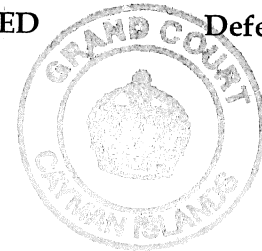
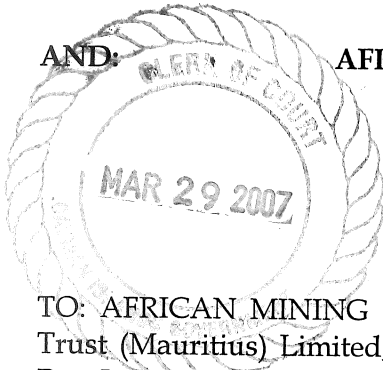


IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 130 OF 2007

BETWEEN: ORYX NATURAL RESOURCES Plaintiff

AND: AFRICAN MINING INVESTMENTS LIMITED Defendant



WRIT OF SUMMONS

TO: AFRICAN MINING INVESTMENTS LIMITED. whose registered office is c/o Investec Trust (Mauritius) Limited, 7th Floor, Harbour Front Building, President John Kennedy Street, Port Louis, Mauritius

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff, ORYX NATURAL RESOURCES whose registered office is c/o Campbell Corporate Services Limited, Scotiabank Building, George Town, Grand Cayman, Cayman Islands, in respect of the claim set out on the next and following pages.

Within fourteen (28) days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P.O. Box 495G, George Town, Grand Cayman, the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 29th day of March 2007

NOTE - This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

STATEMENT OF CLAIM

1 Introduction

- 1.1 The Plaintiff ('ONR'/'the Company') is an exempted limited company incorporated in the Cayman Islands with effect from 14 May 1999 under the Cayman Companies Law. At all material times from 7 May 2002 the authorised share capital of ONR has been US\$350,000,000 divided into 350,000,000 Ordinary Shares of US\$1 each.
- 1.2 The Defendant ('AMIL') is a private company incorporated in Mauritius.
- 1.3 At all material times:
- (1) Dr Issa Al Kawari ('Dr Al Kawari'), until 1995 Minister of Information of the Emirate of Qatar and since then the personal advisor to and Director of the Private Office of His Highness Sheikh Khalifa Bin Hamad Al Thani ('Sheikh Khalifa'), the former Emir of Qatar (until deposed in 1995), was:
 - (i) a director of ONR and representative of certain of its shareholders;
 - (ii) from 1 January 2003 the Chairman of ONR;
 - (iii) the owner of 50% of the shares in AMIL (with Sheikh Khalifa being the owner of the remaining 50%);
 - (2) Geoffrey White ('Mr White') was from [1999] a director of ONR and from 2004 acting in that capacity as a nominee of AMIL and a director of AMMCO;

- (3) Mr Martin Bowen ('Mr Bowen') and Mr David Lloyd ('Mr Lloyd') were directors of ONR, appointed to act in that capacity by AMIL pursuant to a Board resolution of 31 May 2004.
- (4) Randy Conn ('Mr Conn'), was from 1 May 2004 a director of ONR acting in that capacity as a nominee of certain of its shareholders;
- (5) African Mining Management Company (Pty) Ltd ('AMMCO') was a South African company being a subsidiary of or associated with AMIL;
- (6) Michael Halliday ('Mr Halliday'), a South African lawyer, was from 2002 the in-house attorney of ONR based in Johannesburg, but from May 2004 the Secretary of the Company and an associate of AMIL and AMMCO;
- (7) the Libyan Arab African Investment Company ('LAAICo'), a Libyan state-owned company for investments by Libya in Africa, represented at various times by Mr Mustafa Tayeb Khattabi ('Mr Khattabi'), its general manager Mr Mohamed Abdallah Agili ('Mr Agili'), and Dr Mostapha Ali Elbaghdadi ('Dr Elbaghdadi'), was a substantial shareholder of ONR, being the holder of some 30,000,000 ordinary shares of US\$1 each;
- (8) Sheikh Suleiman Ahmed Al Hoqani ('Sheikh Al Hoqani') was until [] a director of ONR and the representative of certain of its shareholders;
- (9) Sheikh Salem bin Mustahail Al-Mashani is a minority shareholder; and
- (10) Thamer Al Shanfari ('Mr Al Shanfari') was until 31 December 2002 chairman and a director of ONR, one of the minority shareholders, and the representative of certain of its shareholders.

1.4 References in these Particulars of Claim to:

- (1) 'ADCB' shall be to the Abu Dhabi Commercial Bank, a bank registered in Abu Dhabi in the United Arab Emirates;
- (2) 'Board Meeting No. [n]' refer to the nth Board Meeting of ONR;
- (3) 'the Board' shall refer to the Board of Directors of ONR;
- (4) 'cash consideration' shall refer to cash sums required to be paid by given dates in consideration for the issue of shares, and 'non-cash consideration' shall refer to any other form of consideration, for example in a promise to provide services or to commit some money or assets at some future date;
- (5) 'CEO', 'CFO' and 'COO' shall refer to the Chief Executive, Financial and Operational Officers of ONR;
- (6) 'EGM' shall refer to an Extraordinary General Meeting of ONR;
- (7) 'the Directors', 'the Shareholders' and 'the Investors' shall be to the Directors and the Shareholders of and the Investors in ONR;
- (8) 'the minority shareholders' shall be to the minority shareholders of ONR after the 13 May 2004, and where the particular context requires, refer to the shareholders represented by Mr Al Shanfari and LAAICo; and
- (9) 'NPV' shall be a 'net present value' of the relevant assets of ONR, including the mine referred to below.

1.5 In 1999, ONR negotiated with the then Government of the Democratic Republic of Congo ('the DRC') a 25-year mining concession ('the Concession') comprising various exploitation areas and an exclusive prospecting area ('the Mine') in the province of East Kasai, near the regional capital of Mbuji Mayi. This region is widely reputed as being the most rich in industrial grade diamonds in the world.

1.6 Also in 1999, an independent leading geological consultant, Mr Jim Williams, prepared a report ('the Williams Report') on the mineral reserves available on the Concession. The Williams Report found that:

- (1) there were substantial diamond reserves on the Concession;
- (2) there were two categories of reserves: (i) 'kimberlite', being a volcanic intrusion 'pipe' in the ground which has brought diamonds to the surface and (ii) alluvial deposits resulting from the erosion of the kimberlite; and
- (3) the value of diamonds to a depth of 200 metres in the kimberlite then discovered was estimated as being some US\$2 billion.

1.7 However, the Concession presented substantial logistical and management issues in the following circumstances:

- (1) In order to exploit the full resources within the 25 years of the Concession would require either very substantial processing capacity or the 24-hour operation of the Mine;
- (2) There was considerable political instability in the DRC after the overthrow of the former President Mobutu in May 1997;
- (3) At the time the Concession was obtained, there were no roads and almost no other accommodation or infrastructure;

- (4) The nearest reliable source of the necessary supplies, mining equipment technical support and spare parts was the Republic of South Africa, some 2,000 kilometres to the South of the RDC across Zambia and Zimbabwe.

1.8 Pursuant to the Concession, and from around 2000, ONR acquired a 49% stake in La Minière de Senga Senga SARL ('Sengamines'), a company incorporated under the laws of the DRC as a vehicle for pursuing the joint venture of ONR and the Government of the DRC in exploiting the Mine. The remaining shares in Senga-mines were initially held by (i) the Société Minière de Bakwanga ('MIBA'), a state-owned mining corporation of the DRC, which had previously held the concession for the Mine, and (ii) another company, Comiex SARL ('Comiex'), representing the Government of the DRC. ONR and Sengamines further entered a management contract, pursuant to which ONR agreed to manage the Mine for Sengamines and the operating profits of Sengamines would be divided as follows:

- (1) 25% of the operating profits would be paid to ONR;
- (2) ONR investment in Sengamines by way of loan would be repaid by way of a preferential exclusive dividend; and
- (3) the remaining operating profits would be divided as between ONR (49%), MIBA (16%) and the Government of the DRC (35%).

1.9 The mining operations of Sengamines, managed for it as aforesaid by ONR, were spread over three sites, being (i) alluvial plants at Senga Senga and at Movo and (ii) a substantial mine and processing plants at the Tschibue kimberlite.

1.10 Mr Al Shanfari sought and obtained investors and shareholders in ONR by means of his extensive family, business and political connections within Africa and the Middle East. By December 2002, the principal investors in ONR, albeit through various entities

owned and/or controlled by them or associated with them, were Mr Al Shanfari, Dr Al Kawari, LAAICo and Sheikh Al Hoquani.

2 The Memorandum and Articles of Association of ONR

- 2.1 Under the Memorandum of Association of ONR, as amended by resolution of an EGM of the Company held on 7 May 2002, ONR had an authorised share capital of US\$350,000,000 divided into 350,000,000 shares of US\$1 each.
- 2.2 The Articles of Association of ONR contain the following provisions:

'ISSUE OF SHARES

6. *Subject to the provisions, if any, in that behalf in the Memorandum of Association and to any direction that may be given by the Company in general meeting and without prejudice to any special rights previously conferred on the holders of existing shares, the Directors may allot, issue, grant options over or otherwise dispose of shares of the Company (including fractions of a share) with or without preferred, deferred or other special rights or restrictions, whether in regard to dividend, voting, return of capital or otherwise and to such persons, at such times and on such terms as they think proper.*

...LIEN ON SHARES

16. *The Company shall have a first and paramount lien and charge on all shares (whether fully paid-up or not) registered in the name of a Member (whether solely or jointly with others) for all debts, liabilities or engagements to or with the Company (whether presently payable or not) by such Member or his estate, either alone or jointly with any other person, whether a Member or not, but the Directors may at any time declare any share to be wholly or in part exempt from the provisions of this Article. The registration of a transfer of any such share shall operate as a waiver of the Company's lien (if any) thereon. The Company's lien (if any) on a share shall extend to all dividends or other monies payable in respect thereof.*
17. *The Company may sell, in such manner as the Directors think fit, any shares on which the Company has such a lien, but no sale shall be made unless a sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder or holders of the share, or the person, of which the Company has notice, entitled thereto by reason of his death or bankruptcy.*

- ...19. *The proceeds of such sale shall be received by the Company and applied in payment of such part of the amount in respect of which the lien exists as is presently payable and the residue, if any, shall ...be paid to the person entitled to the shares at the date of the sale.*

CALL ON SHARES

20. (a) *The Directors may from time to time make calls upon the Members in respect of any monies unpaid on their shares (whether on account of the nominal value of the shares or by way of premium or otherwise) and not by the conditions of allotment thereof made payable at fixed terms, provided that no call shall be payable at less than one month from the date fixed for the payment of the last preceding call, and each Member shall (subject to receiving at least fourteen days notice specifying the time or times for payment) pay to the Company at the time or times so specified the amount called on the shares. A call may be revoked or postponed as the Directors may determine. A call may be made by payment of instalments.*
- (b) *A call shall be deemed to have been made at the time when the resolution of the Directors authorising such call was passed...*
21. *If a sum called in respect of a share is not paid before or on a day appointed for payment thereof, the persons from whom the sum is due shall pay interest on the sum from the day appointed for payment thereof to the time of actual payment at such rate not exceeding ten per cent per annum as the Directors may determine, but the Directors shall be at liberty to waive payment of such interest either wholly or in part.*
22. *Any sum which by the terms of issue of a share becomes payable on allotment or at any fixed date, whether on account of the nominal value of the share or by way of premium or otherwise, shall for the purposes of these Articles be deemed to be a call duly made, notified and payable on the date on which by the terms of issue the same becomes payable, and in the case of non-payment all the relevant provisions of these Articles as to payment of interest forfeiture or otherwise shall apply as if such sum had become payable by virtue of a call duly made and notified.*

3 Management and Funding Crisis

3.1 In October 2001, the BBC issued a 'special report' ('the Special Report') which falsely suggested that there were links between ONR and a terrorist organisation known as 'Al Qaeda'. The BBC subsequently admitted their error and summary judgment was entered against it on a substantial claim in defamation in July 2002. However, the Company suffered insofar as the reputational damage to ONR:

- (1) made it harder for the Company to obtain either institutional investment or to interest a major mining house in participating in the Mine; and

(2) made it difficult to employ professional managers at all levels.

3.2 Increasingly, the Board had to turn to its existing shareholders and investors for further investment, whether by loan or further share subscription, in order to pay for the continuing operation of the Mine. The Company already had a US\$10 million revolving facility with the ADCB, referred to as 'the commercial loan'.

3.3 At Board Meeting No. 8 on 9 February 2002, it was agreed that ONR should seek to raise a further US\$10 million of capital to fund future capital expenditure requirements by the issue of equity as a minimum price of US\$2 per share, which was twice the nominal value of such shares.

3.4 Dr Al Kawari subscribed a further US\$2 million to ONR on this basis in 2002, in addition to his existing investment in and lending to the Company. However, he became angered by his own lack of influence in the management of ONR. The Minutes of Board Meeting No. 9 on 27 April 2002 record not only the decision of the Board that the capital of the Company should be increased at the subsequent EGM on 12 May 2002 but also the said irritation of Dr Al Kawari:

- '15. *...[I]t was formally put by [Mr Al Shanfari] that US\$6.8 million was required to fulfil the demands for fuel, spares and further equipment necessary to move the company comfortably into full production. The figure had been US\$8.8 million, but was reduced because of the option conversion of Dr Al Kawari US\$2 million option previously granted by the board.*
16. *[Dr Al Kawari] stated that he, and those he represents, have invested substantially in the project and have provided more than half of the capital of the company. [He] noted that 'he who pays the piper calls the tune'....*
27. *[Mr Al Shanfari] explained that [Dr Al Kawari] had converted at the minimum price of US\$2.00 per share, as per the agreement at the previous Board meeting. [Dr Al Kawari] stated that he has had to save the ship, nobody else was prepared to commit further funds, and so he had been forced to supply the company alone.*
- ...31. *[Dr Al Kawari] stated that he would have to totally review the management structure of the company, including all the Directors.*

...39. *It was agreed that [Dr Al Kawari] would discuss the situation. Thereafter, [Dr Al Kawari] would contact everyone for a further meeting to announce the new corporate strategy for management and if any of the current directorships were to continue.'*

- 3.5 By July 2002, Mr Al Shanfari had himself injected a further US\$2 million by exercising his option to take further equity in ONR at US\$2 per share, leaving an immediate funding requirement of US\$4.8 million.
- 3.6 However, the funding situation of ONR continued to deteriorate through 2002, notwithstanding the participation of LAAICo from around December 2002. In October 2002, the Final Report of the Panel of Experts of the UN into the Illegal Exploitation of the Natural Resources and Other Forms of Wealth in the DRC was published in terms which made various allegations not previously put to ONR against the Company. At Board Meeting No. 12 on 12 December 2002, Mr Al Shanfari announced his own resignation as director and chairman of ONR and chairman of Sengamines. The Board resolved to accept the said resignation and appointed Dr Al Kawari and Mr White to act as Chairman of the Board and Executive Vice Chairman respectively with effect from 1 January 2003.
- 3.7 In early 2003, ONR succeeded in re-structuring of Sengamines pursuant to the dissolution of Comiex so that:
- (1) ONR increased its stake in Sengamines from 49% to 80%; and
 - (2) MIBA increased its stake from 16% to 20%.
- 3.8 However, there was growing dissatisfaction with the management of ONR and the Mine, not least as production at the Mine had continually dropped after reaching a level of 110,000 carats per month in October 2002. The Board was increasingly drawn directly into the issues of operational and production management which should more properly have been resolved by the Executive Committee ('Exco'). At Board Meeting No. 14 on 28 June 2003, it was acknowledged that Mr White, who was then acting as CEO lacked the

relevant mining experience, so that an appropriately qualified COO was urgently required by the Company.

3.9 At Board Meeting No. 16 on 7/8 January 2004, Dr Al Kawari acknowledged that ONR was experiencing a 'management crisis'. The meeting further recognised the very substantial technical problems faced by the Company in maintaining and servicing and the mining equipment and staff required on the Mine. It was then resolved to recruit a CEO and a new mine manager and to establish a committee of shareholders or 'Management Committee' to take over day to day control of the operation of the Company from the existing management of the Company. Dr Al Kawari, Mr Al Shanfari, Mr Khattabi and Mr Al Hoqani were immediately appointed to the said Management Committee.

3.10 Certain of the Investors and Directors pledged to make further loans available to the Company in order to stabilise the Company, and pursuant thereto:

(1) Sheikh Khalifa and Dr Al Kawari contributed:

(i) US\$1,255,000 by way of fuel supplied to the Company; and

(ii) US\$875,000 by way of a loan made by agreement of 26 February 2004 by Beagle Equities Ltd ('Beagle'), a company incorporated under the laws of the British Virgin Islands but beneficially owned by Sheikh Khalifa and his family; and

(2) LAAICo contributed a further US\$1,400,000 by way of loan to ONR.

3.12 At Board Meeting No. 11 on 12 February 2004, it was agreed by the Board, as it had already been agreed by the Shareholders, that Mr White, who as 'Vice Chairman' was acting as CEO of the Company but had no relevant mining expertise or experience, should immediately be removed from managing the Company and made responsible

only for ONR's marketing and public relations. Notwithstanding this agreement, Mr White continued to manage the Company.

3.13 On 25 April 2004, the then Mines Director of ONR, Mr Jimmie Wilde, presented a written Situation Report which showed that the performance of the Mine had been adversely affected by two main problems:

- (1) There were *technical* problems, in particular with less than 50% of the earthmoving equipment being operational due to shortages of spare parts and a lack of any workshop facilities; and
- (2) There were deficiencies in ONR's *geological* understanding of the Mine, which had commenced production *before* all of the requisite geological surveys and economic evaluations had been carried out:

'Geological knowledge:

We are working with limited information on the ore body – we have some of the old MIBA reports, a report from Williamson and the initial drilling by SRK. This is not enough information to be able to understand the ore body, the surrounding country rock along with the inert ground water problems and therefore prohibits the pit and mine designs and economic model.

...At no time has any extensive metallurgical work been done on the Tshibwe kimberlite to assist in the plant parameters and design, consequently most of our plant and equipment has been purchased as "off the shelf" items and therefore in some respects is not suited to the existing parameters.'

3.14 A 'Management Action Plan' produced on 28 April 2004 made clear that a 're-shuffle of management', with the following functions being required:

- (1) a COO, to whom a 'Technical Mines Director' and an 'Administrative Mines Director' would report;
- (2) a CFO; and

(3) a Marketing and Sales Director.

3.15 An 'Informal Meeting of the Shareholders' was convened on 1 May 2004. A pack of information was prepared by ONR's management for the purposes of that meeting. That pack identified the following 'cash requirements' of the Company:

(1) an 'immediate cash requirement' for US\$7,625,000 required '*to reach a cash positive position in August this year*'; and

(2) '*additional capital items that require funding to improve the reliability of operation*', which could be funded either from future cash flow or from a capital injection, the total of which was some US\$36,900,000.

3.16 Looking to the future, the same information pack for the Shareholders:

(1) envisaged that the short-term loans already provided to Shareholders might be converted to equity, but at *rates* which need to be determined by the Shareholders; and

(2) contemplated that shares might need to be issued at a discount:

'The company has addressed the issue of future funding and has been unable to raise funds from any commercial or other source.'

'The only possible source of funding to support the business is via a rights issue offered to all shareholders. It is the current belief of management that the company will only be able to attract shareholders funds at a substantial discount to par value.'

3.17 At the informal meeting of Shareholders on 1 May 2004, there was discussion of the immediate need of US\$10 million and general acceptance that '*whoever is putting US\$10M into the company will get control*'.

3.18 By this time, the Company was facing an immediate cash crisis. In those circumstances, at the said meeting on 1 May 2004:

- (1) Mr White acknowledged that the Company required an urgent injection of capital of at least US\$10 million by the end of May 2004, including US\$3 million by 4 May 2004;
- (2) ONR's management contended that it had no specific proposals to raise the said funds, and that it was the responsibility of the Shareholders;
- (3) It was suggested that whoever provided the said funds should be entitled to specify the terms and the Directors were asked for funding proposals;
- (4) On a call for the dismissal of the entire management of the Company, Mr Halliday and Mr White were required to, and did, resign as secretary and Director respectively of the Company.

4 The Funding Proposals

- 4.1 By an email to the Directors of 2 May 2004, Dr Al Kawari, in his capacity as Chairman of ONR, circulated certain process rules to govern the submission of proposals for further investment by shareholders. These rules provided that:
- (1) The proposals must include immediate funding of US\$3 million;
 - (2) The proposals would be required to be submitted by 3 May 2004, although revised proposals could be made on 4 May 2004; and
 - (3) The proposals would be reviewed by the Chairman's office and circulated to the Directors for their decision as to the *'best commercial offer that is for the benefit of the shareholders of the company'*.

4.2 On 3 May 2004, Dr Al Kawari submitted to the Board the proposal of his office ('the Al Kawari Proposal') of which the core terms were as follows:

- (1) AMIL would invest some US\$22 million, including \$3 million to be paid by 5 May 2004, in return for a 47.5% shareholding in the Company:

'In consideration for the acquisition of the forty seven and one half percent shareholding, AMIL undertakes to invest an amount of US\$22 million (twenty two million) which sum shall be utilised in settling some of the current liabilities, the development of a geological mining model and the necessary stabilisation of the business.'

- (2) No due diligence would be required, and the US\$22 million would be paid in the following tranches:

- (i) US\$3 million by 5 May 2004;
- (ii) US\$4 million by 19 May 2004;
- (iii) US\$8 million by 9 July 2004; and
- (iv) US\$7 by the end of September 2004;

- (3) This advance of US\$22 million would not be used to repay US\$10 million of borrowing provided by the ADCB, which would forbear from requiring repayment;

- (4) AMIL would assume all managerial responsibility for ONR and would appoint four directors and the chairman of a newly constituted Board;

- (5) AMIL would obtain an exclusive marketing and sales agreement, under which it would be entitled to a commission of 3% on gross sale proceeds;

- (6) AMIL would undertake to continue to support ONR, on equivalent terms to the above, as necessary, to ensure that the Company developed so that it could produce more than 400,000 carats per month; and

- (7) AMIL would, as soon as practical when the company had been stabilised, enter into a joint venture agreement with a major international mining house to expand, develop and manage the Company.

4.3 Also on 3 May 2004, Mr Al Shanfari made his own proposal ('the Al Shanfari Proposal') to the Board with the following core terms being in the final version of that proposal as submitted on 4 May 2004:

- (1) A company formed out of the association of Mr Al Shanfari, Mr Al Hoqani and the Leviev group of companies ('Leviev'), then called 'Newco Legit' would, subject to due diligence by Leviev, invest at least US\$45 million and at most US\$60 million in the Company, to be used in settling ONR's liabilities, developing a geological mining model and expanding the Mine in order that they might produce 400,000 carat per month;
- (2) Newco Legit would in return for its investment to revive and stabilise the Company acquire a 50% shareholding in ONR;
- (3) US\$3 million of the total investment would be paid immediately upon acceptance of the Al Shanfari Proposal;
- (4) Newco Legit would assume all managerial responsibility for ONR, and a new Board would be formed of 8 directors, with 4 representing Leviev;
- (5) Newco Legit would be given an exclusive marketing and sale agreement and be entitled to a commission of 4% on all proceeds of sale.

4.4 In analysing the rival proposals for the benefit of the Directors, Mr Halliday, in terms which were not challenged by Dr Al Kawari, noted as follows:

' The main difference lies in the conditionality of the one offer. [Mr Al Shanfari's] offer is subject to a long due diligence period that may result in the lowering of the*

acquisition price or a termination by Newco Legit which is not the case with Dr [Al Kawari's] offer which is unconditional.

- * To estimate a price being paid per share is difficult as the one offer is open ended.*
- * In Dr [Al Kawari's] offer the funds (22 million) are guaranteed in terms of the payment schedule. [Mr Al Shanfari's] offer commits 3 million and undertakes to fund the ongoing working cost requirements.*
- * [Mr Al Shanfari's] offer contemplates Leviev management and Dr [Al Kawari's] offer includes an undertaking to recruit the necessary skills.*
- * Dr [Al Kawari's] offer entails no risk whatsoever as the offer is not subject to a due diligence and is therefore more certain.'*

4.5 By letter to Mr Halliday of 4 May 2004, Dr Al Kawari further confirmed that:

- (1) AMIL was a wholly owned subsidiary of a trust in which Dr Al Kawari's principals were beneficially interested;
- (2) The offer of funding was '*NOT subject to any due diligence whatsoever*' and AMIL funding was '*therefore not at risk from a negative conclusion*';
- (3) AMIL '*[would] invest the necessary funds into the company to reach 400,000 carats for 47.5% of the equity*', so that it was not envisaged that additional funding would require the issue of further equity; and
- (4) AMIL would bring professional management to the Company, possibly by cooperation with a major diamond mining company and/or by bringing in sub-contractors to provide support infrastructure, and using appropriate specialists being used to project manage the expansion of the Mine;

4.6 The Al Kawari Proposal therefore had and was understood by others to have the following particular characteristics:

- (1) it was an *unconditional* commitment to invest first (i) US\$22 million by the specified dates *and* (ii) such further sums as were required in order to bring the Mine to capability to produce 400,000 carats per month;
- (2) it could therefore ascribe no particular value to the shares which would be issued in order to give AMIL 47.5% of the shares in ONR; and
- (3) it involved an undertaking to replace the existing management of ONR by recruitment to the relevant managerial positions.

4.7 By further email to the Directors of 5 May 2004 inviting their votes on the rival proposals, Mr Halliday confirmed that the accepted proposal would need to be incorporated into:

'a definitive agreement incorporating the terms of the successful proposal and appropriate minority protection at board level which will then provide the board with a programme and timeframes for evaluating performance.'

4.8 Mr Halliday attempted to assess which one of the Al Shanfari Proposal and the Al Kawari Proposal brought more value to the Company in its dire cash crisis. However:

- (1) In comparing the rival proposals, he made no attempt to calculate the number of ordinary US\$1 shares which would be issued under each; and
- (2) at no stage did he, or any other person acting on behalf of ONR, attempt or purport to make any assessment as to:
 - (i) the value of the cash and non-cash consideration to be provided under either proposal and the Al Kawari Proposal in particular; and
 - (ii) whether that value equated to the nominal value of the shares to be issued in consideration of the promised investment.

- 4.9 The only objective basis on which the non-cash consideration offered in the Al Kawari Proposal could possibly then have been valued was an estimate of US\$40 to US\$50 million made by SNC Lavallin, a firm of independent consultants, as being the capital expenditure required to bring the production of the Mine up to a level of 400,000 carats per month. The *current* value of a *contingent* commitment to make available such funds would be substantially less than such amounts.

5 Board Resolution of 13 May 2004

- 5.1 By an email of 13 May 2004 to Mr Conn, Mr Halliday announced to Mr Conn and to Mr Al Shanfari that the Al Kawari proposal had received the support of the majority of the Directors.
- 5.2 By an email of the same day in the following terms, Mr Halliday sent to the Board the draft of a Board resolution said to reflect the Al Kawari proposal:

'Attached is the relevant board resolution for the acceptance of Dr [Al Kawari's] proposal. This resolution has been discussed with the majority of the directors and in order to proceed as quickly as possible I would be grateful if you would sign it where provided and fax it to me... If there are any major issues in the resolution that cannot be rectified at the next board meeting please contact me.'

- 5.3 That board resolution ('the Resolution') was subsequently signed by all of the Board members. By it, the Board resolved in the following terms that the Shares should be issued in consideration for certain undertakings set out in paragraphs 1.1 to 1.4 thereof ('the First to Fourth Promises'):

'1. THAT, subject to the fulfilment of the conditions in 1.1 to 1.4 below, the Company issues 132 816 837 shares, which after the issue will represent 47.5 percent of the entire issued share capital in the Company, to AMIL in consideration for AMIL irrevocably undertaking:

1.1 To make payment of US\$22 million for the settling of the Company's current liabilities (excluding the commercial loan), the development of a geological mining model for the Company's subsidiary ("Sengamines") and the stabilization of Sengamines' business, such payment to be made in accordance with the following schedule:

- 1.1.1 US\$3 million to be released to the Company's bankers immediately;
 - 1.1.2 US\$4 million to be released to the Company's bankers on 19 May 2004;
 - 1.1.3 US\$8 million to be released to the Company's bankers on 9 July 2004;
 - 1.1.4 US\$7 million to be released to the Company's bankers on or before the end of September 2004;
 - 1.2 AMIL commencing a detailed drilling program and geological review of Sengamine's operations and the preparation of a mine plan;
 - 1.3 Subject to a positive mine evaluation meeting the Board's investment criteria, AMIL will, at its cost and without recourse to the other shareholders, fund the necessary expansion to ensure that Sengamines is able to produce 400,000 carats of diamonds consistently and on a constant basis per month; and
 - 1.4 AMIL providing interim management and securing new professional management including a Chief Operating Officer, to the Company and Sengamines, such management to have the expertise and ability to achieve the objective set out in 1.2 and 1.3 above.
- ...5. THAT the Company incorporates the terms and conditions contained in the [AMIL] Proposal following this resolution in a definitive agreement incorporating the estimated time frames and/or dates by when the undertakings are estimated to be completed.
- ...7. THAT the board of the Company shall be reconstituted to comprise 7 directors 3 of which shall be representatives of the current major shareholders and 4, including the new chairman, shall be representatives of AMIL.
8. THAT any major decision of the Company, for example a financial restructuring or the introduction of a new partner, any participation in the business of the Company, any amendment to the capital of the company or a liquidation or disposal of any asset shall only be effective if at least two thirds of the directors and/or shareholders vote in favour thereof and that the articles of association of the Company be amended to reflect this.'
- 5.4 The number of shares to be issued to AMIL under the Resolution, 132,816,837 was the precise number required to constitute 47.5% of the new issued capital of the Company.
- 5.5 In the premises, the Resolution constituted a contract for the allotment of the Shares to AMIL on the basis that:
- (1) the Shares were to be issued in return for a promise of:
 - (i) the payment in May 2004 of some US\$7 million;

- (ii) the future payment of the remaining US\$15 million; and
 - (iii) the provision of services and the contingent commitment of further funding under the Second to Fourth Promises;
- (2) the number of the Shares, 132,816,837, was calculated not by reference to the value of the consideration being provided to the Company but by reference to the number needed in order to provide AMIL with 47.5% of the shares in ONR;
- (3) the monies to be provided under the First Promise constituted only 16% of the nominal value of the Shares;
- (4) no attempt was made to ascribe any value to any of the Second to Fourth Promises (and none could have been in the following circumstances);
- (5) there was no certainty as to the definitions or necessary qualities of either:
 - (i) the detailed drilling programme, geological review and mine plan which had only to be 'commenced' under the Second Promise; or
 - (ii) the new professional management to have the expertise and ability to achieve the above tasks and to ensure the ability of the Mine to produce 400,000 carats per month;
- (6) there were no minimum or maximum limits to the contingent financial commitment made in the Third Promise;
- (7) the Third Promise to fund the expansion of Sengamines to secure levels of production of 400,000 carats per month was entirely *conditional* upon:

- (i) an undefined '*mine evaluation*' which was not finally promised;
 - (ii) being '*positive*' on some analysis of benefit over time against cost; and
 - (iii) '*meeting the Board's investment criteria*', which criteria were not identified;
- (8) AMIL would provide interim management and secure new professional management to ONR and Sengamines within an unspecified time period.

5.6 In the premises:

- (1) the Shares, with a nominal value of some US\$132,816,837, were to be issued in return for only US\$22 million in cash and certain ill-defined services of questionable value which could have only negligible money's worth, alternatively a value substantially less than the nominal value of the Shares;
- (2) no attempt had been made by the Company or the Board to place a value on the Second to Fourth Promises in order properly to correlate the nominal value of the Shares to be allotted and issued to the actual value of the financial commitment and various services being provided by way of consideration under those promises;
- (3) insofar as the First Promise was worth the amount of money to be paid by AMIL, the Shares were to be issued at a true price of US\$0.16 per share and a substantial discount from their par value of US\$1 per share; and
- (4) the only available evidence for an assessment of the value of the financial commitment offered in the Third Promise was the estimate of an external consultant, SNC Lavallin, that capital expenditure of US\$40 to 50 million would be needed in order to raise production to 400,000 carats per month.

5.7 In the months which followed 13 May 2004, there were substantial attempts to negotiate the definitive agreement which had been contemplated by the Directors. However, for the reasons pleaded below, no 'definitive agreement' was concluded by the Directors or by the Shareholders in order to give effect to the Resolution.

5.8 A press release which was issued by ONR on 20 May 2004 announced as follows:

'It was today announced that a controlling interest in [ONR] has been acquired by offices represented by His Excellency Dr Issa Al Kawari. Dr Al Kawari has agreed to invest substantial additional funds in order to increase production from the mine.

...HE Dr Issa Al Kawari, Chairman of Oryx stated:

"...With our further capital injection and commitment, we have taken equity and Board control of ONR, and will develop the mine to become a significant producer of diamonds..."

Oryx is in discussions with several corporations in the industry to provide the professional management of the company and to develop phase two of the mine.

Geoffrey White, CEO stated:

"...With the new funding, the company will complete its drilling program and take the Tschibue kimberlite to a proven resource..."

6 Conditionality of the Issue of the Shares

6.1 By email of 25 May 2004 to Mr Conn, Mr Halliday suggested that the Shares then needed to be issued. Mr Conn objected to this on the basis of his understanding of the Resolution that the Shares would be issued upon the Promises being fulfilled.

6.2 Mr Halliday, by an email of 27 May 2004, explained his alleged understanding of the Resolution as being that it required the immediate issue of the Shares to AMIL but subject to conditions subsequent, although it was unclear how the Promises could be effective as such conditions where the Shares had *already* been issued:

'Regarding the resolution and the issue of shares I agree the resolution is conditional but it is a resolutive condition. That is, the conditions are deemed to have been met and the arrangement is concluded and it only terminates on non-fulfillment of the conditions. It had to be this way as the use of partly paid shares was unavailable as the company had to create these and it was felt that AMIL's obligations could be adequately monitored by the Board.'

6.3 At Board Meeting No. 18 on 23 June 2004, the issue of the basis on which the Shares were to be issued to AMIL was discussed and agreed in the following terms as recorded in the Minutes of that meeting:

'6. ...The issue resulted in some debate and it was felt that some control had to be placed on the shares. There also appeared to be reluctance on issuing the shares to AMIL until it had completed its obligations. A clear difference of opinion existed on the interpretation of the resolution and whether AMIL was entitled to the benefit of the shares prior to the completion of its obligations. In an attempt to resolve the impasse, debate ensued regarding options and various alternatives were discussed. Having rejected the concept of deferred shares and convertibles it was agreed that the shares be placed in escrow pending the fulfilment of AMIL's obligations. It was further agreed that AMIL will be entitled to vote these shares and that the shares would rank parri passu with those already in issue. Furthermore it was accepted that if the board elected not to proceed with the expansion as this was not viable the shares would be released from escrow to AMIL.

...8. ...It was also agreed that AMIL would not sell its ONR shares and that during AMIL's management of ONR and Sengamines there would be full transparency and proper bookkeeping.'

(The final sentence of paragraph 6 of the said Minutes, as set out above, was at all material times disputed by Mr Conn.)

6.4 Further, by a formal written resolution signed by the Directors at or shortly after the Board Meeting of 23 June 2004 and stated to have been passed on that date, the Board resolved:

'That pursuant to a resolution of the Board of Directors, passed on 13th May 2004, in terms of which the Company resolved to issue 132,816,837 shares in the capital of the company to AMIL, that the Company agrees to issue 132,816,837 ordinary shares to AMIL for the provision of capital, the undertaking of the exploration programme and the undertaking to expand the operations and for all related services rendered or to be rendered to give the undertakings of AMIL pursuant to the resolution of 13th May 2004 and on the following conditions:

- (1) *The shares will be held in an escrow account, and only released on completion of points 1.1, 1.2, 1.3, 1.4 in the resolution of the 13th May 2004;*
- (2) *Pending the release of the shares, AMIL shall be entitled to vote these shares subject to the conditions contained in resolution 8 of the resolution at any meeting of shareholders at which it may be entitled to vote. The shares shall rank pari passu with the other ordinary shares in issue.*
- (3) *AMIL undertakes that it will not sell the shares to any third party until after the shares are released and then only after following any pre-emptive rights.*

The above three conditions together with the other conditions regulating the terms of the resolution of 13th May 2004 shall be incorporated in the definitive agreement referred to in the resolution passed on 13th May 2004.'

6.5 During the latter months of 2004, attempts were made by the parties to conclude a written 'subscription agreement' between ONR and AMIL. On 24 August 2004, Mr Halliday, then acting for AMIL, presented a draft which he believed to reflect the terms of the Al Kawari Proposal and the Resolution. A South African attorney based in Johannesburg, a Mr Derek Burns ('Mr Burns') was instructed, initially by LAACO but subsequently also by Mr Conn, to advise on certain drafts of the agreement to ensure that ONR's interests were adequately protected and to give further definition to the obligations undertaken by AMIL.

6.6 Mr Burns duly amended as follows the draft subscription agreement prepared by Mr Halliday on behalf of AMIL:

'4 ISSUE OF NEW SHARES

4.1 *Following the acceptance of the AMIL proposal by the board, the board resolved, by resolution dated 13 May 2004 ("the resolution"), that in consideration for AMIL irrevocably undertaking to provide the financing and other obligations ~~below~~ set out in this agreement ONR would issue 132,816,837 ...ordinary shares to AMIL, such issue to be effected only when AMIL has satisfactorily completed all its obligations in terms of this agreement and such resolution.*

4.2 *By resolution dated 23 June 2004, the board of ONR further resolved that the 132,816,837 shares authorized pursuant to the resolution of that date would be held in escrow and only released on completion by AMIL of the obligations thrust upon AMIL, namely:*

4.2.1 the payment of US\$22 million;

4.2.2 the drilling program and production of the geological mining model of Sengamines operations and the preparation of the mine plan;

4.2.3 the funding by AMIL of the necessary expansion in the operations of Sengamines in order to ensure that Sengamines is able to produce 400,000 carats of diamonds consistently and on a constant basis each month;

4.2.4 the provision of interim management and new professional management as set out in the resolution of the 13th May 2004...'

6.7 A further substantial point of difference between the parties was as to what should happen in the event that AMIL *failed* to fulfil all or any of the Promises:

- (1) The AMIL draft, prepared by Mr Halliday and considered by Mr Burns on or before 7 September 2004 provided (in its clause 4.3) that, in the event of no or partial fulfilment of the Promises, AMIL should be entitled to the number of shares equalling its '*demonstrable financial contribution*':

'Should AMIL fail to fulfill the obligations set out in clause 5 below, [it shall] be issued that number of ordinary shares at par as equals AMIL's demonstrable financial contribution (taking into account its direct financial contribution and that expended by itself and/or any third party undertaking the exploration programme on AMIL's behalf) to ONR up to that point.'

- (2) The rival draft, proposed by Mr Burns on behalf of ONR provided that AMIL should forfeit *all* of its rights to any of the Shares if it failed to fulfil the Promises in any respect:

'Should AMIL fail to fulfill the obligations thrust upon it in terms of this agreement, it shall not be entitled to all the shares held in escrow and shall forfeit its right to any of such shares regardless of the financial contributions it has or had made.'

6.8 In the premises, there were substantial differences of opinion between ONR and AMIL, reflected in the different drafts as aforesaid, as to whether:

- (1) AMIL should only be entitled to the Shares only upon completion of *all* of the Promises (and therefore upon production reaching 400,000 carats per month); and
- (2) AMIL should have be entitled to *any* of the Shares, in circumstances where it had *not* fulfilled *all* of the Promises.

6.9 Notwithstanding such differences of opinion, it is apparent that AMIL accepted that:

- (1) AMIL would not have an immediate right to the Shares, which were only to be released to it from escrow on some form of substantial performance;
- (2) in the event of *partial* performance, AMIL was to be entitled to the release of an amount of shares which would be referable to its '*demonstrable financial contribution*' to the Company; and
- (3) implicitly, the value of the Promises or any of them could not be assessed and the shares would therefore be referable to such financial contribution as could be shown by AMIL at the relevant time to have been made.

6.10 By letter of 19 December 2004 to Dr Al Kawari, Mr Khattabi demanded that the agreement between ONR and AMIL should be finally concluded and presented for approval by the Board of ONR.

6.11 By a faxed letter of Dr Al Kawari to Mr Khattabi dated 21 December 2004, AMIL withdrew from the negotiations for a subscription agreement on the basis that it was not willing to accept any *further* conditionality to the issue of the Shares:

'All members of the Board should recognise that the Resolution passed by the Board of ONR on 13th May 2004 is final. It was not subject to any further conditionality, such as the execution of a Supplementary Agree-ment, otherwise we would not have invested the \$22,000,000 required in terms of the resolution.'

7 Performance of the Promises

- 7.1 By January 2005, it was apparent that AMIL had failed to perform or to show its performance of each and every one of the Promises set out in the Resolution. In support of this contention, ONR will rely on the following facts and matters.
- 7.2 As for the payment of the monies promised under the First Promise:
- (1) Mr Halliday by email to Mr Conn of 25 May 2004 stated that the tranches of US\$3 million and US\$4 million payable by then had been paid.
 - (2) By a further email of 16 August 2004 from his new AMIL email address, Mr Halliday advised that loan repayments had not commenced, and that US\$10 million was still outstanding to ADCB on the Commercial Loan.
 - (3) By annexure to Mr Halliday's letter of 27 October 2004 to Mr Burns, a table was provided of the payments of the sums set to constitute the US\$22 million, showing that (i) payments of US\$7,000,000, US\$500,000, US\$3,000,000, US\$3,000,000 and US\$5,000,000 had been made to ADCB (ii) a payment of US\$2,500,000 to Standard Bank and (iii) a payment of US\$1,000,000 to Rawbank. However, no dates or other data, for example as to payment method or the account into which they were paid, has been provided to ONR or its minority shareholders.
 - (4) At a meeting on or before 13 December 2004, Mr Halliday undertook to establish to Mr Burns' satisfaction that the US\$22 million had been paid. No further evidence was supplied by Mr Halliday as undertaken, although Mr Burns continued to press for verificatory information in January 2005.
 - (5) At the same meeting, Mr Halliday confirmed that the US\$22 million had been '*utilized in respect of current liabilities*'. Insofar as it is claimed by AMIL that

substantial payments were made to ADCB, no confirmation has been given that the monies so paid were paid contractually in accordance with the Resolution, being for the settling of current liabilities '*excluding the Commercial Loan*', being the overdraft provided by ADCB to ONR.

7.3 As for the investigations required under the Second Promise, and the provision of further funding for the expansion of the Mine under the Third Promise:

- (1) In his email to Mr Conn of 16 August 2004, Mr Halliday, writing from an AMIL email address, *already* appeared to dismiss the likelihood of any of the 'unlimited' funding being provided pursuant to the Third Promise:

'My understanding of the process was that the AMIL funding went into ONR but when this is exhausted a potential problem arises. Hence the view that the shares in [two subsidiaries] be disposed of to AMIL and that ONR simply becomes an investment holding company. This would effectively pass the costs of these two companies to AMIL and free ONR of any further liability, excluding the ADCB loan...'

- (2) In a further email to Mr Conn of 29 September 2004, Mr Halliday reported that, with the proceeds of the sale of production being paid to AMIL, the only future receipts of ONR other than loan repayments and dividend from Sengamines would be 'further equity subscriptions', implying that further investment in ONR by any party would require the issue of *further* shares;

- (3) By letter of 27 October 2004 to Mr Burns, Mr Halliday, writing on behalf of AMMCO, reported that:

'No positive valuation meeting has taken place. This could only happen on conclusion of the geological work program. The [ONR] board will need to know what is in the ground and the value to determine if it can be mined viably.'

- (4) In the same letter, Mr Halliday conceded on behalf of AMMCO that only a limited drilling program had been undertaken (and by De Beers) and that the geological work would not necessarily be completed by AMIL:

'As regards the drilling program, De Beers initially undertook to perform this on behalf of AMIL. However, this has not proceeded as quickly as perhaps initially anticipated. It is extremely difficult to secure the correct drilling rigs as only 2 exist, both of which are contracted elsewhere. ...Clearly the mining model cannot be commenced until sufficient geological work is done to give confidence and it is only once the model proves to be financially viable that the operations will be expanded. This I believe has been accepted as the resolutions passed on 23 June 2004 contemplate the release of the shares from escrow on completion of the geological work to a level accepted by the board. Also AMIL anticipated that the mine would reach a cash neutral or cash positive point soon after June. This has not happened and the cash burn continues... [I]n the absence of proper geological information nobody can positively state that the mine will become cash positive. The reason I mention this is that AMIL will not necessarily proceed with the geological work if the mine cannot become self sufficient and the US\$22 million is finally consumed. If a decision is taken to extend the operations future financing becomes an issue.'

- (5) AMIL was clearly stating by that letter that if all of the US\$22 million had been expended, and if the Mine was not in profit, then AMIL would not proceed to complete the geological investigations undertaken by De Beers.
- (6) Further, there was suggestion in the same letter that AMIL would then have to seek further funds from the *other* Shareholders:

'Contractually, [ONR] has the obligation to provide Sengamines with the necessary funds to develop the project. This has historically been done by the shareholders of Oryx subscribing for shares at par (US\$1.00) but as the project has developed without generating a return all the shareholders have become disinclined to invest at all and additional investment can only be secured on preferential terms and hence the problem.

...This process is not a renegotiation but should rather be the foundation for the future and should address the inevitable question regarding future funding not covered by the resolutions. In other words, if the US\$22 million is spent and the mine is not cash positive and the geological work is not complete how the operations will be funded until the completion of the exploration program.'

- (7) At the meeting between Mr Halliday for AMIL and Mr Burns for ONR on or before 13 December 2004:

- (i) it was confirmed by Mr Halliday that it had not been possible for AMIL to prepare the detailed drilling program and geological mining model together or a mining plan for the production of 400,000 carats per month; and
- (ii) Mr Halliday expressed his view and belief that:

'...the only possibility which he could envisage in order to provide any hope for the future would necessitate a complete and professional restructuring of the mining operations and further investment being made by the current shareholders.'

- (8) On 21 December 2004, Dr Al Kawari wrote to Mr Khattabi of LAAICo to inform him in terms that:

'...[T]o get production up to the level which will produce a return to shareholders of ONR will require further capital investment, which will have to be underwritten by all if further dilution is to be avoided.'

7.4 As for the provision of interim and specialist management for the Company under the Fourth Promise:

- (1) At Board Meeting No. 18 on 23 June 2004, it was formally resolved by majority vote that a management agreement should be ceded to AMIL in which would be specified the particular duties to be fulfilled by AMIL;
- (2) By a Board Resolution passed at the said meeting, it was resolved that ONR would consent to the cession of the contract for the management of the Mine to AMIL, which would assume full managerial responsibility;
- (3) All of the existing management team of ONR, including Mr White and Mr Halliday remained in place and from around July 2004:

- (i) The press release put out by AMIL in respect of the Resolution and restructuring of ONR thereunder includes substantial quotation from Mr White, as CEO of ONR, as to the Company's intentions to invest the new funding in completing its drilling program and expanding production at the Mine so as to improve efficiency;
 - (i) Mr White continued to sit on the Board as a nominee of AMIL and became a director of AMMCO, the subsidiary operating company or associate of AMIL by which the Mine was operated; and
 - (ii) Mr Halliday started to act for AMIL and/or AMMCO, for example in negotiating on behalf of AMIL as to the terms and provisions of the draft subscription agreement as aforesaid;
- (4) By letter of 19 December 2004 to Dr Al Kawari, Mr Khattabi demanded that AMIL should make all of the new management appointments which had been promised in the Resolution; and
- (5) The only high-level interim manager appointed by AMIL appears to have been a COO for the Mine, as was recognised by Dr Al Kawari in his effort in his reply of 21 December 2004 to Mr Khattabi, some six months after the Resolution, setting out AMIL's achievements on personnel issues:

'As you have noted, management has been strengthened by the appointment of a new Chief Operations Officer. Further personnel changes are possible but you should note that this is the sole responsibility of AMIL who has taken over management of the Sengamines concession from ONR. All employees assigned to the project are employees of AMIL, and not ONR.'

8 Abandonment of Expansion Plans

- 8.1 By a letter dated 23 December 2004, Mr Khattabi of LAAICo requested that a Board meeting be convened by the end of January 2001 in order to review ONR's progress. By

letter of 8 January 2005, Mr Conn added his own request for a Board meeting to be held by the end of that month:

- (1) to review the current operating statistics of the Mine;
- (2) to review the accounts for 2003;
- (3) to review progress towards the fulfilment of the Promises; and
- (4) to finalise the management agreement between ONR and AMIL.

8.2 On 13 January 2005, Mr Burns reported to Mr Conn and Mr Khattabi a telephone conversation which he had had with Mr Halliday in which Mr Halliday had advised him that the production at the Mine had been suspended for the previous three months:

'[Mr Halliday] advised me the production for the last three months has been blocked by the Government which has prevented the export of the parcels of diamonds by Sengamines which is experiencing a cash-flow crisis in consequence of which he believes that it will be necessary to suspend the mining operations in view of the inability to pay the cost of continuing to operate.

He advised that AMIL will definitely not fund any shortfall in cash in the immediate future and he believes that the suspension of operations will effectively mean the abandonment of the project.'

8.3 At Board Meeting No. 19 of 11 February 2005, which was convened pursuant to the aforesaid request of Mr Conn, and which was attended by Mr Bowen (the Acting Chairman), Mr White, and Mr Lloyd (all having been nominated to act as directors by AMIL), and by Mr Conn and a Dr Tabuli, but with Mr Khattabi of LAAICo and a Mr Rob Scott ('Mr Scott'), associated with AMIL, being present by invitation, and Mr Halliday being present as Secretary of the Company:

- (1) Mr Halliday sought to argue that if the mining plan and financial model for the Mines prepared by AMIL did not meet the investment criteria of the Board, then AMIL would be entitled without more to release of the Shares;

'[Mr Halliday] revisited the tender process that saw the acceptance of the AMIL proposal and the board conditions imposed on AMIL for the issue of the shares. These conditions were clarified at the meeting of 23 June 2004... It was reiterated that AMIL would, in its administration of the company, comply with certain obligations and would prepare a mining plan and financial model for the company that would be presented to the company for its approval. If this plan did not demonstrate a return that met the investment criteria of the board of the company then the shares issued to AMIL would be released to it.'

- (2) By reference to an AMMCO 'PowerPoint' slide, Mr Scott further sought to argue that the payment of \$22 million required under the First Promise had been duly made by receipted payments of (i) US\$18.5 million to ADCB (ii) US\$2.5 million to Standard Bank and (iii) US\$1.0 to Rawbank, although no evidence was provided and the only relevant reported cash movement for the same period was the movement of US\$10.5 million to ADCB. He further insisted that the Commercial Loan and the loans from the Investors had not been repaid.

- (3) Mr Scott and Mr White then made a bleak assessment of the viability of the Mines on the particular grounds that:
 - (i) there were particular geological reasons and continuing operational issues making the mining of the Mine difficult;
 - (ii) the financial models prepared by both AMIL and De Beers, while prepared independently, both showed that the Mine would yield a negative return at the current production capacities and would have a negative NPV, even with further capital expenditure;
 - (iii) it was difficult to recruit staff to the Mine not least because it was in the DRC and because of ONR's reputation;
 - (iv) it had also been impossible to secure the interest of a major mining house because of ONR's reputation; and

- (v) the US\$22 million had not been sufficient to stabilise the operation of the Mine, in view of the continuing operational problems, and ONR's cash resources would, without further investment, run out in early April 2005.
- (4) Mr Bowen and Mr White concluded that ONR was '*between a rock and a hard place*' and AMIL '*did not necessarily have the appetite to continue*'.
- (5) Mr Bowen then sought to argue that the Shares should be released on the basis that the Promises had been fulfilled, as recorded in the Minutes:

'This brought the meeting to the question of the issue of the AMIL shares. The Acting Chairman [for AMIL] stressed that the funds had only been released on the basis of the issue of the shares and that by agreement these were to be held in escrow pending the conclusion of the AMIL obligations. Following the presentation the conditions had now been fulfilled and the view of management (and De Beers) was that the project was marginal at best and did not demonstrate an adequate return or justify an expansion. As a result AMIL was now entitled to the shares and this was put to the vote.'

- (6) By a majority of four to three (the four votes being cast by and on behalf of the directors nominated by AMIL) the Board resolved that the Shares be released to AMIL forthwith.

9 Issue of the Shares

- 9.1 By written resolution of the Board dated 24 February 2005 signed by Dr Al Kawari and Mr White, ONR resolved to issue the Shares to AMIL:

'RESOLUTION PASSED BY THE BOARD OF DIRECTORS OF [ONR] ON 24 FEBRUARY 2005

WHEREAS the authorised share capital of the Company is US\$350,000,000 (three hundred and fifty million United States Dollars) divided into 350,000,000 shares of US\$1.00 (one United States Dollar) each.

AND WHEREAS the Company has received certain requests for the issue of new fully paid shares in the capital of the Company together with the consideration due by cash and

or services in respect of such shares and wishes to proceed with the issue of such new shares.

RESOLVED

1. *THAT the Company issues new shares in the capital of the Company as follows, such shares to be fully paid up:*

132,816,837 shares to African Mining Investments Limited

AND that the Company issues a new certificate to the above company, as referred to, in respect of the newly issued shares and that any one director of the Company and the assistant secretary be and are hereby authorized to execute such share certificate on behalf of the Company...'

- 9.2 A share certificate, No. 99, was then obtained from the registered office of ONR, showing AMIL as the registered owner of the Shares from 24 February 2005:

'US\$350,000,000 divided into 350,000,000 shares or a nominal or par value of US\$1.00 each

THIS IS TO CERTIFY THAT African Mining Investments Limited is the registered holder of 132,816,837 fully paid shares in the above-named Company subject to the Memorandum and Articles of Association thereof.'

- 9.3 The issue of the Shares as aforesaid was carried out notwithstanding that:

- (1) there was no documentary evidence that the full sum of US\$22 million had been invested in settling liabilities of ONR other than the Commercial Loan;
- (2) no evidence or particulars, as had been promised to Mr Burns as aforesaid, were provided as to how the US\$22 million had allegedly been paid on behalf of ONR;
- (3) AMIL had failed to carry out a detailed drilling program and geological mining model and/or to prepare a mine plan;
- (4) AMIL had failed to recruit and retain new professional management having the expertise to prepare such a mine Plan and oversee a substantial expansion of operations at the Mine;

- (5) AMIL had *already* determined for the reasons presented by it at the Board Meeting on 11 February 2005 that the Mine had a *negative NPV*, so that a promise to provide further funding conditional upon a *positive* valuation of the Mine could not possibly have any value in money's worth;
- (6) AMIL had simply continued to operate the Mine, in effect under the same management as before, but had failed to bring the Mine into profit or to interest any mining company in pursuing a joint venture, and had, *on that basis*, determined that the Mine was not viable;
- (7) there was, in the premises, no evidence that any of the Promises had been fulfilled by AMIL;
- (8) there was no attempt to ascertain either:
 - (i) the current value of AMIL's promises as at 24 February 2005 when the Shares were issued; or
 - (ii) the demonstrable (or any) financial contribution made by AMIL to the funding of ONR;
- (9) the calculation of the number of the Shares remained unaltered from the quantity decided upon as aforesaid in order to give AMIL 47.5% of the shares in ONR as decided by the Board in the Resolution; and
- (10) in those circumstances:
 - (i) it was unlikely that any of the Promises had any substantial value as at that date; and

- (ii) no additional consideration had been provided for the issue on 24 February 2005 of the Shares whether in money or money's worth.

9.4 In the premises, the Shares were issued as fully paid up in circumstances where they were not so fully paid and/or cannot properly be treated as having been fully paid up. The Shares were in fact issued a substantial discount to their nominal value and, to the extent that any evaluation was made by the Directors to the same, the value of the non-cash consideration provided in respect of the Second to Fourth Promises had evaporated and/or was illusory.

10 Affirmation of the Shares

10.1 At an EGM of the Company held on 31 May 2005, the Shares were voted by AMIL in support of a resolution that the Shares, among other shares, should be sold to the Company as part of a proposed corporate restructuring. The said resolution was never put into effect.

10.2 At a further EGM held on 7 November 2005, ONR resolved to authorise among other things:

- (1) the sale of ONR's 80% shareholding in Sengamines to First African Diamonds Limited ('FAD');
- (2) the appointment of AMIL as its agent for the purpose of receiving any purchase monies received from FAD; and
- (3) the deduction from them of any liability of ONR to AMIL.

- 10.3 Some 191,022,413 shares were voted by AMIL in support of the said resolutions, including the Shares. The use of the voting rights attached to the Shares enabled the said resolutions to be carried.
- 10.4 In the premises, AMIL by so voting the Shares which it had procured to be issued to it as aforesaid, affirmed the contract for the allotment and issue of the Shares to it as fully paid shares.
- 10.5 Thereafter, in late 2005 or early 2006, ONR sold its interest in Sengamines to FAD under an 'Agreement for the Sale of Shares and Cession of Rights' made between ONR, AMIL and FAD.

11 Relief sought

- 11.1 By a letter dated 2 March 2007 to AMIL sent by Hassan Khan & Co on behalf of ONR pursuant to a resolution passed at a Board meeting held on 21 February 2007, ONR formally required payment of the full amount of the sum outstanding by way of consideration for the Shares, being at least US\$110 million, of which some US\$ 27,500,000 was to be provided by immediate payment on account:

'Leaving aside the payment of the US\$22 million of cash that you allegedly paid (about which ONR reserves all of its rights pending the provision of documents confirming payment) it appears that none of the non-cash consideration was provided. In the circumstances, therefore, there is an outstanding sum of approximately US\$110 million owing from AMIL to ONR. To the extent that you are unable to prove the value of the consideration provided to the value of US\$132,816,837, ONR requires payment in cash of this outstanding balance.

Furthermore ...ONR requests immediate payment from you on account in the sum of US\$27,500,000 which will enable ONR to meet the amounts due to all its creditors at this time....'

- 11.2 As at the date hereof, AMIL has failed to pay to ONR any part of the outstanding sum of approximately US\$110 million owing from AMIL to ONR. By letter of 7 March 2007 to Hassan Khan & Co, AMIL declined to make any payment. They failed therein to

address the points taken in these Particulars of Claim, save in alleging that AMIL fulfilled all of the Promises, which is denied in the premises.

11.3 In the premises:

- (1) As at the time at which it was agreed by the Resolution, and/or by the Board resolution of 23 June 2004, that the Shares should be issued to AMIL :
 - (i) no attempt was made to value (a) the conditional future financial commitments to ONR or (b) the services to be provided to ONR under the Second to Fourth Promises;
 - (ii) insofar as the non-cash consideration provided under the Second to Fourth Promises had any value, such value could not reasonably be said fairly to represent US\$110 million;
- (2) Insofar as the Promises were not fulfilled as aforesaid and AMIL was in breach of its contractual obligations, there was plainly no value in the Second to Fourth Promises;
- (3) During the course of late 2004, it had been accepted by AMIL that, in the event of only partial performance of the Promises, there should be a reduction in the number of shares issued to it, but no such reduction in the number of shares issued was made by the Board on 11 February 2005 or in the written resolution dated 24 February 2005; and
- (4) As at the date of issue of the Shares in February 2005:
 - (i) no attempt was made to assess the current value of the services and funding commitment made by AMIL in the Promises;

- (ii) no evidence had been provided as to the payment of the US\$22 million of cash consideration under the First Promise in accordance with the terms of the Resolution in the discharge of debts other than the Commercial Loan; and
- (iii) insofar as the non-cash consideration provided under the Second to Fourth Promises had any value, such value could not reasonably be said fairly to represent US\$110 million.

11.4 In the premises, ONR seeks and is entitled to:

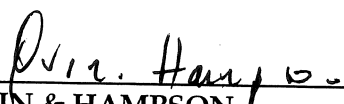
- (1) declarations that:
 - (i) contrary to the terms of the resolution of the Board of 24 February 2005 by which the Shares were issued, the Shares were issued as only partly paid up, alternatively as nil paid;
 - (ii) alternatively, insofar as the Shares were issued as fully paid, they were so issued at a substantial discount from their nominal value;
- (2) an enquiry as to the amount:
 - (i) by which the Shares were not fully paid as aforesaid;
 - (ii) alternatively of the discount received by AMIL on the issue to it of the Shares ('the Discount');
- (3) an order for:
 - (ii) specific performance of AMIL's obligation to make payment of the sums owed in respect of the nominal value of the Shares;

- (iii) alternatively, AMIL to pay by way of debt to ONR the amount by which the Shares were not fully paid, alternatively the amount of the Discount, as determined by the above enquiry;
- (4) alternatively, damages in the amount of the Discount;
- (5) interest on the sums owed pursuant to Section 34 of the Judicature Law (2004 Revision) at such rates and from such time as the Court shall find to be just and fair.

AND THE PLAINTIFF CLAIMS:

- (1) Declarations as aforesaid;
- (2) An enquiry as to the amount owed or to be paid;
- (3) Payment of the sums owed or to be paid as aforesaid;
- (4) Alternatively, damages;
- (5) Interest as aforesaid;
- (6) Any further or other relief;
- (7) Costs.

Dated this 29 day of March 2007



QUIN & HAMPSON
Attorneys-at-Law for the Plaintiffs

TO: The Clerk of the Courts

And To: African Mining Investments Limited
C/o Its Registered Office
Investec Trust (Mauritius) Limited,
7th Floor, Harbour Front Building,
President John Kennedy Street,
Port Louis, Mauritius

THIS WRIT was issued by Messrs. Quin & Hampson, Attorneys-at-Law for the Plaintiff, whose address for service is Third Floor, Harbour Centre, 42 North Church Street, George Town, P.O. Box 1348, Grand Cayman KY1-1108, Cayman Islands.

DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE
OF WRIT OF SUMMONS

1. The accompanying form of *Acknowledgment of Service* should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person

After completion it must be delivered or sent by post to the Law Courts, P.O. Box 495G, George Town, Grand Cayman

2. A Defendant who states in his Acknowledgment of Service that he intends to contest the proceedings *must also serve a defence* on the Attorney for the Plaintiff (or on the Plaintiff if acting in person).

If a Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear on the top of page 2), the Defence must be served within 14 days after the time for acknowledging service of the Writ, unless in the meantime a summons for judgment is served on the Defendant.

If the Statement of Claim is not indorsed on the Writ, the Defence need not be served until 14 days after a Statement of Claim has been served on the Defendant

If the Defendant fails to serve his defence within the appropriate time, the Plaintiff may enter judgment against him without further notice.

3. A *Stay of Execution* against the Defendant's goods may be applied for where the Defendant is unable to pay the money for which any judgment is entered. If a Defendant to an action for a debt or liquidated demand (i.e. a fixed sum) who does not intend to contest the proceedings states, in answer to Question 3 in the Acknowledgment of Service, that he intends to apply for a stay, execution will be stayed for 14 days after his Acknowledgment, but he must, within that time, *issue a Summons* for a stay of execution, supported by an affidavit of his means. The affidavit should state any offer which the Defendant desires to make for payment of the money by installments or otherwise.

See over for notes for guidance

Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.
2. For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.
3. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (*the name stated on the Writ of Summons*)".
4. Where the Defendant is a **FIRM** and an attorney is not instructed, the form must be completed by a **PARTNER** by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after his name.
5. Where the Defendant is sued as an individual **TRADING IN A NAME OTHER THAN HIS OWN**, the form must be completed by him with the addition in paragraph 1 of the description "trading as (.....)" after his name.
6. Where the Defendant is a **LIMITED COMPANY** the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on his behalf.
7. Where the Defendant is a **MINOR** or a **MENTAL PATIENT**, the form must be completed by an Attorney acting for a guardian *ad litem*.
8. A Defendant acting in person may obtain help in completing the form at the Courts Office.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. OF 2007

BETWEEN: ORYX NATURAL RESOURCES Plaintiff

AND: AFRICAN MINING INVESTMENTS LIMITED Defendant

ACKNOWLEDGMENT OF SERVICE
OF WRIT OF SUMMONS

If you intend to instruct an Attorney to act for you, give him this form IMMEDIATELY.

IMPORTANT. Read the accompanying directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, THIS FORM MAY HAVE TO BE RETURNED.

Delay may result in judgment being entered against a Defendant whereby he may have to pay the costs of applying to set it aside.

1. State the full name of the Defendant by whom or on whose behalf the service of the Writ is being acknowledged.

2. State whether the Defendant intends to contest the proceedings (*tick appropriate box*)

yes

no

3. If the claim against the Defendant is for a debt or liquidated demand, AND he does not intend to contest the proceedings, state if the Defendant intends to apply for a stay of execution against any judgment entered by the Plaintiff (*tick box*).

yes

Service of the Writ is acknowledged accordingly

(Signed)

[Attorney] for

[Defendant in person]

Address for service:

Please complete overleaf

Notes on address for service

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, he must give his post office box number and the physical address of his residence or, if he does not reside in the Cayman Islands, he must give an address in Grand Cayman where communications for him should be sent. In the case of a limited company, "residence" means its registered or principal office.

Indorsement by plaintiff's Attorney (or by plaintiff if suing in person) of his name, address and reference, if any, in the box below.

Messrs. Quin & Hampson
Attorneys-at-Law
Third Floor, Harbour Centre
P.O. Box 1348
George Town,
GRAND CAYMAN

Indorsement by defendant's Attorney (or by defendant if suing in person) of his name, address and reference, if any, in the box below.