ANJIN INVESTMENTS (PRIVATE) LIMITED
versus
THE MINISTER OF MINES & MINING DEVELOPMENT
and
THE MINISTER OF HOME AFFAIRS
and
THE COMMISSIONER-GENERAL
OF THE ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 7 and 30 March 2016

Urgent Chamber Application

P Ranchhod, for the applicant
L Uriri, for the 1st respondent
S M Hashiti, for the 2nd respondent
G R J Sithole, for the 3rd respondent

MANGOTA J: On 22 February 2016, the first respondent summoned and ordered the applicant and others who were mining diamonds in Marange District to cease their operations as at that date. The first respondent's directive was followed by a letter which his permanent secretary addressed to the applicant's chief executive officer. The applicant attached the letter to its application. It marked it Annexure B. The annexure is dated 22 February 2016. It reads, in part, as follows:

> "RE: EXPIRATION OF SPECIAL GRANT 4765 AND 5247.
>
> The above matter refers.
>
> It has come to our attention that special grants 4765 and 5247 that were issued to you have since expired. … It is trite law that a special grant is issued upon application and its issuance is done in terms of section 291 of the Mines and Minerals Act [Chapter 21:05] which demands that a period for the subsistence of the Special Grant shall be specified, failure of which renders the Special Grant void. …..
>
> Since you no longer hold any title we do hereby notify you to cease all mining activities with immediate effect and to vacate the areas covered by Special Grants 4765 and 5247 for diamonds. You are given 90 days within which to remove your equipment and other valuables [22 February

> to 22 May, 2016] and during this period access to the premises will be approved upon request to the Ministry." [emphasis added].

The conduct of the first respondent and his permanent secretary together with that of the other respondents triggered this application. It was the applicant's contention that the mentioned conduct prejudiced it in a substantial way. It submitted that the conduct jeopardized its operations and resulted in what it termed significant financial harm to it. It stated that the first respondent's decision adversely affected and infringed upon its rights.

The applicant submitted that it invested into the mining project more than $100 million in capital, plant and equipment as well as technology transfer and specialised skills development, infrastructure and social responsibility programs and it created thousands of jobs in its investment in the mining area. It said its expectation was that the special grants would remain valid for as long as mining operations were viable to enable it to recoup its investment. It stated that the first respondent was using the pretext of the invalidity of the special grants to punish other diamond mining companies and it for their refusal to enter into a merger which the first respondent was compelling them to enter into. It recounted the harm which it said it suffered and continues to suffer at the hands of the respondents in the following words:

> "Debts are being incurred by the applicant which have to be paid; its employees and creditors have to be paid. A notice from the first respondent, wrongly issued, has resulted in the applicant not being able to carry out the ordinary functions and responsibilities of a company. Applicant is being prejudiced in its right and is therefore compelled to seek recourse from this Honourable Court to protect its interests and those of the applicant's employees affected by the actions of the respondents."

It, therefore, moved the court to grant interim relief to it by way of setting aside the first respondent's directive and having the parties return to the status *quo ante* 22 February, 2016.

The respondents opposed the application. The first respondent submitted, among other matters, that:

(a) the mining grant was issued to the Zimbabwe Mining Corporation ["the corporation"] and not to the applicant;

(b) the fact that no *deed of cession* was attached to the application showed that no cession was ever made in favour of the applicant;

(c) the applicant's right was derived from the title of the corporation which neglected to renew the grant as a result of which it lapsed;

(d) the special grant was invalid on the basis that it did not have a termination date as the law required of it;

(e) unauthorised *lis* i.e. annexure A which the applicant attached to the application was defective;

(f) the application was not urgent – and

(g) the relief which the applicant prayed for sought to establish an illegality.

The second respondent stated that his mandate was to deal with policy matters which related to the operations of the police. He said he did not direct or control the police to act as the applicant alleged. He submitted that he was not involved in the police's presence at the applicant's mining site. He moved the court not to make an order against him.

The third respondent contended that the Constitution of Zimbabwe conferred authority upon him to preserve law and order. He referred the court to s 219 (1) (c) and (d) of the Constitution in the mentioned regard.

The following observed matters are pertinent:

(i) On 6 December 2006, Government issued special grant 4765 ["the grant"] to Zimbabwe Mining development Corporation ["the corporation"]. The grant covered an area of 63548 hectares. It is situated within the Reserved Area No. 1518 in Muatre Mining District.

(ii) The terms and conditions of the grant were spelt out for the corporation's observance as well as compliance. Those were stated at the time that the grant was issued to the corporation.

(iii) On 2 February, 2010 the corporation addressed a letter to the first respondent's chief mining commissioner. The letter reads, in part, as follows :

"Dear Sir

RE: SPECIAL GRANT NO.4765 MARANGE DIAMOND FIELD SEGMENTATION OF SPECIAL GRANT (FIRST LOT)

We wish to apply for the segmentation of SPECIAL GRANT NO.4765 located in the Marange Communal Lands.

We wish to transfer title of the Southern Portion of the SG 4765 measuring 3731 hectares as shown in the attached plan. The title of that portion is to be transferred to ANJIN

INVESTMENTS (PVT) LTD a joint venture between ZMDC & local companies and Chinese Company."

(iv) The first respondent's Permanent Secretry replied to the abovementioned application. His letter which was dated 2 February, 2010 made reference to SPECIAL GRANT NO.4765AND Anjin Investments. It reads:

"Dear Sirs
CESSION OF PART OF SPECIAL GRANT 4765 FROM ZIMBABWE MINING DEVELOPMENT CORPORATION (ZMDC) TO ANJIN INVESTMENS (PVT) LTD.

The above mentioned matter refers.

We are pleased to confirm that cession of part of SPECIAL GRANT 4765 measuring 3731 hectares from ZMDC to Anjin Investments has been approved by the secretary for Mines and Mining Development.

Anjin Investments (Pvt) Ltd is a Joint Venture between Matt Bronze (Pvt) Ltd and Anhui Economic Construction Group Co."

(v) The above correspondence between the corporation and the first respondent resulted in the endorsement which appears in Special Grant 4765. The endorsement reads:

"3731 hectares of Special Grant 4765 have been ceded to Anjin Investments (Pvt) Ltd w.e.f. 2nd February, 2010."

(iv) The grant as issued to the corporation has a total area of 63 548 hectares. The area was reduced to 59, 817 hectares after the *cession* to the applicant of 3731 hectares on 2 February, 2010. The applicant made mention of special grant 5247. It, however, stated that its application did not have any bearing on that special grant. It said its application related to the respondents' conduct *vis–a-vis* special grant 4765 only. It was for the mentioned reason that the observations which the court made in the foregoing paragraphs centred on special grant 4765 to the total exclusion of special grant 5247.

The applicant did not say the conduct of the respondents infringed its rights in the *ceded* portion of the grant. It said the conduct in question infringed its rights in special grant 4765. It, in that regard, acknowledged as well as accepted the fact that its rights in the *ceded* portion of grant did not, and do not exist, independently of the grant itself. It, in other words, portrayed the correct view which was that its rights in the *ceded* portion of the grant exists in, and were exercised by it through, special grant 4765 which the first respondent issued to the corporation

on 6 December, 2006. The applicant's reliance on clauses 8 and 10 of Special Grant 4765 fortified the view which the court held and still holds on this aspect of the matter. Those clauses came into existence before the applicant was born. They were incorporated into the grant at the time that the first respondent issued special grant 4765 to the corporation. The applicant cannot, under the stated set of circumstances, be heard to argue, on the one hand, that the *ceded* portion of the grant existed or exists independently of the grant and, on the other, that the clauses which relate to Special Grant 4765 also relate to it. It cannot, in short, blow both hot and cold.

Clause 8 upon which the applicant rested its case reads:

> "The holder shall mine this special grant as long as is feasible provide inspection fees are paid as provided in the Mines and Minerals Act [*Chapter 21:05*]" [emphasis added].

Whilst the definition of the phrase "The holder" is not available in the grant, the fact that the clause pre-existed the birth of the applicant supports the proposition that the phrase, by way of deductive logic, refers to the corporation as the holder and not the applicant. The applicant, on its part, did not produce any evidence which showed that the "*ceded*" portion of the grant existed outside that grant itself. All it was able to show was the endorsement which appeared in the grant. The endorsement is not evidence of the existence of the applicant's mining rights outside the grant.

The applicant's assertion which was to the effect that clause 8 of the grant allowed it to work the sites which were *ceded* to it for an indefinite period of time was misplaced. It ran contrary to s 291 of the Mines and Minerals Act [*Chapter 21:05*] ["the Act"]. The section is peremptory in form and nature. No special grant nor agreement can supercede it.

The applicant stated, and in the court's view correctly so, that the permanent secretary for the Ministry of Mines and Mining Development has a discretion to cancel a special grant if the holder thereof fails to comply with any provision of the grant or with the provisions of the Act. Clause 10 of the grant has words to a similar effect. Section 291 of the Act is one provision which the applicant and the corporation failed to comply with. 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 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…." [emphasis added].

It was on the basis of the section that the Secretary for Mines and Mining Development wrote and advised the applicant, on 22 February 2016, that Special Grant 4 765 had expired. He did not say the *ceded* portion of the grant had expired. He referred to Special Grant 4765 as a whole as, in his opinion, no real cession had occurred as the applicant continued to submit.

In writing as he did, the Secretary was acknowledging that the holders of the *ceded* and '*residual*' portions of the grant were operating outside the law. He advised them that their conduct in continuing to mine on an expired grant was unlawful. He also acknowledged that the holders of the rights which appeared in the grant were, in the past, compliant with the law in that they had, or at least one of them – the corporation – had, from time – to – time, applied for the renewal of its, or their, title in the grant. Reference is made in this regard to Annexures C and E which the first respondent attached to his opposing papers.

It is recorded that, notwithstanding the existence in the grant of clause 8 which said the holder of the grant would mine in perpetuity, the corporation applied, on its behalf as well as on behalf of the applicant, for the renewal of the grant. Annexure C, for instance, showed that the grant which was issued to the corporation on 6 December, 2006 was given a lifespan of four years. Its initial expiry date was 4 December, 2010. Annexure E showed that Special Grant 4765 which expired on 4 December, 2010 remained unrenewed from that date todate. The appendix to that annexure is pertinent. It showed that the corporation should have renewed the whole grant and not the residual portion of the same as the applicant contended. Column 3 of the appendix is relevant. It makes reference to the area of 63 548, and not to the residual area of 59 817, hectares.

It requires little, if any, effort to observe that special grant 4765 had expired for five (5) years running before the first respondent declared it to have been invalid on 22 February, 2016. The special grant had been allowed to operate outside the law for that stated period of time. The corporation and the applicant took no steps at all to keep the grant within the confines of the law. The obligation to renew the grant rested upon them or upon one of them on behalf of the other and not upon the first respondent. The first respondent gave them a very long rope with which they hanged themselves as has occurred *in casu*.

The applicant stated that its expectation was that the grant would remain valid for as long as the mining operations were viable to enable it to recoup the investment it made in the mining

project. Whilst its expectation was noble, the same did not permit it to live and continue to operate its mining of diamonds outside the law.

It is the duty of every person who resides in any country to comply with the laws of the country from which he conducts his business. Where a person whose business interests run in conflict with the laws of the territory from which he conducts his business is adversely affected by his unwholesome conduct *vis-à-vis* the territory's laws, the person cannot receive the sympathy of the offended country's courts which he approaches with dirty hands. He should first purge his quilt before he runs to the courts of the territory to seek relief of whatever form or nature.

The applicant, in the court's view, is not an exception to the above stated position. It continued to conduct its mining operations with a special grant which had expired. It was aware from as far back as December 2010, that the grant which was issued to the corporation with a portion having been *ceded* to it, was no longer valid. It made no effort to have it renewed. It, in fact, took pleasure in operating outside the law for five consecutive years. The law cannot support its unwholesome conduct in the mentioned regard.

The sworn duty of any court the world over is to ensure that parties who bring matters to it have, in the first place, complied with the letter and spirit of any law which applies to their cases. It is not the duty of a court to perpetuate an illegality. To do so would run contrary to judicial ethics, the court's rules, procedures as well as practice and above all, the law itself which every person is bound to observe and obey without exception.

In the instant case, it is evident that the letter, Annexure E, which the corporation addressed to the first respondent's Permanent Secretary on 30 September, 2015 was an attempt by the corporation to have the grant further renewed. The corporation wrote the letter on behalf of the applicant and on its own behalf, so it would appear. The fact that the letter was written five (5) years after the event goes to show that the corporation and the applicant suffered an inexcusable dereliction of duty towards the first respondent and, through him, the Government of Zimbabwe as a whole. The applicant, through the corporation, was candid enough to acknowledge, in the letter, that Special Grant 4765 had expired. Various reasons were advanced for the non-renewal of the grant. In the letter, the corporation appealed to the Ministry of the first respondent to "reconsider its earlier position not to extend the exemption of its payment of

renewal of Special Grant fees and grant ZMDC exemption to update its diamond Special Grant fees for a further period of 3 years up to 2016, to …..".

It is evident that the corporation had, earlier on, requested the first respondent's Ministry to extend to it an exemption of payment of fees for the renewal of the Special Grant. The first respondent, it is clear, had turned down the corporation's request. The letter of 30 September, 2015 was, therefore, an appeal to the Ministry to reconsider its earlier position.

The request and the appeal of the corporation and the applicant would, in the court's view, have made sense if the applicant and the corporation were not conducting mining operations in terms of the expired grant or an expired part of the grant. They advanced as a reason for the non-renewal of the grant that they were financially constrained. They stated that they were not able to raise the necessary fees which related to the renewal of the grant.

The attitude which the first respondent took towards them would appear to be understandable. It was, so it would appear, premised on the question as to where they were channeling the money which they were receiving from their operations which they continued to conduct on the strength of an invalid special grant. The Permanent Secretary's letter of 22 February, 2016 spelt out the attitude of the first respondent's Ministry to the request and the appeal to a point where no further debate of the same was required. The permanent secretary exercised his discretion against the applicant and the corporation. He acknowledged the fact that both of them had breached the condition upon which the special grant was issued to them as well as s 291 of the Act. The manner in which he used his discretion cannot be faulted.

The conduct of the first respondent could not, under the stated circumstances, be said to have been unlawful, unreasonable or disproportionate as the applicant alleged. He simply pronounced what the law says. He could not cancel the grant which ceased to exist five years ago by operation of the law. What he did was to declare the position as it was and to direct that the corporation and the applicant do cease forthwith their operations which they continued to engage upon a special grant which had expired.

The applicant's statement which was to the effect that the first respondent did not follow due process of law when it directed companies which were in the same boat with it to cease operations did not hold. It would have held if the grant from which it derived its authority to work the site(s) was valid. The grant was unfortunately invalid. The first respondent did not,

therefore, have any obligation to the applicant or to anyone who was in the same position as the latter to have directed in any manner other than what he did.

The corporation and the applicant have only themselves to blame for the unfortunate position in which they found themselves. They took solace in continuing to break the law with impugnity. They could not be heard to cry foul when the law descended upon them as it did.

It is important that a comment be made as regards the resolutions which accompanied the applicant's application. The resolutions purport to confer authority upon one Zhang Shibin to depose to the founding affidavit. The first resolution is dated 2 March, 2016. The one which was attached to the applicant's answering affidavit was dated 25 February 2016. It is an expanded version of the resolution of 2 March, 2016. The contents of the two resolutions are totally dis-similar although they purported to portray the view that Mr Shibin did have the authority to depose to the applicant's affidavit. The court was left in an invidious position as to which of the two resolutions was more authentic than the other.

The applicant's attempt to unprocedurally introduce into the record, at the eleventh hour, a document which it never referred to in its papers or during submissions was received with displeasure. The document appeared to have aimed at influencing the court to view the applicant's case from a perspective which was different from the one it had, earlier on, presented. The court drew the attention of the applicant's legal practitioner to the matter and the latter tendered an apology after which he withdrew the document onto which was attached another document which resembled Special Grant 4765.

On 11 March, 2016 the applicant filed a chamber application with the court. The application aimed at introducing into the record the document which it attempted to introduce outside the rules of court on 9 March, 2016. Its application was in terms of r 235 of the rules of court. It sought leave of the court to introduce the document into the record. It moved the court to exercise its discretion in terms of r 4 C of the same riles.

The first respondent opposed the application. He filed his opposing papers on 21 March, 2016. The other respondents did not. The first respondent's opposition to the application notwithstanding, the court granted the application. It did so in the interests of justice.

The applicant marked the document which was the subject of its chamber application Annexure AA4. It said the annexure contained evidence which was critical to the determination

of the urgent chamber application. It said the annexure was not available to it when the answering affidavit and submissions were made. It stated that the annexure was the special grant which was issued to the corporation on 6 December, 2016. Its position was that the annexure was different from Annexure E which it attached to its founding affidavit.

The first respondent objected to the admission of the supplementary affidavit and the annexure. He stated that the applicant's position was that the corporation ceded a portion of the special grant to itself. He submitted that the source of the rights that were *ceded* to the applicant should have been brought before the court. He stated that the applicant had a duty to prove its claim in the mentioned regard. He argued that the applicant was endeavoring to rebuild its case which, according to him, had crumpled. He observed that the grant was dated 6 December, 2006. His further observation was that para 2 of the annexure stated that the grant would remain valid for only twelve (12) months. He submitted that the annexure's validity expired on 6 December, 2007. He said the annexure had already expired when *cession* of rights to the applicant allegedly took place on 2 December, 2010. He stated that the applicant could not have derived any rights from an expired grant.

Both Annexures E and AA4 relate to Special Grant 4765. Annexure E has 10 clauses and Annexure AA4 has 8 clauses. It is curious to observe that the permanent secretary of the first respondent issued those two annexures on 6 December, 2006. The Ministry's date-stamp which appears on the face of Annexure E resonates with the purported cession of 3731 hectares of Special Grant 4765 to the applicant. The applicant did not explain why the date of issue as is stated in Annexure E was allowed to remain reading 6 December, 2006 when the alleged cession occurred on 2 February, 2010.

It may be accepted, for argument's sake, that the secretary made an error in not correcting the date to read 2 February, 2010. However, the Ministry's date-stamp which appears underneath the secretary's signature in Annexure E would not have read 6 December, 2006 which it is reading. It should have read 2 February, 2010 which is the date of the alleged cession. One is, therefore, left to wonder whether or not the two annexures are capable of being reconciled to allow them to tell a story about themselves. It is evident that they cannot tell any meaningful story.

Condition 3 of Annexure E is relevant. It reads:

> "In terms of section 295 of the Act the holder shall beacon the area of the grant to the direction of the Mining Commissioner and shall maintain such beacons until a certificate of quittance has been issued in terms of the Act." [emphasis added]

The applicant's statement was that Annexure E was issued to it. It, however, produced no evidence to show that it complied with the above condition which is peremptory in nature and form. All what it was able to show was the endorsement which appears on the face of the annexure.

The first respondent's observations as regards condition number 2 of Annexure AA4 cannot be glossed over. The annexure, according to the applicant, was issued to the corporation on 6 December, 2006. The Annexure had a lifespan of only one year from its date of issue. It, accordingly, remained valid up to 6 December, 2007. The applicant produced no evidence to show that the annexure was renewed after 6 December, 2007. The first respondent's assertion which was to the effect that the corporation could not, in February 2010, cede what it did not have therefore holds.

The introduction into the record of Annexure AA4 left the applicant's case in a more confused state than it had concluded it. The annexure raised material disputes of fact which could not be resolved on the papers. The application cannot succeed under the stated set of circumstances.

The respondents raised a number of in *limine* matters which the court chose not to consider. It remained of the view that the application should be disposed of on the basis of its substance and not on technical issues which had been placed before the court. The applicant's case was unsustainable. It could not prove its case on a balance of probabilities. The application is, accordingly dismissed with costs.

Hussein Ranchhod and Company, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners