

# REQUEST FOR INSPECTION

To the WORLD BANK INSPECTION PANEL  
1818 H Street, NW, Washington, D.C. 20433, USA

## INDEX TO REQUEST

Volume 1A	Pages A1 to A15	The Request
Volume 1B	Pages B1 to B144	Annexure 1
Volume 2	Pages 1 to 322	Attachments 1 to 5
Volume 3	Pages 323 to 566	Attachment 6 to 23
Volume 4	Pages 567 to 870	Attachments 24 to 31
Volume 5	Pages 871 to 946.28	Attachments 32 to 37
Volume 6	Pages 947 to 1295	Annexures 2 & 3

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# REQUEST FOR INSPECTION

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1818 H St, NW, Washington, D.C. 20433, USA

This request for Inspection is brought by:

## THE REQUESTERS

1	Swissbourgh Diamond Mines (Pty) Limited	First Requester
2	Matsoku Diamond (Pty) Limited	Second Requester
3	Patiseng Diamonds (Pty) Limited	Third Requester
4	Orange Diamonds (Pty) Limited	Forth Requester
5	Motete Diamonds (Pty) Limited	Fifth Requester
6	Rampai Diamonds (Pty) Limited	Sixth Requester
7	Josias van Zyl	Seventh Requester
8	Josias van Zyl Family Trust	Eighth Requester
9	Burmilla Trust	Ninth Requester

Together "*the Requesters*"

The Request comprises this Request to which is incorporated **Annexures 1 to 3 and Attachments 1 to 37**.

The Requesters are companies registered in the Kingdom of Lesotho and South African nationals who have interests in the rights. The RSA nationals are shareholders in the Lesotho companies and have invested in the mining

rights in Lesotho. As a direct result of the implementation of the Lesotho Highlands Water Project ("*the Project*") the Requesters interests and investments ("rights") in Lesotho have been unlawfully expropriated by the Government of Lesotho. No compensation has been offered or paid by the Lesotho Highlands Development Authority ("*LHDA* ") and/or the Government of Lesotho ("GOL "), and/or the Government of the Republic of South Africa ("RSA I and/or the Trans-Caledon Tunnel Authority ("TCTA "). The expropriation has occurred with the knowledge, support and concurrence of the World Bank ("*the Bank*") which has funded both Phase 1A and (more recently) Phase 1 B of the Project.

The Project consists of the water transfer component (which constitutes about 95% of the total costs) and the hydro-electric power generation component. RSA is responsible for the financing of the water transfer component and GOL is solely responsible for financing the hydro power portion. RSA assisted GOL in certain of its finance obligations in respect of the hydro power component of the Project.

Beyond its financial support, the Bank provides monitoring of total project execution. The Bank has at all times had actual knowledge of the unlawful expropriation and the disputes which ensued. It has failed to take any steps to remedy, alternatively to ensure that Lesotho and/or South Africa remedy the situation. The factual details are set out in **Annexure 1** to this Request. A detailed chronology of the events is set out in **Annexure 2**.

1. The Requesters present this Request for Inspection because they have suffered harm - and continue to suffer harm - as a result of failures or omissions in the appraisal, monitoring and implementation

by the Bank of Phase 1 A and 1 B of the Project. Specifically, the Requesters have been deprived of their property rights and their entitlement to prompt, effective and adequate compensation. That deprivation would not have occurred if the Bank had complied with its Policies and Procedures.

### **1.1 List of failures or omissions the Requesters believe are the Bank's responsibility**

In order to implement the Project GOL has expropriated the Requesters rights in the Rampai area of Lesotho and elsewhere: see Attachments 1 & 8. It has done so without paying any compensation, in a manner described by the then President of the Lesotho Court of Appeal as invading *"the protection of property without any compensation and without any reason asserted to support such invasion"* and purporting *"to effect such invasion without any recourse to any court of Law"* (see **Annexure 1**, para 58).

The Bank has proceeded to appraise, monitor, implement and finance the Project even though it has had - at the time it financed Phase 1A and 1B of the Project - actual and direct knowledge of the Requesters' rights and interests, the expropriation and the disputes between the Requesters and GOL, RSA and LHDA. Before deciding to proceed to the appraisal and financing of Phase 1A(in 1991)andPhase 1B(in 1998) the Bank should have taken steps to ensure that the Requesters' rights were duly respected, fully protected and the

disputes resolved. The failure of the Bank to do so constitutes complicity in the acts of expropriation and in the disputes, and violates its operational policies and procedures by proceeding to participate in the Project in full knowledge of the expropriation and the disputes the Bank has contributed in a material and direct way to the violation of the Requesters' rights. It is responsible for that violation, which would not have occurred if its policies and procedures had been followed.

The Bank violated UN Resolutions (economic and trade sanctions) imposed against RSA during 1991 by participating in a scheme to accommodate RSA's financial obligations in respect of the water transfer component of the Project, using Lesotho more specifically LHDA as the vehicle therefore. The Bank's conduct in this regard was during March 1994 protected when the then apartheid regime granted various organisations within the Bank immunities and privileges against civil and criminal prosecution in the South African courts (see **Annexure 1** para 51).

## **1.2 Description of the damage or harm resulting from the failures or omissions**

As a result of the Bank's failures and its contribution to implement and support the unlawful expropriation, the Requesters have been deprived of their rights to peaceful enjoyment of property, including the right to fair, full and prompt compensation. Specifically, the Requesters have lost

the ability to carry out mining activities pursuant to the leases granted to them in 1988. They have been deprived of their property and their livelihood. They have suffered financial damage including loss of profit. These losses are directly attributable to the Bank, which co-financed the Project and clearly approved of the implementation procedures and unlawful expropriation methods employed and thereby indicated to GOL and RSA that expropriatory acts of this kind and human rights abuses of the kind referred to by the then Chief Justice, His Lordship B P Cullinan (as quoted in **Annexure 1**) will not preclude the involvement of the Bank.

### 1.3 List or description of the Bank policies and procedures which have not been observed

The Bank has explicit policies and procedures dealing with expropriation situations of this kind. It failed to follow them in 1991 and thereafter in respect of Phase 1 A of the Project, and again in 1998 and thereafter in respect of Phase 1 B of the Project. The following operational policies and procedures pertain to the design, appraisal, monitoring and/or implementation and/or execution of a project financed by the Bank, *inter alia*:

- Operational Policy 7.40 (*Disputes over Defaults on External Debt, Expropriation, and Breach of Contract*), and
- Bank Procedures 17.50 (*Disclosure of Operational Information*)

At all material times since July 1991 the Bank had actual knowledge of the expropriation and the disputes. If it had followed the requirements of these Policies and Procedures the rights of the Requesters would have been respected and protected. Specifically, under these Policies and Procedures the Bank was required *inter alia* to:

- suspend the disbursement of any financial resources in relation to Phase 1 A of the Project, in particular the \$US 10 million facility approved on 16 September 1991;
- suspend forthwith the disbursement of any further financial resources in relation to Phase 1 B of the Project, in particular the \$US 45 million facility approved on 4 June 1998 and subsequently in a further funding agreement concluded between the Bank, GOL and RSA on or around 18 December 1998;
- Consider whether to continue lending for and/ or sanctioning new projects in Lesotho
- not appraise Phase 1A of the Project whilst the dispute as to expropriation was pending;



- not appraise Phase 1B of the Project whilst the dispute as to expropriation was pending;
- seek to improve communications between the Requesters and GOL and RSA;
- promote a prompt and adequate settlement of the disputes;
- perform the various steps required under Bank Procedure 7.40 (with a view to ensuring that its financial and other acts did not contribute to and/or condone an unlawful expropriation);
- provide the Requesters with copies of all Project information Documents and Staff Appraisal Reports in relation to them and in relation to the Project (including Phases 1 A and 1 B and such other phases in respect of which the Bank sanctioned and is contemplating the provision and/or sanctioning of further financial support);
- assist the Requesters in achieving a prompt and adequate settlement of the disputes between GOL and RSA and the Bank.

It has failed to take any of these steps.

- 2 The Requesters' complaints have been raised with the Bank's staff by correspondence and efforts to meet with its representatives.
  - 2.1 As set out in **Attachment 2** to this Request, the Requesters have written to the Bank in Pretoria and at headquarters in

Washington DC to complain about its conduct (acts) since 1993, as well as the acts of GOL, RSA, LHDA and TCTA. The chronology of the correspondence is referred to in **Attachment 2** copies of the communications themselves are already in possession of the Bank.

- 2.2 The Bank's responses were not substantive, it has failed and/or refused to provide documents and information, or to seek to resolve the disputes (see e.g. letter dated 25 March 1998 **Attachment 2** [SDM ref 2059.131]). It has acknowledged receipt of some of the correspondence (confirming its actual knowledge of the expropriation and the disputes). And by a letter of 19 January 1999 it has claimed immunity from legal action in the national courts of Lesotho in relation to this matter: see **Attachment 3**.
  
- 2.3 By letter dated 1 July 1993 Mr Josias van Zyl (the Seventh Requester) wrote to the then President of the Bank enclosing a Press Statement issued by SDM, drawing attention to the unlawful expropriation and interference with the Requesters' property rights and the refusal of RSA and GOL to hold independent inquiries: see **Attachment 22**. The Press Statement *inter alia* refers to the decree (the Revocation Order) by which the First and Sixth Requesters' rights had been expropriated without compensation. [The Bank did not respond.



- 2.4 By letter dated 10 February 1998 the Requesters provided the Bank with all relevant documentation pertaining to the expropriation and the disputes with GOL and RSA: see **Attachment 2** [SDM ref 990.1 - 990.3 enclosed thereto volumes 1 to 4 ref 989.1 to 989.8181. The documentation included the constitutional request for access to state documents from RSA President Dr Nelson Mandela together with Annexures in which all the facts, allegations and supporting documentation were submitted. Furthermore, the Annexures included the decisions of the Lesotho court of first instance and appeal court in relation to the striking down of the Revocation Order. [The Bank did not respond.]
- 2.5 By letter dated 26 February 1998 the Requesters wrote to Mrs Judith Edstrom in Pretoria (with a request to copy the letter to the President of the World Bank in Washington) requesting copies of and access to all documents exchanged between the Bank, GOL, RSA, LHDA and TCTA involving and/or relating to and/or concerning and/or affecting the First Requester and its rights in respect of the LHWP for the period 1991 to 1999: see **Attachment 2** [SDM ref 2059.73 to 2059.751. Mrs Edstrom responded in a letter dated 26 February 1998 directing the request to Mr Arnaud Guinard, task team leader of the LHWP in Washington. [The Bank did not respond to the request and other allegations made in the Requesters' letter]

- 2.6 By letter dated 13 March 1998 the Requesters wrote to Messrs. Guinard and Roome as Task Team Leaders of the LHWP Project at the Bank, requesting the Bank to act as mediator in the dispute over expropriation: see **Attachment 2** [SDM ref 2059.91 to 2059.1111. The letter identified the various claims for damages on the part of each of the Claimant companies. (The Bank in a letter dated 25 March 1998 declined to act as mediator: see **Attachment 2** [SDM ref 2059.1311])
- 2.7 By letters dated 27 March and 22 April 1998 the Requesters again wrote to the Bank's Task Team Leaders, calling on the Bank to take action to halt LHDA efforts to maintain the claim to lawful expropriation: see **Attachment 2** [SDM ref 2059.112 and 2059.113 to 2059.1301. Full documentation was provided. [The Bank did not respond.]
- 2.8 By letters dated 10 May, 13 May, 29 September and 15 October 1998 the Bank was further kept fully informed of developments as to the dispute over the expropriation: see **Attachment 2** [SDM ref 2059.144 to 2059.2291. [The Bank did not respond.]
- 2.9 By a Rooth & Wessels letter dated 21 December 1998 addressed to the President of the Bank, the Requesters notified the Bank that proceedings in Lesotho against LHDA (for unlawful expropriation) had been instigated (case CIV/T/348/98): see **Attachment 2** [SDM ref 2073.1 to

2073.481 The Bank was provided with a copy of the summons. The Particulars of the Claimants' claim were provided to the Bank's Pretoria office. The Claimants further requested documentation in relation to the case and outlined the allegations against the Bank [The Bank did not respond.]

- 2.10 By a further letter of 14 October 1998, the Requesters asked for copies of World Bank Appraisal Reports on the Project for the period 1990 to 1998 be forwarded to them: see **Attachment 2** [SDM ref 2059.2191. [The Bank did not respond.]
- 2.11 By a Rooth & Wessels letter dated 16 February 1999: see **Attachment 2** addressed to the President of the Bank the Requesters invited the Bank to explain its position, and specifically:
1. to suspend forthwith the disbursement of any further financial resources in relation to Phases 1 A and 1 B of the Project, in particular the \$US 45 million facility approved on 4 June 1998 and further funding subsequently agreed on or around 18 December 1998;
  2. To explain *inter alia* how the Bank has complied with the requirements of Operational Policy 7.40, including the obligations:

- to consider whether to continue lending for new projects in Lesotho,
  - to not appraise Phase 1 B of the Project whilst the dispute as to expropriation was pending,
  - to improve communications between the Claimants and the Government of Lesotho,
  - to promote a prompt and adequate settlement of the disputes, and
  - to perform the various steps required under Bank Procedure 7.40.
- 3 to provide the Claimants with copies of all Project Information Documents and Staff Appraisal Reports in relation to the Project (including Phases 1A and 113 and such other phases in respect of which the Bank is contemplating the provision of further financial support); and
- 4 to assist the Claimants in achieving a prompt and adequate settlement of the outstanding disputes with GOL.

The Requesters indicated to the Bank that they would be willing to meet with its representatives to discuss the above, and that in the absence of a substantive response to the letter

by 26 February 1999 they would commence proceedings against the Bank. The Bank's response was not substantive, it did not address the issues raised and was unacceptable to the Requesters.

- 3 In addition, the Requesters have taken steps to resolve their disputes with GOL, RSA, LHIDA, TCTA and the Bank as to the expropriation and the failure to provide compensation. As set out in **Annexure 1** (at paras. 46, 49 & 66), legal proceedings have been commenced against GOL, LHIDA, RSA and TCTA. The Requesters have reserved their right to bring proceedings against the Bank, and are first filing this Request in the spirit of reaching an appropriate resolution of the disputes.
- 4 The Bank, during the period April 1991 to the present, *inter alia* unlawfully and intentionally participated in and supported the unlawful expropriation of the Requesters' rights and investments in the Kingdom of Lesotho in the execution of the LHWP, and the failure to compensate the Requesters.
- 5 The Requesters request that the Inspection Panel recommend to the Bank's executive directors that an investigation of the violation by the Bank of its policies and procedures be carried out. The investigation to include its financing, appraisal, monitoring and implementation of the Project and the expropriation of the Requesters' lease rights. As advised in your Operating Procedures, this Request for Inspection is brief. A detailed factual summary is set out at **Annexure 1**, together with Maps and Attachments, to



which is incorporated **Attachments 1 to 37 and Annexures 2 and 3**. The Requesters will be pleased to provide the Inspection Panel with more information as required and to meet with the Panel as necessary.

- 6 The Requesters' rights to institute such proceedings against the Bank and/or any person or entity in any forum in the world as they may be advised and to supplement and amplify this request for inspection, are expressly reserved.
- 7 The Requesters authorize and request the Inspection Panel to make this request public.
- 8 Communications in respect of this Request should be addressed to Dr Dawie Botha, c/o Rooth & Wessels, First National Bank Building, Church Square, P.O. Box 208 Pretoria, 0002, Republic of South Africa, telephone +2712/325-2940, fax +2712/323-0344.