REPORTABLE ZLR(13)

Judgment No. SC 3/11
Civil Appeal No. 350/06

BUBYE MINERALS (PVT) LIMITED v (1) MINISTER OF MINES AND MINING DEVELOPMENT (2) MINERALS MARKETING CORPORATION OF ZIMBABWE (3) MINING COMMISSIONER MASVINGO (4) RIVER RANCH (PVT) LTD

SUPREME COURT OF ZIMBABWE
MALABA DCJ, SANDURA JA & ZIYAMBI JA
HARARE, OCTOBER 26, 2010 & NOVEMBER 14, 2011

H Zhou, for the appellant

S Maposa, for the first and third respondents

A P de Bourborn SC, for the fourth respondent

MALABA DCJ: This is an appeal against the judgment of the High Court given on 6 December 2006 granting an application for a final order and confirmation of an interim order authorising the appellant to have rights under Special Grant No. 1278 to mine precious stones (diamonds) in area No. 405 in the district of Masvingo.

The background facts are these. On 13 December 1992 the first respondent gave to Auridiam Zimbabwe (Pvt) Ltd a "Special Grant" No. 1278 under Part XV11 of the Mines and Minerals Act [*Cap. 21:05*] ("the Act") authorizing it to carry out mining operations for diamonds in an area covering approximately 70 hectares within

reserved area No. 405 in the mining district of Masvingo for a renewable period of 25 years.

Clause 14 of the Special Grant provides:

> "Rights under this grant cannot be transferred and shall not be ceded or otherwise assigned without the consent of the Secretary in writing. Such consent shall be subject to the provisions of s 265 of the Act."

The Secretary referred to in clause 14 of the Special Grant is the Secretary for Mines and Mining Development ("the Secretary"). The reference in clause 14 to s 265 of the Act was the numbering as it existed in 1992 in terms of what was then called the Mines and Minerals Act [*Cap. 165*]. In the revised edition of Statutes of 1994 the section number became 282. Section 282 of the Act provides:

> "Notwithstanding anything contained in this Act or any other enactment, no holder of a mining location registered for precious stones or a mining lease on which the principal mineral being mined or to be mined is precious stones shall tribute, cede, assign, sell or otherwise alienate in any manner whatsoever that mining location or mining lease or any interest therein without the permission of the Minister."

On 13 February 1997 Auridiam Zimbabwe (Pvt) Ltd changed its name to River Ranch (Pvt) Ltd ("the fourth respondent"). The fourth respondent continued the mining operations and production of diamonds in terms of the Special Grant until it was placed under voluntary provisional liquidation on 24 February 1998. Mr Lewis Bailey of KPMG was appointed the provisional liquidator.

On 13 October 1999 the provisional liquidator representing the fourth respondent and its creditors entered into an agreement of compromise with the appellant.

The company had recently been incorporated by Mr and Mrs Farquhar who had acted as fourth respondent's buyers before it was placed under provisional liquidation. The purpose of the agreement of compromise was stated as being to enable the appellant to take transfer of all proved claims of creditors of fourth respondent and for the creditors to effect transfer of the liabilities of fourth respondent to the appellant in accordance with the terms and conditions set out in the agreement.

It was a condition of the agreement of compromise that specific classes of creditors had to be paid specific sums of money by the appellant on specific dates from the effective date. The terms and conditions of the agreement of compromise had to be made part of a court order by which fourth respondent was to be removed from provisional liquidation. Mr Bailey was to be appointed the agent of the creditors for the purposes of effecting transfer to the appellant of their claims. He was also to be appointed the agent of the appellant in order to receive, administer and make payments of money due to the creditors in terms of the agreement. It was also a term of the agreement of compromise that the shareholding structure of the fourth respondent would not be altered. The directors of the appellant made a declaration which was a term of the agreement that neither the appellant nor any of them had any interest in the fourth respondent.

The order was made by the High Court in case HC 1591/99 on 20 October 1999. As a result of the court order the provisional liquidation of the fourth respondent was set aside. In terms of the order Mr Bailey was appointed the agent of the parties for

the purposes of effecting transfer of the claims of the creditors and for receipt, administration and payment of all monies due to the creditors in terms of the agreement of compromise. The effective date was the date on which the court order and a copy of the agreement of compromise were served by the Deputy Sheriff for Harare on the office of the Registrar of Companies. The appellant took transfer of all proved claims of the creditors excluding the shareholders' loans.

The appellant did not have money with which to meet its obligations to the creditors in terms of the agreement of compromise. It had controlling shareholding in two external companies, Sedna and Cornerstone which had shares in the fourth respondent. The appellant entered into an agreement with Mr Adel Aujan an external investor who agreed to purchase shares in the two external companies. Mr Bailey who still exercised administrative powers under the agreement of compromise gave the appellant the right to treat stockpiles of ore at the mine in order to raise the money to pay the creditors. It was not given authority to mine the pit.

The appellant operated the mine until 2000. It did not have sufficient capital to conduct mining operations. It borrowed heavily from Mr Aujan. Over the period from 23 February 1999 to 1 October 2001 the appellant obtained seven loans from companies belonging to Mr Aujan who was the fourth respondent's principal shareholder. The loans totaled US1 399 764. The first three loans were for capital expenditure and working capital at the mine. There was then one loan of US1 million in March 2000 for payment of a creditor of the fourth respondent because the appellant had failed to meet its

commitments under the agreement of compromise. The last three loans were for payment of wages at the mine. From January 2001 the mine was under care and maintenance management.

On 21 February 2000, Mr E Matikiti wrote a letter to the first respondent seeking advice as to whether the Special Grant held by the fourth respondent could be "registered" in the appellant's name. He misrepresented that the appellant had purchased all the shares and assets of the fourth respondent which was liquidated. The letter reads:

> "Re: **SPECIAL GRANT NO. 1278 – RIVER RANCH LIMITED**
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> Given that liquidation proceedings are now complete and Bubye Minerals (Pvt) Ltd has been awarded the shares and assets of River Ranch Limited (previously in liquidation) we are proceeding with the necessary matters of good housekeeping. This brings us to the matter of the Special Grant, which remains registered to River Ranch Limited. We strongly believe it is in the interests of the local partners that the Special Grant is registered to Bubye Minerals (Pvt) Ltd since the aforesaid company was the successful bidder for the shares, claims and assets of River Ranch Limited (Zimbabwe). This will serve to protect the interests of local shareholders and ensure that the partnership retains a majority indigenous component.
>
> We would be glad to have your advice in this matter given that the way is legally clear for the transfer."

Notwithstanding the attempt to found the right to claim transfer of the Special Grant from the fourth responded to it on an alleged sale, the appellant sought the transfer at a time it was in breach of the agreement of compromise. On 16 May 2000 an official in the Ministry responded to the request for transfer of the Special Grant by saying that at its 492nd meeting the Mining Affairs Board ("the Board") had resolved that the "application" could not be considered until outstanding payments to the creditors

were made in terms of the agreement of compromise. On 12 September 2000 another letter was written to the appellant advising that at its 494th meeting the Board had resolved that a final reminder be sent to it to the effect that unless the outstanding payments to creditors were made by the appellant before the Board's next meeting on 11 October the "application" for transfer of the Special Grant would not be considered. The appellant failed to pay the outstanding amounts owed to the creditors. The money was paid by Mr Aujan in 2004.

Mr Aujan decided to appoint a new board of directors and management to run the affairs of the fourth respondent. In March 2004 a general meeting of shareholders, at which the appellant was represented, was held. A new Board of Directors was appointed. It was tasked with taking possession of the mine and carrying out mining operations in accordance with clause 10 of the Special Grant requiring continuous working of the mine. The Board of Directors was also mandated to demand from the appellant a statement of account on the administration of the affairs of the fourth respondent during the period October 1999 to March 2004.

On 17 June 2004 Mr Farquhar wrote to the Secretary saying that the appellant was renewing the "application" it made on 21 February 2000 for "cession" of the Special Grant from fourth respondent to it. He asked that the "application" be placed before the Board. The reason given for the renewed, "application" was that all outstanding payments owed to the creditors had been made. The fourth respondent was not given notice of the renewed application. The appellant withheld from the Secretary

the fact that the outstanding payments to the creditors had been made by Mr Aujan and not itself. At the time the appellant wrote the letter of 17 June 2004 it had been served on 27 April with a letter of demand for the statement of account.

On 7 September 2004 the fourth respondent applied to the High Court in case HC 10814/04 for an order directing the appellant and its directors to render an account of the administration of its affairs from October 1999 to March 2004. The appellant opposed the application on the ground that the fourth respondent had no *locus standi*.

On 25 January 2005, without notifying the fourth respondent of its intention to consider the application, the Board at its 518th meeting, decided to "approve" the transfer of the Special Grant from the fourth respondent to the appellant. The letter written on 28 January 2005 by the Secretary of the Board reads:

> "**RE: APPLICATION FOR CESSION OF SPECIAL GRANT NO. 1278: FROM RIVER RANCH (PVT) LTD TO BUBYE MINERALS (PVT) LTD**
>
> The above matter refers.
>
> I am pleased to advise that the Chairman of the Mining Affairs Board who is also the Secretary for Mines and Mining Development has approved cession of the abovementioned Special Grant viz from River Ranch (Pvt) Ltd to Bubye Minerals (Pvt) Ltd with effect from 25 January 2005."

On 15 February 2005 the High Court made an order in case No. HC 10814/04 referring the question of the obligation on the appellant to render the statement of account to trial on the ground that there was a dispute of facts which could not be

resolved on the papers. On 13 May 2005, the fourth respondent made an application to the High Court in case No. HC 2091/05 for an order setting aside the decision of the Board to transfer the Special Grant to the appellant. The grounds on which the application was made were two. The first ground was that the decision was unlawful as no agreement of cession had been entered into by the fourth respondent with the appellant. The second ground was that the fourth respondent had not been notified of the proposed decision. The appellant opposed the application.

On 13 May 2005 the High Court stayed the proceedings pending the determination of the issues referred to trial in case No. HC 10814/04. The ground on which the decision to stay the proceedings was made was that the two cases raised the same questions for determination. The fourth respondent appealed against the judgment of the High Court in case No. SC-289-05. There is no doubt that the decision of the High Court to stay the proceedings for the reasons given was wrong. The issue of the validity of the decision of the Board made on 25 January 2005 was unrelated in time and substance to the question whether the appellant was under an obligation to render the statement of account demanded by the fourth respondent in case No. HC 10814/04. The validity of the decision of the Board could not have been raised in case No. HC 10814/04 because the decision had not been made when those proceedings were commenced.

On 16 May 2005 the fourth respondent wrote a letter to the Minister questioning the legality of the decision to transfer the Special Grant to the appellant and asking that the decision be reversed. The argument put forward in support of the

proposed action was that the decision was invalid for contravening s 282 of the Act. It was also pointed out to the Minister that the invalidity of the decision had been conceded by the representative of the Ministry at the hearing of the application in case No. HC 2091/05 on the ground that it had been made on false information to the effect that the appellant had been awarded all shares and assets of the fourth respondent. It was indicated that at no time had the fourth respondent agreed to cede the rights under the Special Grant to the appellant. It said that the fourth respondent had not even known that the appellant had approached the Ministry seeking to have the Special Grant transferred to it.

On 28 July 2005 the fourth respondent made another application to the High Court in case No. HC 3336/05 for a provisional order setting aside the decision of the Board. The appellant opposed the application which was dismissed by the Court on 7 September. The ground for the dismissal of the application was that it raised the same issues as were referred to trial in case HC 10814/04. The decision of the High Court was clearly wrong. The question of the validity of the decision of the Board arose after the decision was made on 25 January 2005. It could not have been part of the cause of action in case no. HC 10814/04 which was commenced on 7 September 2004. The fourth respondent appealed in SC-144-05 against the judgment of the High Court.

On 22 November 2005 a letter was written to the fourth respondent on behalf of the Secretary advising that the decision of the Board to transfer the Special Grant to the appellant had been set aside. The letter was communicating the decision of

the first respondent made on 16 November. The first reason given for the reversal of the decision of the Board was that it was in contravention of s 282 of the Act as the permission of the Minister had not been obtained. The second reason was that the decision was made without notice to the holder of the Special Grant.

On 1 February 2006 the appellant made an application to the High Court in case No. HC 278/06 for a provisional order declaring that the "purported cancellation of the cession" by the first respondent was null and void and be set aside. An interim order interdicting the third respondent from giving effect to the "purported cancellation of the deed of cession of Special Grant 1278" was granted on 2 February 2006. The first respondent was also interdicted from representing to any person or authority pending determination of the application for the provisional order that, "the cession of Special Grant 1278" to the appellant was cancelled save in terms of the law. The appellant also sought a final order confirming the interim order and directing the fourth respondent to restore vacant possession of the area covered by the Special Grant save under express written authority of the appellant.

On 6 December 2006 the High Court discharged the interim order and dismissed the application for the provisional order. Although it was argued on behalf of the appellant that the sole issue for determination was the legality of "the cancellation of the cession" by the first respondent, the learned Judge accepted the contention advanced on behalf of the respondents that the validity of the decision of the Board to transfer the Special Grant from the fourth respondent to the appellant was the critical question for

determination. The argument was that the legality of the "cancellation of the cession" could not be established if the decision of the Board was illegal.

Proceeding on the basis of the assumption that the Board had the power to entertain the "application for the cession" of the rights under the Special Grant from the fourth respondent to the appellant, the learned Judge held that the manner in which the decision to transfer the Special Grant was made was unfair and in contravention of s 3(2) of the Administrative Justice Act [*Cap. 10:28*] in that, the fourth respondent was not given notice of the proposed action. The conclusion was that as the unlawful decision could not confer rights on the appellant the decision of the first respondent setting it aside did not affect any rights of the appellant under the Special Grant. Authority for the principle relied upon that all proceedings founded upon a decision which is null and void *ab initio* are also bad and incurably bad was found in the cases *of MacFoy v United Africa Co. Ltd* [1961] 3 ALL ER 1169 (PC) at 1172I and *Mugwebie v Seed Co. Ltd & Anor* 2000(1) ZLR 93 at 97A-B.

The grounds of appeal are repetitive. They can be addressed comprehensively by addressing the question whether the learned Judge was correct in holding that the validity of the decision of the Board to transfer the Special Grant from the fourth respondent to the appellant was the critical question for determination.

It is necessary to point out that at the time the application was made to the High Court the fourth respondent had formally withdrawn all the appeals it had filed in

the Supreme Court in cases SC-289-05 and SC-144-05. It had also formally withdrawn cases HC 10814/04 and HC 2091/05 from the High Court. The question of the validity of the decision of the Board was therefore not *lis pendens* in relation to any of the previously filed cases at the time the application in case HC 278/06 was made to the High Court as had been argued by Mr *Zhou* on behalf of the appellant.

Whilst the learned Judge found that the decision of the Board was unlawful on the ground of procedural unfairness based upon breach of the right of the fourth respondent to be heard, the facts show that the Board did not have the power to entertain the "application for cession" of the rights held by the fourth respondent under the Special Grant. It is a fundamental principle of law that a public official or public body can only do things which are governed by law and cannot act where there is no law authorizing the kind of action to be undertaken. As the validity of the decision of the Board was challenged, justification of the action taken had to be tested by reference to evidence of compliance with the procedural and substantive requirements of the provisions of clause 14 of the Special Grant as read with s 282 of the Act. Section 294(1) of the Act provides that a Special Grant shall be governed by its terms and conditions. It was to the terms and conditions of the Special Grant No. 1278 that the court *a quo* had to turn to decide the question of validity of the decision of the Board.

Clause 14 of the Special Grant prescribed specifically the power to be used in cases of cession of rights under the Special Grant, the form the exercise of the power had to take, the repository thereof and conditions which had to prevail before it

could be exercised. The power prescribed under clause 14 was exercisable by the repository giving consent to the holder of the mining rights under the Special Grant to cede those rights to a third party. The power was specifically vested in the Secretary acting as such. The consent had to be in writing. It is clear that no other public official could give written consent to the holder of mining rights under the Special Grant relating to precious stones to cede them to any other person. The Secretary clearly had no power to cede the mining rights under the Special Grant because he would not have been the holder of those rights. He could not cede what he did not have. The condition precedent to the exercise by the Secretary of the power reposed in him or her was that there had to be a proposed cession in terms of which the holder of the mining rights under the Special Grant (the cedent) agreed to cede them to the third party (the cessionary) who agreed to acquire them.

The prohibition directed specifically at the holder of the rights under the Special Grant to the effect that he or she could not cede the rights to any person without the written consent of the Secretary and the permission of the Minister did not only underlie the significance of the content of the power as a consent but also underlies the existence of an agreement of cession involving the holder of the mining rights as a condition precedent to the exercise of the power by the Secretary. The Secretary could not create a cession. He could not enter into an agreement of cession involving rights belonging to another person. It was the party holding the rights under the Special Grant who could enter into an agreement to cede the rights to another person who upon written

consent being given by the Secretary would move into the shoes of the cedent to become the new holder of the rights under the Special Grant.

The authorities emphasize the conception of a cession as a bilateral agreement to transfer rights from one person to another. It cannot be a unilateral act. In *LTA Engineering Co. Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747(A) at 762A JANSEN JA said:

> "A cession is now considered to be a bilateral juristic act (agreement) whereby the cedent transfers his right of action to the cessionary, the latter taking the place of the former as creditor."

In *Hippo Quarries (TVL) (Pty) Ltd v Eardley* 1992(1) SA 867(A) at 873E-F, NIENABER JA said:

> "Cession, it is trite, is a particular method of transferring a right. The transfer is effected by means of agreement. The agreement consists of a concurrence between the cedent's *animus transferendi* of the right and the cessionary's corresponding *animus acquirendi*. If a complete surrender of the right is not intended the transaction, however it is dressed up, is not an out – and – out cession."

See also Shell *Zimbabwe (Pvt) Ltd v Webb* 1981(4) SA 749(z) at 754. *Botha v Carapax Shadeports (Pty) Ltd* 1992(1) SA 202(A) at 214.

The additional requirement for a valid exercise of the power vested in the Secretary under clause 14 was that under s 282 of the Act the written consent given to the holder of the rights under the Special Grant must have the permission of the Minister. In other words s 282 prohibited specifically the holder of rights to mine precious stones (in this case diamonds) within a mining location under a Special Grant from ceding those

rights without the permission of the Minister. Under s 274 which falls under Part XVII of the Act together with s 282 of the Act the words "mining location" are defined so as to exclude a special grant.

The contention advanced on behalf of the appellant was that s 282 of the Act did not apply to the Special Grant because of the definition of "mining location" in s 274 of the Act. It is, however, clear from the examination of the provisions of ss 275 to 281 that they deal with the registration of transfers, hypothecations, options, tribute agreements and conditions governing mining rights on reserved ground. These are matters which would apply generally to all minerals. In each instance specific provision is made and a special grant excluded because of the wording of s 274.

The contention ignored the fact that s 282 starts with the words "notwithstanding anything contained in this Act or any other enactment …". It is a rule of construction that when a provision starts with the non-obstante clause the intention of the legislature is that the provision should have overriding effect in relation to any other provision in the same statute or any other enactment to the contrary.

So no other provision of the Act including s 274 or any other statute would apply to the holder of a mining location dealing in precious stones. In respect of such mining location the holder could not cede mining rights under a special grant without the permission of the Minister.

The contention also ignored the fact that s 282 makes special provision in respect of mining locations where precious stones are mined. Section 274 makes general provision applicable to all minerals. The principle of *generalia specialibus non derogant* would apply. It is to the effect that general provisions do not override special provisions. In *Barker v Edger* [1898] AC 748 at 754 LORD HOBHOUSE said:

> "The general maxim is generalia specialibus non derogant. When the legislature has given attention to a separate subject and made provisions for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject – matter and its own terms."

So, s 282 of the Act must be construed according to its subject – matter which is the prohibition of the holder of a mining right relating to precious stones from ceding those rights without the permission of the Minister. In this case the Special Grant related to precious stones (diamonds). Accordingly, s 282 applied to the cession of those rights. The cession would have required the permission of the Minister.

In applying the principles of the law to the facts of the case there is no question that none of the requirements of clause 14 of the Special Grant as read with s 282 of the Act were complied with. There was no cession within the meaning of clause 14 of the Special Grant as read with s 282 of the Act entered into between the holder of the mining rights and the appellant. The fourth respondent denied that it ceded or intended to cede the rights it held under the Special Grant to the appellant. The appellant did not produce any evidence to the contrary. Without a proposed cession there would have been no cause for the exercise of the power conferred on him or her by the Secretary

under clause 14 of the Special Grant. There would have been no cause for the granting of permission by the Minister in terms of s 282 of the Act. It is, indeed, clear that the Secretary did not give written consent to the fourth respondent to cede any rights under the Special Grant. It is also common cause that the permission of the Minister was not sought.

The Board which made the decision to transfer the rights held by the fourth respondent under the Special Grant had no power to do what it did. When the decision was made the Secretary was not acting as such. He was acting in the capacity of a chairman of the Board. In any case the repository of the power prescribed under clause 14 of the Special Grant had no power to grant a cession of rights under the Special Grant. The Board could not have had power outside the provisions of clause 14 of the Special Grant to grant cession of rights it did not hold. The learned Judge was correct in holding that the question of the validity of the decision of the Board was the critical question for determination. Whilst he arrived at the correct conclusion that the decision of the Board was a nullity, he was wrong in assuming that the Board had power to entertain the application by the appellant for transfer of the Special Grant from the fourth respondent to itself.

The appeal is dismissed with costs.

SANDURA JA: I agree

ZIYAMBI JA: I agree

Messrs Hussein Ranchhod & Co, the appellant's legal practitioners

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Messrs Costa & Madzonga, the fourth respondent's legal practitioners