Court below. On appeal it was ventured but faintly. It is without substance.

In the light of the aims and objects of the Act, and especially the provisions of s 49, it is plain that the legislature's intention was that the State, through the Minister, should exercise absolute control over the use and disposal of all nuclear matter in this country, both emanating from within and imported from without. Its potential in evil hands for limitless devastation, not to speak of accidents like Three Mile Island and Chernobyl, carry profound political and humanitarian implications. The complexion of a transaction that might seem secure and

beneficial for both sides could, within a very short time, be altered drastically by major international and even domestic events. The Minister is therefore understandably vested not only with the final say but the unfettered discretion to impose conditions. Because of the considerations just mentioned it is obvious that conditions imposed initially might later have to be more stringent. Authority might even have to be withdrawn altogether. Transactions falling within the ambit of s 49 not only involve individuals or companies. As the present case illustrates, they may well, in effect, involve deals between sovereign states. It is not surprising, therefore, to find in ss (3) that the Minister, on behalf of the State, is given the power to amend or rescind any decision by the AEC or its officers. This means that even had De Villiers, in his letter of 2 April 1985, granted unqualified authority for the sale and export of the uranium, the Minister could lawfully have altered or

withdrawn it. The State, in other words, would not have been bound by De Villiers's postulated decision. Even assuming that the refusal of an export authority in this matter would, if reviewably irregular, have been liable to judicial correction, there was not the slightest suggestion at any stage of these proceedings that such irregularity had occurred. It follows that there is no basis for holding that such refusal was unlawful. Respondent's only proffered ground for saying that impossibility had not been established therefore falls away.

One might add that in finding absolute impossibility to have supervened, the learned Judge may well have considered, but did not discuss, the possibility that the necessary authority would have been granted had Hugelshofer or the third party softened their stance on the production of the undertaking required in conditions (b) and (d) imposed by De Villiers on 2 April 1985. In that regard one need say no more than that the position at the close of the

day on 15 May 1985 was this. De Villiers and the Minister refused to give an export authority without fulfilment of those conditions. Hugelshofer would not or could not then provide the means to fulfil them and appellant could not compel him to do so. As at that stage, delivery under the contract would have been illegal and performance by appellant was therefore impossible in law. Although, subsequently, it lay within respondent's power to accept De Villiers's offer to view the undertaking Hugelshofer said he had, that offer was refused. As a result, the position obtaining on 15 May remained undisturbed at all relevant later stages. In these circumstances any suggestion by respondent that performance was not impossible would be untenable. The learned Judge's finding of impossibility was therefore clearly correct.

It may be mentioned in passing that counsel for appellant advanced submissions based on the view of some writers that the failure of a common assumption, on the

strength of which the parties contract, leads to substantially the same result as impossibility of performance: see De Wet en Van Wyk, Kontraktereg en Handelsreg, 5th ed, 154 *et seq*; Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz, Contract, General Principles, 202-3; and Kerr, The Principles of the Law of Contract, 4th ed, 406 *et seq*. (*sed contra* Christie, The Law of Contract in South Africa, 2nd ed, 400-1). However, in the light of the finding that impossibility was established in this case it is unnecessary to consider whether his submissions were well-founded.

In referring thus far to impossibility of performance I have done so because that is the terminology used by the Court *a quo* and by counsel both on trial and appeal. More accurately, however, this is a case of supervening illegality of performance. The difference between supervening impossibility due, say, to destruction of the *merx* or failure of the intended source of supply, on the

one hand, and supervening illegality, on the other, is one of substance and importance. The latter brings to the fore considerations of public policy. In this regard see **Treitel, Frustration and Force Majeure, 364, 460.** I shall revert to that work in due course. First I shall deal with the question whether, on the basis of impossibility of performance as that doctrine has developed in South Africa, appellant was relieved of its obligations under the contract.

Certain remarks in the judgment in the leading case of *Peters, Flamman & Co v Kokstad Municipality 1919 AD 427* at *435* and *437* seem to suggest that State action, such as the refusal of the requisite authority in this case, constitutes ***vis major*** and that absolute impossibility of performance due to ***vis major*** extinguishes the contract and thereby the parties' contractual obligations. This is referred to at *434* as the general rule, to which (as stated at *435* with reference to the Digest) there are exceptions.

What precisely the exceptions are was not discussed and the examples in the quoted text from the Digest are not helpful.

In *Hersman v Shapiro & Co 1926 TPD 367* at *372*, with reference to the judgment in **Peters, Flamman** it was said:

> "A careful perusal of the judgment leads me to think that the learned Judge never meant to say that the defence of impossibility of performance is so absolute as to override the terms or the implications of the contract in regard to which the defence is invoked."

At 373 Stratford J (with whom Tindall J concurred) went on to say this:

> "Indeed, it seems clear that it is impossible to disregard the nature not only of the contract, but of the causes of impossibility, because those causes might be in the contemplation of the parties; or, again, they might be such as no human foresight could have foreseen. That distinction between different kinds of causes of impossibility must be a feature to be regarded before applying this doctrine of impossibility of performance without qualification. Therefore, the rule that I propose to apply in the present case is the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and that we must look to the nature of the contract, the relation of the parties, the circumstances of the

> case, and the nature of the impossibility invoked by the defendant, to see whether that general rule ought, in the particular circumstances of the case, to be applied."

That ***dictum*** has not been approved or commented on in reported judgments of this Court, as far as I am aware. However, it was followed in *Bischofberger v Van Eyk 1981 (2) SA 607 (W)* which in turn was quoted with approval in the reported judgment at *82H - 83D*. It is also one of the authoritative sources relied on by **Ramsden**, <u>Supervening Impossibility of Performance</u>, a work referred to in argument by counsel on both sides, for the proposition (at 51) that:

> "(N)either *vis major* nor *casus fortuitus* can exist where the consequences of the event
> (a) were within the contemplation of the parties at the time of contracting; for example, where the promisor had either expressly or impliedly guaranteed that performance was possible or had agreed to be liable in any event ..."

Ramsden contends at 52 that there are other situations in which ***vis major*** cannot exist, namely:

"(b) ... where (the consequences of the event) should have been foreseen by the exercise of reasonable foresight, and could have been avoided if reasonable care or diligence (which includes the taking of ordinary precautions) had been exercised;

(c) (they) were brought about by the fault of one or both of the parties, which includes

(i) a deliberate or negligent act; or

(ii) undue delay in tendering the performance in question."

The chief authority relied on by **Ramsden** for proposition (b) is *Bayley v Harwood 1954 (3) SA 498 (A)* to which counsel also referred. That case concerned the question whether a lessee, who had been effectively deprived of beneficial occupation of the leased premises by the terms of a supervening amendment to legislation governing the use of the property, was entitled on the equities to remission of rent. In the course of the main judgment Greenberg JA said (at *503H - 504B*):

> "Dealing with this question of *vis major* from another angle, I am unable to come to any conclusion adverse to the lessee, in regard to the question whether he ought to have foreseen the possibility that legislation of this kind would be passed and that it

> was either remiss on his part not to have done so, or that he must be deemed to have contemplated that this would happen and to have undertaken the risk. Placing myself as best as I can in the position of the *prudens paterfamilias*, it seems to me that a particularly prudent person might have foreseen the possibility of the event and provided for it, but beyond this I am not prepared to go. Speaking for myself, I can only say that I would at least be as likely to foresee the possibility on the Witwatersrand, where the leased property is situate, of damage by lightning, and this appears to be accepted as *vis major*."

From that passage it would appear that remissness on the part of the debtor or the assumption of risk by him can certainly be relevant. What is not altogether clear is whether such factors assist in determining the existence of *vis major* or, *vis major* having been established, the existence of considerations which result in the debtor being nonetheless liable. In his separate concurring judgment Schreiner JA stressed the relevance of the parties' foresight. He said (at *506G - 507 in principe*):

> "It cannot be said of the parties to a contract that they ought to have foreseen, or must be taken to have foreseen, a change in the law merely because laws can always be changed by the lawgiver; and it could, in

> my view, make no difference if the legislation were of a type or kind that was well-known and might be expected to be introduced from time to time and in one form or another.
>
> If it could be inferred as a fact that the parties to a lease actually foresaw the change in the law which afterwards made it impossible to use the property for the purpose for which it was leased, then it may be assumed that there could be no claim for remission, whatever the precise foundation for the conclusion would be. But there is nothing in the present record to support an inference of fact that, at the time when the lease was entered into, the change in the law which was subsequently effected was in the contemplation of the parties."

Here, too, it is not certain whether foresight of the event rendering performance impossible serves to rule out ***vis major*** or is an important factor in determining whether, ***vis major*** having supervened, it must be inferred, as a fact, that the debtor assumed the risk of impossibility due to ***vis major***. Either way, it is clear from the judgments in *Bayley v Harwood* that what is relevant is actual foresight, or the reasonable foreseeability, of the event which causes impossibility, not the consequences of such event, as **Ramsden, *op cit.***, would have it. If you foresee ***vis major***

you must necessarily foresee impossibility of performance. See, too, the ***dictum*** in *Wilson v Smith and Another 1956 (1) SA 393 (W)* at *396D* (cited in the reported judgment at *83 E-F*) where the stress is on foresight of the event, not foresight of the consequences.

It is unnecessary, however, to discuss the role of ***vis major*** any further. I shall accept that it gives rise to what has been called the general rule but that it was open to respondent to seek to avoid the legal consequences of impossibility by putting up a case in its replication aimed either at negating ***vis major*** or showing that, despite ***vis major***, appellant should not be relieved of the obligation to deliver. I shall also assume, without deciding, that the grounds upon which such a case can successfully be based are those enumerated by **Ramsden, *op. cit.***, at 51, 52.

Turning to the grounds relied on in the replication it is convenient to repeat them at this point. They appear in the paragraphs earlier numbered (1) and (3) and are:

(1) On a proper construction of the contract interpreted in the light of surrounding circumstances appellant guaranteed performance, alternatively assumed the risk that performance might become impossible.

(3) Appellant, by concluding the contract, nonetheless guaranteed performance, alternatively assumed the risk that performance might become impossible.

The point in (1) would seem to be a matter of interpretation and that in (3) a matter of inference. Either way, what is alleged is (a) a guarantee and (b) an assumption of risk.

Counsel for respondent accepted that the ***onus*** of establishing the facts alleged in the replication lay upon his client.

The alleged guarantee of performance can be nothing other than a matter of contract. The present contract

contains no express guarantee and there is no basis for saying that one is implied by law. Furthermore, no oral guarantee is alleged. It only remains to consider a tacit guarantee. As to that, however Hugelshofer might have responded to the officious bystander's inquiry as to whether a guarantee was intended, nothing in the evidence warrants the conclusion that appellant's answer would have been in the affirmative. The indications are the other way. The evidence is very clear that both parties were aware that implementation of the contract depended absolutely upon the grant of AEC or ministerial authority for the sale and export of the uranium. It shows, further, that they contracted on the understanding, arising out of what De Villiers told Sinclair-Smith on 3 April 1985, that all the conditions set by De Villiers had been met and that such authority would inevitably be granted. And it is manifestly improbable that appellant would have assented to the suggestion that it should undertake liability for

damages in the event of authority not being forthcoming or being withdrawn when both were matters beyond its control or influence. On the probabilities, therefore, a guarantee was neither a matter contemplated but unexpressed nor a matter which would have been incorporated had it been contemplated. A guarantee was therefore not proved.

Whether appellant assumed the risk of impossibility is not as simply disposed of.

Parties may expressly agree that the risk of impossibility of performance will fall on the debtor: *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council 1970 (3) SA 579 (A)* at 585B. In the present case there was no express written or oral term to this effect. The question, then, is whether a tacit assumption of risk must be imported into the contract.

In the reported judgment the learned Judge commenced his discussion on this topic (at *82G*) by adopting, as correct, the following statement of the law in

Bischofberger v Van Eyk 1981 (2) SA 607 (W) at 611 B-D:

> "(W)hen the Court has to decide on the effect of impossibility of performance on a contract, the Court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract, the relation of the parties, the circumstances of the case and the nature of the impossibility to see whether the general rule ought, in the particular circumstances of the case, to be applied. In this connection regard must be had not only to the nature of the contract, but also to the causes of the impossibility. If the causes were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished."

He then approved the abovementioned ***dictum*** in *Wilson v Smith*. It is to the effect that when parties enter into a contract contemplating that the event which rendered performance impossible might occur, and they make no provision in the contract against that event, the implication could be made that the party pleading impossibility should not be relieved of its obligations.

The learned Judge considered that the situation in the instant case warranted the implication referred to in *Wilson* v *Smith* and concluded (at *84 H-I* of the reported judgment):

> "The occasion of impossibility had certainly been foreseen, although for peculiar reasons the parties did not expect that impossibility would supervene. This was surely a situation where the defendant, being the debtor, should have made provision against the eventuality of an ultimate refusal of permission. The other possibility is that Sinclair-Smith was very confident and consequently took a chance and entered into an unconditional contract. If that was so, the case becomes rather like *Hersman v Shapiro.*
> In the light of all these considerations, I find that supervening impossibility did not relieve to defendant of its obligations."

There is no finding in that passage or elsewhere in the reported judgment of a tacit contractual term or an assumption of risk. Indeed there is no reference to the elements of the case raised in the replication. It is also not clear to what extent, if at all, the learned Judge applied what was said in the *Bischofberger* case in the passage cited with approval.

The significance of the last-mentioned point lies in the statement at 611D of *Bischofberger's* case, namely:

> "If the causes (of impossibility) were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished."

With respect, that statement cannot be accepted without qualification. In the first place the contemplation that is relevant is not such as the parties might at some time have had during the negotiation stage. It must, logically, be their contemplation at the time they contract: see the judgment of Schreiner JA in *Bayley v Harwood* at *506* (last line). Secondly, the apparent requirement that the event causing impossibility must be beyond human foresight before the parties' obligations are extinguished, is not supported by authority. The words "human foresight" are taken from the above-quoted passage in *Hersman v Shapiro* at *373*. I do not consider that that ***dictum*** is authority for, or that it

was intended to lay down, the proposition that the debtor is only excused where the event in question is beyond human foresight. One has no difficulty with the position where it is not as a fact foreseen because then it would be difficult if not impossible to find that the risk was assumed. But why should the debtor remain bound even where the cause is humanly foreseeable but understandably, and reasonably, not foreseen in fact? A proper analysis of the passage in question shows that the reference to human foresight appears in nothing more than an example, stated as a hypothetical extreme, of a situation where the foresight in question could not exist. The passage in *Hersman v Shapiro* was referred to in argument in *Bayley v Harwood* but not in the judgments and nothing in the judgments signifies acceptance or approval of the limit of human foresight as the criterion. The indications point in the other direction: *viz* if the cause of impossibility is not foreseen or is not such that it ought to have been

foreseen then the usual consequences of ***vis major*** will follow even if the cause was within the bounds of human foresight.

Reverting now to the findings of the learned Judge at 84 H-I, it would seem, from his view that the facts of the present case were covered by the ***dictum*** in *Wilson v Smith*, quoted earlier, coupled with the finding that the parties foresaw the occasion for impossibility, that he must have considered that appellant had tacitly agreed to undertake the risk in question. If that was indeed his conclusion then I respectfully disagree. I have already said that application of the bystander test cannot justify the deduction that appellant would have given the answer necessary for the implication of a tacit guarantee. The same holds good here. And as to the finding that the parties in fact foresaw impossibility, that is true of the earlier stages of their negotiations, especially when, in March 1985, the Government declined to allow the

transaction to proceed. But that situation altered. First, the authorities changed their tune. In the light of that fact, the parties made the "arrangements" in their Memorandum of Understanding of 29 March 1985. The proper construction of those arrangements, in my view, is that they, or appellant at least, would first ascertain that authority would be granted and depending on the answer they would contract or not. The sequence of subsequent events reinforces the view that that was indeed their approach.

Secondly, De Villiers, on Sinclair-Smith's evidence (which must be accepted in view of the incidence of the *onus*), induced the belief on the latter's part, which was conveyed to Hugelshofer, that all the conditions imposed for the necessary sale and export authority could and would be met and that the grant of such authority was a mere formality. In the result, by the time the contract was concluded both parties were under the fixed impression that such conditions had already been fulfilled. Once again, if

Sinclair-Smith's evidence is the criterion then, of course, they had been.

Thirdly, there is nothing in the evidence to show that after the Government's positive change of stance in March there were any political or economic developments here or overseas which, assuming they could reasonably have come to the knowledge of Sinclair-Smith, ought to have forewarned him of yet a further governmental change of mind. He was entitled to conclude that whatever had troubled the South African authorities before, and which led to their refusal on about 22 March 1985 to let the sale to Russia proceed, was no longer a problem.

Those being the relevant facts, it cannot be found, as the most plausible inference, that when the parties contracted they did foresee the occasion for impossibility. Moreover I do not see that their reasons for not foreseeing that event were peculiar. On the contrary, they were understandable and objectively justifiable.

Whether, had the learned Judge not found that the cause of impossibility was foreseen, he would have found that it was nonetheless reasonably foreseeable, he had no need to say. However, I do not consider that the existence of the Minister's power to override De Villiers and the susceptibility of the official attitude to change by political considerations here or overseas compel the conclusion that refusal of authority was something which the ordinary careful businessperson would have regarded as a reasonable possibility as opposed to a remote one. For that reason and for all the reasons already advanced respondent also failed to show that the cause of impossibility in this case was reasonably foreseeable. That being so, it cannot be said that it ought to have been foreseen.

In so far as the finding is concerned that appellant should have made provision against the refusal of authority I am not sure whether the learned Judge meant that

appellant should have secured a protective contractual provision or should not have contracted at all. It is also not clear whether he would have held against appellant on this ground, or on the alternative finding that Sinclair-Smith took a chance, without the cause of impossibility having been either foreseen or reasonably foreseeable. Nevertheless I shall deal with these findings on the supposition that a case might arise in which, despite the absence of such foresight or foreseeability, it could justifiably be said that the party raising the defence of impossibility could have achieved "protection" in one or other of the ways just postulated.

The evidence is clear that Hugelshofer would not countenance any term or condition rendering the contract subject to the required authority. If it is envisaged that Sinclair-Smith could have tried to insist, say, on a clause absolving appellant from any liability for damages in the event of the impossibility of delivery, this was simply not

investigated. Had the subject come up at the time the parties contracted one does not know for certain what Hugelshofer's attitude would have been but judging by his attitude to the contract being subject to the grant of authority, the likelihood is that he would not have agreed to this possible term either. Protection by such a clause was therefore not shown to have been attainable.

As to the finding that Sinclair-Smith, took a chance in entering into an unconditional contract, it seems to me that if he did take a chance respondent took just as much of a chance, namely, that appellant might become enabled, in the event of refusal of authority, lawfully to avoid the obligation to deliver.

As to the suggestion that Sinclair-Smith should not have contracted at all, there is no sound reason why he should have abandoned the idea of contracting altogether. If that was not required of him, for how long should he have waited, in the exercise of what would have been

extreme caution, for some further indication from De Villiers that he really meant what he had said? (Significantly, it was not argued that Sinclair-Smith should rather have found out the Minister's attitude.) One must keep in mind that the parties' respective representatives were both experienced in the hard and demanding world of international commerce. One would not be justified, in my view, in finding that where delivery was expected to be achieved as soon as May or June Sinclair-Smith should have held back. In any trade, if the opportunity for a legitimate and possible transaction presents itself the realistic and reasonable approach is surely to go for it while the climate is right. That was certainly the climate here once it was authoritatively indicated that the grant of State permission would pose no difficulty.

Reaching beyond the trial Court's findings, respondent's counsel sought to argue that Sinclair-Smith

was negligent in not getting De Villiers to furnish the altered conditions in writing or in failing to confirm in a letter to De Villiers what the latter had said on 3 April 1985 or in not being certain he had the required authority before entering into an unconditional contract. There are several answers to this.

In the first place, it is not possible, on the evidence, to find that even had Sinclair-Smith taken any of these steps De Villiers would probably have said anything more, or committed himself further, than he did on 3 April. Nothing suggests that he would have done a ***volte face*** and withdrawn authority altogether but if he was, as he professed in evidence, playing a waiting game, he would not have been more explicit than he was over the telephone. Of course, on Sinclair-Smith's evidence, what De Villiers told him was unequivocal and unqualified so there was little, if any, incentive or, objectively viewed, any reasonable need, on the former's part to call for confirmation or more

certainty.

Secondly, no amount of written confirmation to or by De Villiers, not even an unequivocal, unconditional authorization by him, could have protected appellant. The reason is that whatever De Villiers might have authorized, the Minister was empowered to rescind. And, as one knows, it was in the end the Minister's refusal which was decisive.

Lastly, negligence on the part of appellant was neither pleaded nor adequately investigated in evidence.

For all these reasons I conclude that the case advanced in the replication was not established and that the so-called general rule applied. Refusal of the necessary authority put an end to the contract and the parties' obligations under it.

Because the reasons advanced so far have not specifically addressed the matter of supervening illegality it is appropriate to say something on that topic, as the

case gives rise to the question whether, as a matter of public policy, the law ought to assist respondent to hold appellant to its bargain, at least to the extent of paying damages in lieu of delivery.

The role of public policy in cases of supervening illegality is discussed in depth by **Treitel** in his recent work to which reference was made earlier. At 326, on the strength of various decided cases illustrating the point, the learned author emphasises the difference between supervening impossibility and supervening illegality as grounds of a contract's discharge. The payment of money, he says, cannot in law become impossible but the contract is discharged on the ground of public policy by the supervening prohibition. That is the basic principle. The ***ratio*** is that the parties must not be given the incentive, which they might have if the contract remained in force, to violate the prohibition which gives rise to the illegality.

From what the learned writer says at *327* ***et seq*** it is

clear that by supervening illegality he means a prohibition coming into force after conclusion of the contract. That is not, of course, what we have here. However, he then deals with the situation, which we do have here, where, at the time of contracting, the contract can be lawfully performed only if the consent of some public authority is obtained e.g. if a licence is granted for the export of goods. If such consent is sought and refused after conclusion of the contract it is possible, he says, to view the case as one of supervening illegality but he prefers to conclude that the basic principle does not apply. Nonetheless he suggests that the failure to obtain the licence may affect the parties' obligations in other ways depending on the circumstances.

If I may pause here, the present case involves a hybrid situation. Before the parties contracted they were assured that the authority would be furnished; after they contracted it was refused. On those facts the case is, to

my mind, substantially one of supervening illegality.

On an alternative approach, the case is essentially comparable, in principle, with a situation involving a change in government policy which, according to **Treitel** (at 337 ***et seq***), is also an instance of supervening illegality leading to discharge of the contract. That is where, licences having been granted as a matter of course, there is a change of government policy and they are refused or issued only subject to new restrictions. As a result the contract can no longer be lawfully performed either because a licence is refused or because it will only be granted subject to conditions inconsistent with the terms of the contract. In the present case conditions for the grant of authority were set which had all been met by the time of signature of the contract by respondent. Afterwards, due to a change in official attitude, different conditions were set, the fulfilment of which was unattainable and the authority was consequently refused.

Whether contractual terms can validly avoid the discharge of the contract by supervening illegality is a matter dealt with by **Treitel** at *364*. The author there points out that policy considerations underlying the supervening prohibition which would be infringed were the contract to be performed can vary considerably in strength from one type of illegality to another. Accordingly, he says, policy considerations will not always require invalidation of a term, for example, requiring the party whose performance would be illegal to pay a sum of money in lieu of performance. In the case before us there was, of course, no such term but the conclusion reached by the trial Court had the same effect as if there had been one. In view of the nature of the commodity involved in the present matter and the profound political and humanitarian considerations which may prompt the Minister or the AEC to withhold export authority ***ab initio*** or to withdraw a previously granted authority, the gravity of any

contravention of the present prohibition would be such that it could justifiably be said that this contract ought, on the grounds of public policy, to be held to have been discharged in consequence of the refusal of the export authority.

It remains to add that that in this context foresight, or the foreseeability, of the illegality could make no difference. If it were contrary to public policy to hold the parties to their contract it would not matter that they foresaw, or ought to have foreseen, that the prohibition might supervene: Cf. **Treitel**, ***op. cit.*** *459, 460.*

While the English law of frustration differs from the South African law of impossibility of performance in certain respects there is also a strong degree of similarity: see the *Peters Flamman* case at *437*; *Kerr*, ***op. cit.*** *407 - 410.* But quite apart from that, public policy undoubtedly plays an important role in the South African law of contract. It does so in rendering a contract

unenforceable ***ab initio***: e.g. *Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)*. There would seem to be no reason of principle or logic why it should not render a contract unenforceable by reason of supervening illegality.

This short reference to the important statements made by **Treitel** is sufficient to point to the future necessity to decide whether, in South African law, supervening illegality discharges a contract on the grounds of public policy and, if so, in what circumstances. Because these questions were not dealt with in argument and because the present case can, as already explained, be disposed of on other grounds, it is unnecessary to reach that decision now.

For the reasons set out earlier the appeal must succeed.

It is, of course, recognised that the outcome does not provide a satisfactory answer to the allocation of loss such as, for example, respondent's wasted expense in

obtaining a ship. There may have been wasted expenses on appellant's side as well. This is a problem discussed by **De Wet and Van Wyk *op. cit.*** at *86 - 88*. All that need be said here is that such expenses cannot be recovered by way of a claim founded on breach of contract and any losses in this case must lie where they have fallen.

In the circumstances we need not decide the other issues debated before us but it is necessary, I think, to say something briefly about one of them and its implications. It was argued for appellant that the trial Court should not have accepted Hugelshofer's evidence. Apart from the numerous criticisms of it which the learned Judge himself expressed, it was submitted that Hugelshofer's credibility could, by reason of his refusal to answer certain questions in cross-examination, not properly be tested in accordance with established principles and procedure. In essence, argued counsel, the trial Court accepted the credibility of respondent's

crucial witness despite the fact that important parts of his evidence were not tested, and where the reason for that was the witness's refusal to let it be tested.

Vital to respondent's case for the recovery of damages was proof of its contract with the alleged third party. It was in contention whether such a contract had been concluded. To prove the contract, respondent tendered the evidence of Hugelshofer and an alleged copy of the alleged contract. The authenticity of this document was also in issue.

Evidence in court is required to be subject to full investigation as to its honesty and reliability. Appellant required to know who the third party was, who represented it and what the deleted terms of the contract had been. One might add that the document in question does not even reveal where it was signed. Armed with all this relevant and necessary information appellant could have established whether the alleged representative existed, whether he was

at the supposed place at the relevant time and, by such and further means, whether the alleged contract was concluded at all. If it was, appellant could then have proceeded to ascertain what all its terms were. In the present case those were matters in respect of which Hugelshofer refused to answer. As respondent's counsel conceded, no privilege of any kind applied. What Hugelshofer based his refusal on was an alleged express agreement of confidentiality between the parties as to the identity of the third party. The Judge found that agreement not proved. When pressed in cross-examination the witness ventured that it was a tacit agreement and that he was also bound by a confidentiality agreement with the third party. The trial Judge did not refer to either of the latter alleged agreements but accepted (at *79I - 80B*) that in the underworld of secret or sanctions-breaking transactions the rules of conduct are such that concealment and false denials are to be expected. On the strength of that he warned himself of the special

dangers in assessing and accepting the evidence of such a person.

The difficulty I have is that the question whether special rules did indeed apply to Hugelshofer, to the extent that they justified his refusals, was as much in issue as the rest of his evidence. The premise that such rules did apply could well be seen as an advance finding in his favour. Not only that, but whatever "code" applied to Hugelshofer's commercial endeavours abroad, once he chose, on behalf of respondent, to take his case to court in South Africa he became subject to the laws and rules of procedure which govern trial proceedings in this country. According to those laws and rules his refusals were without lawful excuse or foundation.

For whatever reason, counsel for appellant did not seek to make substantive use of the point during the course of the trial and that may explain why the trial Court did not deal with this aspect in its judgment. I would

emphasise that what I have said is not intended to dispose of the credibility argument in appellant's favour. It is not a finding that the trial Court did err in finally accepting Hugelshofer as a credible witness on the essentials of the case. It is intended as a *caveat* lest, in any future litigation involving secret contracts or the like, the impression prevail, based on the present matter, that a witness can be allowed to shield behind esoteric rules when it is sought to subject him to legitimate forensic questioning.

Finally, there is the cross-appeal. Respondent sought to re-open its case to lead Hugelshofer's evidence in order to prove that no alternative supply of uranium oxide was available from which respondent could buy in and on-sell to the third party. Appellant opposed on two main grounds. The first was that the international uranium market was a very specialised field, in respect of which Hugelshofer had no expert knowledge, in sharp contrast to the acknowledged

expert whom appellant proposed to call if the case resumed. Secondly, appellant persisted in maintaining that the third party was not Russia. It did so on the strength of respondent's refusal to identify the third party and on the basis of information obtained from Russian sources. The learned Judge held that appellant's Russian information and respondent's refusal to make frank disclosure justified the opposition.

The argument put forward by respondent's counsel in this Court was that the Judge applied wrong principles or was motivated by insubstantial reasons. It was said that appellant's mere possession of evidence with which to contradict respondent's allegations, while sufficient reason to oppose the claim, was insufficient reason to oppose the application. In addition, said counsel, respondent's attitude to disclosing the identity of the third party was irrelevant.

One of the matters which an applicant for re-opening

must establish is the materiality of the evidence sought to be led. In my view appellant did not act unreasonably in endeavouring to show in its opposing papers that Hugelshofer's further evidence could not have a material bearing on the outcome of the case given (a) his lack of expertise and (b) the overriding suspicion, which his evidence heightened rather than dispelled, that Russia was not the third party. This is in essence what the trial Judge in his discretion held. I am not persuaded that he did so for the wrong reasons or on wrong principles. The cross-appeal must therefore fail.

Proceeding to the order, it is as follows:

1. The appeal is allowed, with costs.

2. The order of the Court below is set aside and substituted for it is the following:

> "The plaintiff's claim is dismissed with costs, including the costs of two counsel."

3. The cross-appeal is dismissed with costs.

4. The costs awarded in paras 1 and 3 will include the costs of two counsel.

C.T. HOWIE

JUDGE OF APPEAL

HEFER JA] CONCUR

F H GROSSKOPF JA]

MARAIS JA]

PLEWMAN JA]

/al