

ANHUI FOREIGN ECONOMIC CONSTRUCTION
(GROUP) COMPANY LIMITED
versus
THE MINISTER OF MINES & MINING DEVELOPMENT
and
THE MINISTER OF HOME AFFAIRS
and
THE COMMISSIONER-GENERAL
OF THE REPUBLIC POLICE
and
MARANGE RESOURCES (PRIVATE) LIMITED
and
ZIMBABWE MINING DEVELOPMENT CORPORATION
and
JINAN MINING (PRIVATE) LIMITED

HIGH COURT O ZIMBABWE
MANGOTA J
HARARE, 10 and 24, March, 2016

Urgent Chamber Application

P. Ranchhod, for the applicant
L Uriri, for the 1st respondent
S.M Hashiti, for the 3rd respondent
G.R.J Sithole, for the 4th respondent

MANGOTA J: The applicant is a *peregrinus*. It hails from China. It is a legal entity which was incorporated under the laws of China. It came into Zimbabwe in search of wealth. It ended up joining hands with the fourth respondent.

The fourth respondent is an *incolae*. It is a legal *persona* which is incorporated under the laws of this country.

The Joint Venture Agreement and the Shareholders' Agreement which the abovementioned parties signed on 23 November, 2011 gave birth to the sixth respondent. It is also a legal entity. It was incorporated under the laws of Zimbabwe.

The applicant and the fourth respondent contributed towards the establishment of the sixth respondent. The applicant injected capital, equipment, plant, machinery, skills and technology into the establishment of the sixth respondent. The fourth respondent, through the

fifth respondent, *ceded* its mining rights to the sixth respondent. It was one of its obligations to ensure that the mining rights remained valid for the duration of the parties' contract. The applicant and the fourth respondent agreed between them that their contract would exist for an unspecified period of time.

The fifth respondent which is also a legal *persona* registered under the Laws of Zimbabwe guaranteed some of the obligations of the fourth respondent.

The cordial relationship which the applicant and the fourth respondent created subsisted from 23 November, 2011 to 22 February, 2016 when it turned sour. It turned sour not as a consequence of one of the parties' conduct towards the other. It did so because the first, second and third respondents came in-between the two of them. The respondents' position was that their conduct was not without a reason.

The conduct of the three respondents precipitated the present application. The applicant submitted that the first respondent's action of cancelling Special Grants 5249 and 5244 without due process resulted in the cessation of mining operations of the sixth respondent. It stated that the cancellation of the grants caused severe financial prejudice to it as a shareholder and investor in the sixth respondent. It said its rights in the sixth respondent and its property have been infringed. It submitted that the three respondents have not accorded any opportunity to it to protect its rights or interests. It said it could not compel the respondents to act in accordance with the law. It moved the court to protect its rights and interests in the sixth respondents against what it termed the arbitrary, unreasonable and disproportionate conduct of the three respondents. It prayed that the parties be returned to the status *quo ante* 22 February, 2016 so that it continues to work the mining site(s) as it used to do before the directive of the first respondent.

The first, third, fourth and fifth respondents opposed the application. The second and sixth respondents did not. The court remains of the view that they will abide by the decision of the court.

The first respondent raised the following *in limine* matters:

- (i) the founding affidavit was void. He said its contents were hearsay and were, therefore, inadmissible.
- (ii) the application was not urgent. He, in this respect, stated that the last attempt which was made towards the renewal of the Special Grants was in September, 2015. He said the fifth respondent knew that the consequence of failing to seek renewal of the grants would be a cessation of the mining operations. He

submitted that the time to act arose when the fourth, fifth and sixth respondents failed to apply for renewal of the grants.

- (iii) the applicant did not have *locus standi* to file the application. He said the applicant was an alien and, as such, it could not enforce the sixth respondent's purported right to possession.
- (iv) the relief sought was incompetent. He submitted that the court would not order that the applicant and the sixth respondent continue to mine on expired Special Grants.
- (v) the applicant had no cause of action – and
- (vi) the relief sought seeks to establish an illegality. He stated that the sixth respondent could not continue to operate on expired Special Grants. He submitted that the sixth respondent's right to operate the mining site(s) extinguished with the expiration of the grants.

The third, fourth and fifth respondents' preliminary matters were substantially similar to those of the first respondent. They were, however, more limited in scope than those of the first respondent. It, accordingly, was the court's considered view that an analysis of the first respondent's *in limine* issues and what he said on the merits vis-a-vis the application would assist the court to dispose of this application one way or the other.

A reading of the application showed that a Mr Wang Bin deposed to the applicant's founding affidavit. Mr *Ranchhod* who appeared for the applicant had some clarification to do on this matter. That was so as no resolution had been filed to show that Mr Bin was clothed with the necessary authority to represent the applicant in the suit.

At the initial stages of the hearing of the application, Mr *Ranchhod* produced a letter which he said the chairperson of the applicant wrote authorising Mr Bin to represent the applicant. He produced the letter with the consent of the respondents. The court marked it exh 1. It is dated 2 March, 2016.

Mr *Ranchhod* submitted that the author of the exhibit was the official owner of the applicant. The author, he said, was therefore empowered to make decisions which bind the applicant. He stated that a resolution was not part of Chinese Company Law as was the case in our jurisdiction.

Advocate *Uriri* who appeared for the first respondent raised some very serious issues on the matter. He queried whether or not the exhibit constituted sufficient authority which allowed Mr Bin to depose to the founding affidavit. He said the letter did not suffice. He

insisted that a resolution of, or by, the directors of the applicant should have been produced. He submitted that the application was fatally defective on the mentioned basis.

The court examined the documents which the parties signed when they established the sixth respondent. The documents in question comprised:

- (a) The Joint Venture Agreement [JVA] – and
- (b) The Shareholders Agreement [SH].

It observed that clause 23.8 of the JVA makes reference to what was termed the Governing Law. It reads:

“This Agreement shall be governed by and construed in accordance with the laws of the Republic of Zimbabwe in force from time to time” [emphasis added]

The parties’ position on the matter was repeated, in substance, in clause 27.6 of the Shareholders Agreement. The clause reads:

“This Agreement shall be governed by and interpreted according to laws of the Republic of Zimbabwe” [emphasis added].

It was on the basis of the foregoing that the court agreed with the submissions of Advocate *Uriri* who, in a paraphrased manner, insisted that the laws and regulations of Zimbabwe, and not those of China, applied to the present application. He, to the stated extent, remained rooted in the old adage which goes ‘when you are in Rome do as they do in Rome’. The applicant cannot, in view of the foregoing, apply Chinese Law(s) of practice and procedure when its application was placed before this court the practice and procedure of which are totally different from those of the courts in China. The court’s view in this regard finds fortification from a reading of clause 1.2.3 of the Shareholders Agreement. The clause makes reference to applicable law. It reads:

“the laws of the Republic of Zimbabwe in force from time to time including any or all statutes and subordinate legislation, common law, regulations, ordinance and by-laws, directives, codes of practice, circulars, guidance notices, judgements and decisions of any competent authority, or any governmental, intra-governmental or supra-national body, agency department or any regulatory or self-regulatory or authority, or organisations and other similar provisions from time to time which has the force of law or which is generally compelled (*sic*) with” [emphasis added]

It goes without saying that all or any of the abovementioned matters constitutes (s) the applicable law for the purposes of the parties’ Shareholders Agreement and any other matter which flows from such. The first respondent was, in the court’s view, correct when he stated that the application was defective. An application the founding affidavit of which was premised upon a letter as opposed to a resolution of the directors of the applicant cannot be

allowed to hold. It cannot as it does not comply with clause 23.8 of the Joint Venture Agreement. It does not comply with clause 27.6, and more specifically with clause 1.2.3, of the Shareholders Agreement. The application is, to the stated extent, incurably defective.

The respondents' statement which was to the effect that the applicant did not have *locus standi* did not hold. The respondents acknowledged as well as accepted the fact that the applicant was not only a 50% shareholder in the sixth respondent. They accepted that it was an investor in the sixth respondent. It stated the extent of its investment in the sixth respondent. Its statement was not challenged.

The applicant stated in its papers that its application was not for, and on behalf of, the sixth respondent. It said it filed the application as a shareholder and investor whose rights and interests, it said, were being trampled upon. It submitted that the application aimed at protecting its interest as an investor.

It could not be suggested that an entity which invested assets which fell in the region of \$200 million could be denied the right of audience on the basis that it is a *peregrinus*. Its status notwithstanding, the applicant has every right to appear and argue its case before the courts of this jurisdiction. Its *locus standi* status derives from the investment which it sunk into the sixth respondent.

The applicant attached Annexures C1 and C2 to the application. The annexures are respectively Special Grants 5249 and 5244 ["the grants"]. Both grants were issued to the fifth respondent on 10 November, 2010.

Special Grant 5249 has an approximate area of 5600 hectares. It is situated within the Reserved Area No 1518 of Mutare Mining District. Special Grant 5244 has an approximate area of 39 282 hectares. It is also situated within the Reserved Area No. 1518 of Mutare Mining District.

On 25 November, 2011 the Permanent Secretary [the Secretary] for the first respondent *ceded* 363 hectares of Special Grant 5249 to the sixth respondent. That left the fifth respondent with 5237 hectares. On the same date, the Secretary *ceded* 5099 hectares of Special Grant 5244 to the sixth respondent. The fifth respondent remained with a residual area of 34183 hectares.

The *cession* of portions of Special Grants 5246 and 5244 to the sixth respondent constituted the fourth respondent's contribution towards the establishment of the sixth respondent. The contribution constituted 50% of the fourth respondent's shareholding in the

sixth respondent. The “cession” resulted in the endorsements which appear on Annexures C1 and C2.

Whether or not the Secretary did have the authority to *cede* portions of the grants to the sixth respondent remains a matter for conjecture. He was not the holder of the grants when he *ceded* portions of the same as he did. The grants were issued to the fifth respondent one year before *cession* of portions of the grants was made by the Secretary. The fifth respondent was the *de jure* holder of the grants.

The secretary’s conduct in *ceding* portions of the grants to the sixth respondent was said to have been carried out with the approval of the first respondent. The first respondent was said to have delegated authority to the Secretary who acted as he did. The fifth respondent who was the holder of the granted when the *cession* took place was not part of the *cession* process.

The above observed matters place the whole issue of cession of portions of the grants into question. Neither the applicant nor any of the respondents produced any evidence of the *cession* of portions of the grants to the sixth respondents. All what the applicant produced was the Special Grants themselves on which some endorsement was made in each case.

Cession in the real sense of the word could not have taken place when the *ceded* portions of the grants continued to exist within the original grants which were issued to the fifth respondent on 10 November, 2010. Where cession proper had occurred, the *ceded* portions of the grants would have been registered in the sixth respondent under a different grant number. There would have been segmentation in terms of s 282 of the Act and, as Advocate *Uriri* correctly submitted, the first respondent’s Ministry would have been requested to alienate the *ceded* portions. The *ceded* portions would have assumed an existence outside the main grants and there would have been beacons which related to the *ceded* portions. A specific grant number would have been originated in each case and the surveyed pieces of the grants would have assumed an identity of their own.

Notwithstanding the obvious defects of *cession* of portions of the grants, the parties adopted the position which they created for themselves. They established the sixth respondent through which they extracted diamonds from the areas which related to the grants.

Each of the grants which are the subject of these proceedings had conditions which pertain to its use by the holder. The conditions are identical in word, form and nature. The first conditions of each grant reads:

“1. Except as otherwise provided hereunder, this grant and any operations carried on under it shall be subject to the provisions of the Act and of the regulations made thereunder” [emphasis added].

The above stated condition, it is evident, was premised on clauses 21.3 and 17.4.3. of the parties’ Joint Venture Agreement of 23 November, 2011. Clause 21.3 reads, in part, as follows:

“MARANGE wishes to strategically partner with AFECC to develop, mine, market and beneficiate diamonds and/or other mineral mined from the concession areas subject to the mining and marketing laws of Zimbabwe in force from time to time.” [emphasis added]

Clauses 17.4.3. of Joint Venture Agreement states as follows:

“The Special Grants shall endure in terms of the Mining Laws of Zimbabwe” [emphasis added].

It follows from the foregoing that the parties were, at all material times, enjoined to strictly observe, as well as comply with, the mining laws of Zimbabwe as they embarked upon, and continued to, conduct their mining operations in the areas which related to portions of the two grants which were *ceded* to the sixth respondent. Any conduct which they engaged upon and which conduct placed them outside the mining laws of Zimbabwe permitted the first respondent’s permanent secretary to cancel the grants or portions of the same as had been *ceded* to them. Reference is made in this regard to clause 9 (i) (a) of Special Grants 5249 and 5244. The clause reads;

“The Secretary may cancel this grant:-

(a) if the holder fails to comply with any of the conditions of this grant or with any obligations imposed upon by the Act”

The face of each grant shows that the grants were issued in terms of Part XIX of the Mines and Minerals Act, [*Chapter 21:05*] (“the Act”). The same face confirms the position that the portions which relate to each grant were *ceded* to the sixth respondent in terms of the mentioned Part of the Act. Under the stated Part is s 291 of the Act. The section reads:

“ISSUE OF SPECIAL GRANTS

(1) The Secretary may issue to any person -

(a) a special grant to carry out prospecting operations; or

(b) a special grant to carry out mining operations or any other operations for mining purposes;

upon a defined area situated within an area which has been reserved against prospecting or pegging under section ‘*thirty-five*’ for a period which shall be specified in such special grant and on such terms and conditions, including terms and conditions relating to the amendment or cancellation thereof as may be approved by the Minister and shall be incorporated in such special grant” [emphasis added].

The cited section is peremptory. It does not give any leeway to the parties or the Secretary or the Minister or anyone else for that matter to import into it what is excluded from it. It follows from a reading of the same that the applicant’s statement which was to the effect that the sixth respondent was allowed to mine for an indefinite period of time was misplaced. The sixth respondent could not do so without running into conflict with s 291 of the Act as read with clauses 2.1.3 and 17.4.3 of the parties’ Joint Venture Agreement, among other clauses of the same.

Special Grants 5244 and 5249, were issued to the fifth respondent on 10 November, 2010. Portions of the same were *ceded* to the sixth respondent on 25 November 2011. The body of the grants does not show the lifespan of each. This suggests that they were issued or *ceded* on an open ended arrangement as the applicant claimed and continues to allege.

It has already been observed that such an arrangement was not in *sinc* with the provisions of the Act. The law and the parties’ agreement did not sanction it. The letter which the fifth respondent addressed to the permanent secretary of the first respondent fortifies the view which the court holds on this aspect of the case. The letter is dated 30 September, 2015. The first respondent attached it to his opposing papers. He marked it Annexure I. The heading of the annexure reads:

“RE: RENEWAL OF MARANGE DIAMONDS SPECIAL GRANTS 4718, 4720, 4765, 5244, 5249 & 5769”

The last paragraph of the annexure reads:

“Sir, we are kindly requesting for your favourable consideration to our submission of renewal of the ZMDC held diamonds Special Grants Nos. 4718, 4719, 4720, 4765, 5244, 5247, 5249 & 5769.” [emphasis added].

Two matters come out clearly from a reading of the annexure. The first is that what was purportedly *ceded* to the sixth respondent was not so *ceded*. The *ceded* portions remained part of the whole grant in each case. The second is that, although the applicant’s view was that the grants *ceded* to the sixth respondents was for an indefinite duration, the holder of the grants realised that it had to have them renewed as the law required of it. The application

which the fifth respondent made on 30 September, 2015, Annexure I, is relevant in this regard. The fifth respondent realised that the grants had expired. It also realised that the grants could not continue to exist in their expired state. It accepted the position that they had to be renewed so that they remain in compliance with the law. It took that correct position notwithstanding the fact that the grants were said to exist for an indefinite period of time.

The first respondent attached Annexures 5 and 6 to his opposing papers. The annexures are letters which his permanent secretary addressed to the sixth and the fifth respondents respectively. Both letters are dated 22 February, 2016. Annexure 5 served as a notice to the sixth respondent. It notified the respondent that portions of the grants which were *ceded* to it had expired and also that the same flouted the mining laws of Zimbabwe to the extent that they did not comply with s 291 of the Act. The second letter, Annexure 6, was a response to the fifth respondent's letter of 30 September, 2015. It, in essence, turned down the respondent's application for the renewal of the grants which had expired.

Neither the applicant nor the fourth or the sixth respondent had title or rights to the grants or portions thereof as at 22 February, 2016. Title or any rights to the grants or portions thereof had been extinguished by operation of the law.

It was within the discretion of the permanent secretary of the first respondent to renew or not to renew the special grants or portions thereof. He chose not to renew the grants following the discovery which was to the effect that the same were not compliant with s 291 of the Act. He also observed that, the stated fact notwithstanding, the fourth, fifth and the sixth respondents had flouted both the law and the parties' Joint Venture Agreement when they:

- (a) allowed the grants to operate for an indefinite period of time – and –
- (b) failed to renew the grants as and when the renewal period of the same had fallen due.

The secretary's conduct in the mentioned regard cannot be faulted. The parties had, at the time that they concluded the Joint Venture Agreement and the Shareholders Agreement, committed themselves to always comply with the mining laws of Zimbabwe. They did not do so. They, in fact connived to, as it were, live outside the law and continue to benefit from their unlawful conduct. They failed to comply with the first condition of the grant and with Clause 9 (i) (a) of the same. Sub-Clauses (ii) and (iii) of Clause (9) of the grants did not apply to them as they were living and operating outside the law.

The applicant's complaint is baseless on the basis of the foregoing. The applicant's rights in the *ceded* portions of the grants were taken away from it by operation of the law.

The applicant is, in fact, approaching the court with dirty hands. It should clean itself before it seeks the court's attention to assist it. It cannot, under the circumstances, be allowed to return to the status *quo ante* 22 February, 2016. The court, in other words, cannot assist it to continue to live outside, but within, the law.

The applicant's statement which was to the effect that it was the first respondent and his permanent secretary who allowed them to operate the *ceded* portions of the grant for an indefinite duration is misplaced. The applicant and the fourth respondent committed themselves to abide by the mining laws of Zimbabwe. The first respondent and his permanent secretary did not and do not form part of the parties' equation. The applicant and its counterpart (i.e. fourth respondent) should therefore have acquainted themselves with what they were committing themselves to. It was incumbent upon the one or the other nor both of them to have drawn the attention of the first respondent and/or the latter's secretary on the point that the portions of the grants which were *ceded* to them did not comply with s 291, and other provisions of the Act. They cannot blame anyone for the misfortune which eventually befell them. They made a commitment and, at the same time, made a conscious decision to turn a blind eye on what the law required of them. They cannot, therefore, succeed under the circumstances of this case.

The expired grants, or portions thereof, made the ground upon which they rested their operations to fall to pieces. The grants became void and they could not be reinstated except through having them renewed. This, unfortunately for them, was turned down.

The court has considered all the circumstances of this case. It is satisfied that, on the basis of the foregoing, the applicant failed to prove its case on a balance of probabilities. The application is, therefore, dismissed with costs.

Hussein Ranchord and Co. applicant's legal practitioners
National Prosecuting Authority, 3rd respondent's legal practitioners
Sawyer and Mkushi, 4th respondent's legal practitioners