REPORTABLE (6)

GRANDWELL HOLDINGS (PRIVATE) LIMITED
v
(1) ZIMBABWE MINING DEVELOPMENT CORPORATION (2) MARANGE RESOURCES (PRIVATE) LIMITED (3) MBADA DIAMONDS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAVANGIRA JA AND MATHONSI JA
HARARE: OCTOBER 21, 2019 & JANUARY 16, 2020

T. Magwaliba, for the appellant.
J.R. Tsivama, for the first and second respondents.
Third respondent in default

MATHONSI JA: This is an appeal against the whole judgment of the High Court handed down on 26 October 2016 dismissing the appellant's application for specific performance with costs.

The facts are that the appellant and the second respondent are each the holders of fifty percent of the issued share capital in the third respondent, a special joint venture company incorporated in terms of a joint venture agreement entered into between the appellant and the second respondent on 21 July 2009. In terms of the joint venture agreement the appellant would provide funding for the business of mining diamonds through the third respondent.

The second respondent undertook to ensure that the mining rights held under special grants at Marange existed in perpetuity. The first respondent, which is the sole shareholder in the second respondent guaranteed the second respondent's performance of its obligations under the agreement.

Although the appellant performed its obligations under the agreement, the second respondent did not pay the special grants' renewal fees. The second respondent let the special grants in terms of which the mining rights existed, expire. When that happened, the second respondent did not secure the reinstatement of the special grants. The first respondent, which had guaranteed the second respondent's performance of its contractual obligations, also failed to do anything about that breach of the agreement.

On 30 September 2015, the first respondent addressed a letter to the Permanent Secretary for Mines and Mining Development which, because of its centrality in the resolution of this case, is reproduced hereunder:

> "RE: RENEWAL OF THE MARANGE DIAMOND SPECIAL GRANTS: 4718, 4719, 4720, 4765, 5244, 5247, 5249 & 5769
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> Reference is made to the above matter.
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> As per attached table below, ZMDC has five diamond Special Grants (SG) which expired in October 2013 and one in December 2010. These are SG Nos. 4718, 4719, 4720, 4765 and 5769. From this date the Corporation has to raise the required renewal fees and in 2014, the Ministry of Mines and Mining Development granted a 12 month exemption on the payment of the renewal fees for the said grants. Given the fact that ZMDC's financial position has remained severely constrained, the Corporation is applying for a further exemption on renewal fees for these SGs, which have currently expired.
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> Further, given the fact that actual mining is now taking place in the first four of the above SGs, it is necessary for the SGs to be converted from prospecting to mining SGs, a process that also requires cash out lay by ZMDC, which funds the Corporation is currently finding difficult to raise.

In addition, Marange Resources (Pvt) Ltd, a wholly owned subsidiary of ZMDC, which is currently mining on Block B under SG4720, has requested for a valid copy of SG4720, which it requires in its application for exemption of import duty for an X-Ray Transmography Machine (XRT machine) that it intends to import. Unfortunately the Corporation is not able to assist, given the fact that the SG has expired.

Under these circumstances therefore, the Corporation is appealing to the Ministry, for the Ministry to reconsider its earlier position not to extend the exemption of payment of renewal SG fees, and grant ZMDC an exemption to update its diamond SGs for a further period of 3 years to 2016, to allow Marange Resources to process its application for exemption of import duty.

Sir, we are kindly requesting for your favourable consideration to our submission of renewal of the ZMDC held diamond Special Grants Nos 4718, 4719, 4720, 4765, 5244, 5247, 5249 & 5769 and conversion of SGs Nos. 4718, 4719, 4720 from prospecting to mining.

Yours faithfully

S. Simango
General Manager."
(The underlining is mine)

It is clear from the contents of the letter that the special grants, in terms of which mining operations were to be carried out by the third respondent, had expired in 2010 and 2013. The respondents did not have money to pay renewal fees and were thus asking for exemptions from the Secretary. They had relied on exemptions previously to renew the special grants because they again did not have money. If they were to be granted exemptions from paying renewal fees, only then would they apply for renewal or revival of the expired special grants.

The Secretary of Mines and Mining Development was not impressed. He rejected the request for exemptions in a letter to the first respondent dated 22 February 2016. It reads:

"RE: RENEWAL OF THE MARANGE DIAMOND SPECIAL GRANTS: 4718, 4719, 4720, 4765, 5244, 5247, 5249 AND 5769

The above matter refers. We acknowledge receipt of your letter to our Ministry dated 30 September 2015 contents of which have been noted (copy attached for ease of reference).

> As clearly admitted and indicated by yourselves, you have neglected or failed to renew the Special Grants that were issued to you, some expired as far back as 2010 and others in 2013. An exemption had been extended to you but there has been no commitment on your part to rectify this anomaly which is in contravention of section 293 of the Mines and Minerals Act {Chapter 21:05]. Instead you are requesting for a further exemption. It has also come to our attention that there are some Special Grants that are purported not to have a duration period. 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. In light of this, these Special Grants shall be deemed to have been granted for the period which the applicant had requested in its application.
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> After serious consideration of this matter, we do hereby notify you that the Ministry is not in a position to give any further exemptions for the renewal of all Special Grants namely 4718, 4719, 4720, 4765, 5244, 5247, 5249 and 5769 that were issued to you and neither are we renewing the same.
>
> Prof. P.F. Gudyanga Secretary for Mines and Mining Development." (The underlining is mine)

After the rejection of the request for exemptions, it is common cause that the respondents did not do anything. They did not challenge the Secretary's decision. Neither did they raise money to pay for the renewal or revival of the expired Special Grants.

The appellant then launched an application in the High Court Seeking an order directing the respondents to pay renewal fees for the Special Grants and to file renewal applications among other ancillary relief. The application was prompted by the third respondent's inability to carry out mining operations without regularisation of the special mining grants. The application was premised on the respondents' breach of the joint venture agreement.

The first and second respondents opposed the application. They denied breaching the agreement asserting that they applied for both exemption to pay renewal fees and the renewal of the Special grants to the Secretary for Mines. It therefore became an issue for

determination by the court *a quo* whether the first and second respondents breached the terms of the joint venture agreement by failing to perform specific acts in pursuance of their contractual obligations.

The court *a quo* held that the first respondent's letter of 30 September 2015 is indeed an application for renewal of the Special Grants. The court *a quo* found that the response to the application by the Secretary for Mines dealt with the issues of exemption and renewal of the Special Grants which had expired. The court *a quo* held that the Secretary for Mines had made a decision not to renew the Special Grants. It would therefore be incompetent, so the court *a quo* reasoned, for the court to order the Secretary to review his own decision by granting an order for Specific performance.

This appeal is the fruit of the appellant's grief with that judgment of the court *a quo*. The grounds of appeal are that:

1. The court *a quo* erred and grossly misdirected itself in finding that an application for renewal of the Special mining grants had been filed by the first and second respondents in discharge of their contractual obligations to the appellant;
2. The court *a quo* erred and grossly misdirected itself in limiting the first and second respondents' contractual obligations to filing an application for renewal of the special mining grants whereas their obligation was to do all that was necessary to ensure the existence in perpetuity of the special mining rights.

Whether or not the court *a quo* correctly held the letter of the first respondent to the Secretary for Mines as an act of specific performance in terms of the parties' agreement.

Generally the policy of the law is to give effect to the contracts of the parties because it is salutary in our jurisdiction to uphold the freedom of the parties to contract lawfully. This notion is embodied in the principle of sanctity of contract. Once the parties have contracted, it is not open to the courts to rewrite the contract they have entered into. In addition, the court will not excuse any of the parties from the consequences of the contract that they freely and voluntarily entered into with their eyes wide open. This is so even if the consequences are onerous or oppressive. See *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403 C-D.

As to the remedy of specific performance in the law of contract, it is accepted that it is aimed at upholding the contract and obtaining the performance of the terms of the contract as agreed. Indeed, specific performance is the primary or default remedy for breach of contract and is usually claimable.

According to the learned author I Maja, The Law of Contract in Zimbabwe, 2015, The Maja Foundation, at p126:

> "The general rule under Roman Dutch Law is that an innocent party has a right – in every case of breach of contract – to a remedy of specific performance unless there are exceptional circumstances which justify refusal of an order for specific performance. According to *Farmers Co-operative Society (Reg) v Berry* 1912 AD 343 at 350:
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> > '*Prima facie*, every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in *Thompson v Pullinger* the right of the plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt.'"

See also *Smith & Ors v ZESA* 2003 (1) ZLR 158 (H) at p 165 A-B; *Savanhu v Marere N.O.* & Ors 2009 (1) ZLR 320 (S).

However, the right to claim specific performance is predicated on the concept that the party claiming it must first show that he or she has performed all his or her obligations under the contract or is ready, willing and able to perform his or her side of the bargain. Even then, the court has a discretion, which should be exercised judicially, to grant or refuse a decree of specific performance. It follows therefore that the court's discretion should not be exercised arbitrarily or capriciously. See *Minister of Public Construction & National Housing v Zescon (Pvt) Ltd* 1989 (2) ZLR 311 (S), where at 318 G, this Court stated:

> "The law is clear. This is a remedy to which a party is entitled as of right. It cannot be withheld arbitrarily or capriciously."

It is important to consider the specific terms of the contract entered into between the parties which the appellant wishes to enforce. Clause 6.3 of the Joint Venture Agreement provides:

> "6.3 Marange undertakes that it shall forthwith after the signature date and thereafter for the duration of this Agreement –
>
> 6.3.1 pay all necessary fees and make application for the renewal and/or continued existence and do all that may be necessary so as to ensure that the special grants and rights thereunder are in good standing and remain valid for the duration of this Agreement allowing Marange to mine and prospect the concession area in perpetuity ……"

The appellant's case is that the respondents breached that provision by failing to pay the necessary fees and to make the requisite application for the renewal of the Special Grants. As a result the Special Grants lapsed. The respondents submitted that the letter written by the first respondent to the Secretary of Mines on 30 September 2015 constituted a valid

application for the renewal of the Special Grants which application was rejected by the Secretary for Mines. They therefore fulfilled their part of the bargain.

It is common cause that the appellant fulfilled its own obligations in terms of the contract and was therefore entitled to demand specific performance. The court *a quo* found that the letter of 30 September 2015 was "an application for renewal" and that its heading was very clear needing no further explanation. The court said at p 7 of the cyclostyled judgment:

> "What is clear from the above is that it is an application for renewal. The heading is very clear and needs no further explanation. The first paragraph makes reference to the heading and therefore the renewal of the special grants. The second paragraph relates to an exemption to pay renewal fees. Paragraphs 3 and 4 are not relevant to the determination of the issue at hand. Paragraph 4, again, relates to exemptions. The last paragraph puts paid to any doubt what the letter relates to. It talks about renewal. I agree with Mr *Tsivama* that there is no procedure or format laid down in JVA as to how the application for renewal is to be submitted."

With respect, the court *a quo* took a very simplistic, if not pedestrian, approach to the letter in question. Clause 6.3.1 of the Joint Venture Agreement required the respondents first and foremost, to pay all necessary fees for the renewal of the special grants. It also required them to make the necessary application for such renewal. It recognised the reality that the payment of fees was a pre-requisite for a valid and successful application for renewal.

Such a situation is not what was obtaining on the ground and as such the letter of 30 September 2015 cannot, by any stretch of the imagination, be regarded as a fulfilment of the respondents' obligations under Clause 6.3.1 of the Joint Venture Agreement. Clearly it was not a valid or competent application for renewal. It is clear from the provisions of s 293 of the Mines and Minerals Act [*Chapter 21:05*] that the payment of renewal fees is central to the validity of an application for renewal. Section 293 provides:

> "The person to whom a special grant is issued shall pay the prescribed fee in respect of the issue of a special grant or any renewal thereof."

It is common cause that the respondents did not pay renewal fees. In fact all the relevant special grants were allowed to expire years before the letter of 30 September 2015 was written. The contents of that letter are clear that the first respondent was seeking an exemption from paying renewal fees because of an incongruent financial position. Without the payment of renewal fees the renewal could only be done by the benevolence of the Secretary.

The respondents could not possibly be said to have performed their obligations of ensuring the mining rights existed in perpetuity. The rights had expired. The court *a quo* fell into error in that aspect. The letter of 30 September 2015 did not constitute specific performance of the respondents' obligations in terms of the contract.

Whether the respondents did all that was necessary to ensure the Special Mining rights existed in perpetuity

Mr *Magwaliba* for the appellant submitted that the obligations of the respondents set out in the contract were much broader than merely submitting an application for renewal of the Special Grants. They were required, so the argument goes, to ensure that the mining rights existed in perpetuity. They failed to perform to such an extent that the special grants expired in 2010 and 2013 long before the respondents even submitted the letter they relied on. I agree.

In fact once it is accepted that the respondents did not pay renewal fees and that they allowed the grants to expire, it cannot be said at the same time that the respondents did all that was necessary to ensure the existence of the special mining rights in perpetuity. They could only so exist if there was full compliance with renewal requirements including the

timeous payment of renewal fees and submission of the necessary applications. Repeated requests for exemptions from payment would never ensure perpetuity as that left everything in the hands of the Secretary for Mines.

Whether the court should exercise its discretion in favour of granting specific performance.

Mr *Tsivama* for the respondents submitted that the Secretary for Mines made a decision not to renew the Special Grants which decision is contained in his letter of 22 February 2016 quoted above. He submitted that the court *a quo* cannot be faulted for concluding that it would be incompetent for the court to direct him to review his own decision by granting specific performance. Mr *Magwaliba* on the other hand sharply differed with that assertion. In his view there was no application for renewal placed before the Secretary for Mines. He could not grant an application which was not made and his response clearly showed his disquiet about the respondents' repeated failure to pay renewal fees.

I have said that the court has a discretion whether to grant specific performance but that discretion should be exercised judicially and not arbitrarily or capriciously. This is because specific performance is a remedy to which a party is entitled to as of right. See *Minister of Public Construction & National Housing v Zescon (Pvt) Ltd, Supra*.

The court *a quo* did not consider the circumstances that are relevant in deciding whether to grant a decree of specific performance or not. In its view that was unnecessary because it had come to the conclusion that the respondent's letter to the Secretary for Mines amounted to specific performance. I therefore do not agree with Mr *Tsivama* that the court *a quo* exercised judicial discretion and refused specific performance, which discretion can only

be interfered with if exercised capriciously or upon a wrong principle. The discretion was simply not exercised by the court *a quo* for obvious reasons, namely its finding that specific performance had occurred.

There is no doubt that the Secretary for Mines was called upon to decide whether or not to grant the respondents exemption from paying renewal fees. He refused to do so because, according to him, an exemption had been granted previously but the respondents showed no commitment to rectify the anomalies. The respondents were not entitled to further exemptions. What is significant to note is that the respondents' obligations in terms of the contract are not to apply for exemptions but to pay renewal fees. It is clear from the letter of the Secretary for Mines dated 22 February 2016 that if renewal fees are paid the application will be favourably considered.

In light of that I perceive no ground whatsoever for exercising the discretion reposed upon the court against the granting of specific performance. After all it is the primary remedy for breach of contract. The appellant has shown that the respondents breached the contract. Specific performance is possible and as such it should be granted.

In the result, it is ordered that:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following order:

"2.1. The application be and is hereby granted."

2.2. The 1st and 2nd respondents be and are hereby directed to pay renewal fees in respect of the special grants constituting the concession on which the 3rd respondent was

carrying out mining operations and which mining grants are referred to in the Joint Venture Agreement and the Shareholders Agreement attached to the application.

2.3. Thereafter the 1st and 2nd respondents be and are hereby directed to file a renewal application in respect of the said special grants and to provide the renewing statutory authority with all that is required to enable the said authority to process the renewal application including a detailed written motivation to ensure urgent renewal of the special grants.

2.4. The 1st and 2nd respondents shall provide the applicant with copies of the renewal application together with proof of payment of fees.

2.5. The 1st and 2nd respondents shall pay the costs of this application jointly and severally the one paying the other to be absolved.

GWAUNZA DCJ I agree

MAVANGIRA JA I agree

Scanlen & Holderness, legal practitioners for the appellant.

Sawyer & Mkushi, 1st and 2nd respondents' legal practitioners