IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ONDOMBO BELEGGINGS (EDMS) BEPERK ..... Appellant

AND

THE MINISTER OF MINERAL AND
ENERGY AFFAIRS ..... Respondent

Coram: BOTHA, VIVIER, MILNE, EKSTEEN JJA et KRIEGLER, AJA

Heard: 5 September 1991

Delivered: 19 September 1991

J U D G M E N T

EKSTEEN, JA :

The appellant was the plaintiff and respondent the defendant in the court a quo. In its declaration appellant alleges:

"3. In or about 1979, Mr. S.P. Botha, in his then capacity as Minister of Mineral and Energy Affairs, in terms of Section 4(1)(b) of the Act, granted to Plaintiff prospecting leases in respect of precious stones over portions of State land then described as Sea Areas 1 and 2 on the West Coast of the Republic of South Africa, now known as Sea Areas 1A, 1B and 1C and 2A, 2B and 2C on the West Coast of the Republic of South Africa.

4. The Defendant disputes that the said prospecting leases were granted to Plaintiff as set out in paragraph 3 above.

5. In the premises, a dispute exists between Plaintiff and Defendant as to whether or not the said prospecting leases were granted to Plaintiff as set out in paragraph 3 above.

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6. Notwithstanding the grant of the said prospecting leases to Plaintiff, Defendant has failed and refused to determine the terms and conditions of the said leases in terms of Section 4(2) of the Act."

It then goes on to claim:

"(a) An order declaring that Plaintiff was, in terms of Section 4(1)(b) of the Precious Stones Act, No. 73 of 1964, as amended, granted prospecting leases in respect of precious stones over portions of State land formerly described as Sea Areas 1 and 2 on the West Coast of the Republic of South Africa, and now known as Sea Areas 1A, 1B and 1C and 2A, 2B and 2C on the West Coast of the Republic of South Africa;

(b) An order directing the Defendant to determine the terms and conditions of the said prospecting leases, in terms of Section 4(2) of the Act;

(c) Costs of suit;

(d) Further or alternative relief."

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In response to a request for further particulars the appellant alleged i.a. that:

"1.1 Prospecting leases were granted to Plaintiff during July 1979.

.....

1.5 The leases were granted for a period of 50 years.

1.6 The grants were in writing. The then Minister of Mines S.P. Botha was in possession of the grants. Plaintiff is not in possession of copies thereof."

After giving appellant an opportunity of removing what respondent contended were vague and embarrassing aspects of the particulars of claim in terms of Rule 23(1), respondent excepted to the declaration in the following terms:

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"Defendant hereby excepts to Plaintiff's Particulars of Claim as being bad in law on the following grounds:

1. Plaintiff's Particulars of Claim, as amplified by the Further Particulars thereto, lack averments which are necessary to sustain an action and therefore it discloses no cause of action, alternatively, it is vague and embarrassing in that:

1.1 Plaintiff alleges that two prospecting leases in respect of precious stones over portions of State land were granted to it by the Minister of Mineral and Energy Affairs in terms of section 4(1)(b) of the Precious Stones Act, 1964, Act No. 73 of 1964, ('the Act');

1.2 Plaintiff further alleges that these leases were granted for a period of 50 (Fifty) years;

1.3 Plaintiff further alleges that the grants were in writing;

1.4 These allegations of Plaintiff imply:

1.4.1 that the leases provide for the matters set out in section 4(2) of the Act; and

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1.4.2 that the leases in fact and in law, comply with the provisions of section 4 of the Act; and

1.4.3 that the leases are therefore prospecting leases within the meaning of, and as envisaged by, the provisions of section 4 of the Act;

1.5 Plaintiff further alleges that notwithstanding the grant of the prospecting leases to it, Defendant has failed and refused to determine the terms and conditions of the leases in terms of section 4(2) of the Act;

1.6 If the terms and conditions of the prospecting leases have not been determined in terms of section 4(2) of the Act:

1.6.1 no prospecting lease could have come into existence; and

1.6.2 no prospecting lease could have been granted to Plaintiff by the Minister of Mineral and Energy Affairs in terms of section 4(1)(b) of the Act.

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Notwithstanding Plaintiff having been afforded an

opportunity in terms of Rule 23(1) of the Uniform Rules of Court, of removing the cause of Defendant's complaint, Plaintiff has failed or refused to do so.

WHEREFORE Defendant prays that the exception be upheld with costs and that the particulars of Plaintiff's Claim be set aside with costs."

The exception was upheld and appellant's particulars of claim were struck out with costs. (The judgment is reported in Ondombo Beleggings (Edms.) Bpk. v. Minister of Mineral and Energy Affairs 1989 (4) SA 309(T).) Leave having been granted by the Court a quo, the appellant now comes before us on appeal against that order.

The exception turned primarily on the interpretation of sections 4(1) and (2) of the Precious Stones Act No. 73 of 1964 ("the Act"). These two

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sub-sections read as follows:

"4. Prospecting leases in respect of State land. -

(1) The Minister may -

(a) by notice in the Gazette and in one or more newspapers circulating in the area in which any State land or portion of State land in respect of which the exclusive right of prospecting for precious stones has not accrued to any person is situated, call for tenders for a prospecting lease in respect of precious stones over that land or that portion of such land, and grant a prospecting lease to any person who has submitted a tender and who satisfies the Minister that the scheme according to which he proposes to prospect is satisfactory and either that his financial resources are adequate for proper prospecting under such a lease or that the arrangements by which he proposes to obtain capital for the said purpose are satisfactory; or

(b) without calling for such tenders grant a prospecting lease in respect of precious stones over any such land or portion

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thereof to any person applying therefor who so satisfies him.

(2) Any such lease shall be subject to such terms and conditions as the Minister may deem fit, and -

(a) shall provide for -

(i) the scale on which and the manner in which prospecting operations shall be carried on;

(ii) the furnishing by the holder of the lease to the Minister at such times as may be specified in the lease of full statements describing the nature of the prospecting operations carried out and containing such other information as the Minister may require;

(iii) the keeping by the holder of the lease of such records relating to the prospecting operations as the Minister may require;

(iv) the examination of such records and the inspection of the lease area by any person authorized thereto by the Minister;

(v) the payment by the holder of the lease to any person entitled to use the

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surface of the land, who suffers any surface damage or any damage to crops or improvements on the land caused by the exercise by the holder of the lease of his rights under the lease or by any act or omission incidental thereto, of compensation for such damage; and

(vi) the payment by the holder of the lease to the mining commissioner of a rent to be fixed by the Minister after consultation with the board, ...

(b) may provide inter alia for the payment by

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the holder of the lease to the mining commissioner of such share of the proceeds of any precious stones found by him in the course of prospecting operations on the land in question, as the Minister may after consultation with the board determine."

In its judgment the Court a quo held (at p 313 B-C)

that:

"One need not speculate upon the meaning of the words 'prospecting lease' referred to in section 4(1)(a) and (b) as they are defined in section 1 of the Act. The definition reads:

"'prospecting lease' means a lease granted under section 4;'

The definition embraces all the provisions of section 4. It is not limited to section 4(1); it includes also the requirements of section 4(2). A prospecting lease (as defined) is a grant or privilege which contains and makes provision for certain terms and conditions. It is therefore a concession or privilegium which the Minister is entitled to bestow upon a grantee subject to its containing certain peremptory terms and conditions.

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It is only when a grant, subject to these peremptory terms and conditions, is bestowed upon a grantee that a prospecting lease as defined by the Act comes into existence."

And at p 313 E he remarked that:

"Such terms and conditions are an integral part of a prospecting lease in the sense that, without their existence, there is no prospecting lease as defined in the Act."

Again at p. 314 B-C the learned Judge a quo said:

"In terms of the provisions of section 1, as read with section 4, the prospecting lease which the Minister may grant, of necessity and ex lege, can only be a prospecting lease if it contains the necessary terms and conditions. Should the Minister purport to grant a 'lease' without the said terms and conditions he cannot confer a legally enforceable right. If, after such a purported grant, the Minister imposes terms and conditions acceptable to the grantee, then, and then only, will a prospecting lease come into existence but, prior to that event occurring, no rights can accrue to the grantee."

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With respect it seems to me that the persistent reference to the definition of a prospecting lease contained in section 1 of the Act as elucidating the provisions of sections 4(1) and (2) is inapposite. Sections 4(1) and (2) are specifically designed to circumscribe the origin and the nature of a prospecting lease. The definition of such a lease contained in section 1 of the Act - which simply refers one to section 4 - could never, in my view, have been intended to serve as an aid to the interpretation of section 4 itself. It can only be intended to apply to references to a prospecting lease contained in other sections of the Act. It cannot therefore be used to assist in the interpretation of section 4 itself.

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The gist of Mr. Cohen's argument on behalf of the appellant before us was, as in the Court a quo (cf p 312 E-F), that section 4 postulated two acts viz

(1) the grant of a prospecting lease in terms of section 4(1); and
(2) the determination by the Minister of the terms and conditions of the lease in terms of section 4(2) of the Act.

Having exercised his discretion to grant the prospecting lease, the Minister, he submitted was now in duty bound to fix the conditions of the lease. Both the act of granting the prospecting lease and the act of determining the terms and conditions are, he submitted unilateral acts by the Minister which, unlike a contractual lease, do not require consensus between the applicant and the

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Minister. It followed therefore that it was not necessary that the terms and conditions be determined before the prospecting lease was granted.

The submission that viz. that the granting of a prospecting lease is a unilateral act on the part of the Minister which does not require consensus between him and the appellant found favour with the learned Judge a quo. Relying on Neebe v. Registrar of Mining Rights 1902 T.S. 65 Kirk-Cohen J. held at p 312 G that:

> "The grant of a prospecting lease is in the nature of a concession or privilegium",

and

> "Such a grant is to be distinguished from a contract as consensus on the terms thereof is not

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a prerequisite to the creation of legal rights."

Again I must respectfully disagree with this view. The legislative provisions with which the court was called to deal in Neebe's case differ toto caelo from those with which we are dealing. In the course of his judgment Innes C.J. at pp 81-82 described the legislative provisions he was dealing with (the Transvaal Gold Law No. 15 of 1898) as follows:

> "There is no consensus between the Government and the claim-holder. The right of mining for and disposing of all precious metals has by statute been given to the State. A person duly and legally pegging a prospecting claim has a right to demand a licence for it; the Government has no option to refuse, and the terms under which the claim is held, the rights and obligations reciprocally of the holder and the Government are absolutely fixed by law. .....

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> The claim-holder may at any moment discontinue payment, and the only remedy open to the State is to dispose of the claim under section 85 of the Gold Law, and recover any arrears out of the proceeds of the sale."

In the light of these provisions, i.a., Innes C.J. was driven to the conclusion that:

> "the tenure under which he holds can in no way be regarded as a lease."

He described the tenure as one "sui generis", whereas Wessels J. called it a "privilegium of extracting minerals from a certain area."

The provisions of the Act we are considering are essentially different. Here the Minister may call for tenders for a prospecting lease (section 4(1)(a)) or, as in the present case, grant a prospecting lease without calling for tenders (section 4(1)(b))

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as long as the applicant satisfies him "that the scheme according to which he proposes to prospect is satisfactory" and that he has or has access to, the necessary financial resources for the "proper prospecting under such a lease." (Section 4(1)(a).) The lease must then contain such terms and conditions as shall provide for "the scale on which and the manner in which prospecting operations shall be carried on" (section 4(2)(a)(i)), and it seems to me to be reasonable to infer that such conditions will bear some reference to the information which the applicant has conveyed to the Minister as to the scheme according to which he proposes to prospect, and to his financial resources. The lease must also provide for the

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payment of a rent to be fixed by the Minister (section 4(2)(a)(vi)) and for it to continue "for such period as may be prescribed in the lease or until the lease is determined in accordance with the terms and conditions thereof" (section 4(4)). (In this regard it is perhaps instructive to note that the Afrikaans version of this sub-section reads as follows:

> "4(4) So 'n huur bly van krag vir die tydperk wat in die huurkontrak voorgeskryf word of totdat die huur ooreenkomstig die bedinge en voorwaardes daarvan beëindig word." (My italics.)

The rights and obligations under any such lease may also, with the approval of the Minister, be ceded or transferred either wholly or in part by the holder of the lease (section 4(3)).

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The nature of the prospecting lease under the Act bears a far greater resemblance to a mining lease as first introduced in the Transvaal by section 46 of the Precious and Base Metals Act, No. 35 of 1908, than to a prospector's licence under the Gold Law No. 15 of 1898. Dealing with the mining leases introduced by the 1908 act referred to above, Schreiner J. remarked in Rand Leases (Vogelstruisfontein) G.M. Co. Ltd. v. Registrar of Mining Titles 1938 T.P.D. 383 at p 388:

> "Their twofold nature is apparent. As mining title they are comparable with claims and mijn pachts while as leases they retain their contractual character. In sec. 46(2) of Act 35 of 1908 it is provided that certain conditions shall be contained in every lease entered into under the section. In Act 30 of 1918 the

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conditions are dealt with in greater detail but the element of contract remains."

The right to prospect for minerals on State land continued to be regulated by licence or permit until section 21 of Act 12 of 1960 extended the concept of a mining lease to prospecting and made provision for a prospecting lease. This concept has been taken over and extended in the present Act.

The very wording of section 4 of the Act underlines the contractual and therefore consensual nature of the lease. The Minister in effect binds himself to let the leaseholder prospect on the land concerned for an agreed period of time, and the leaseholder in turn agrees to pay a certain amount as rent.

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What is let is not corporeal property but an incorporeal right, a right to prospect

> "but that fact does not change the legal character of the contract because, subject to specific exceptions, all things in commercio whether corporeal or incorporeal, can be let." -

(per Watermeyer J.A. in Graham v. Local and Overseas Investments (Pty.) Ltd. 1942 A.D. 95 at p 108.)

The fact that the Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not in my view detract from the contractual nature of the lease. After all much the same circumstances pertain to numerous commercial agreements, more particularly

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when an individual contracts with a large corporation and is presented with a printed form of agreement. The mere fact that the individual may not readily be able to procure the alteration of any of the terms does not detract from the fact that his acceptance of those terms would lead to a binding contract being concluded. I am therefore of the view that a prospecting lease in terms of the Act must be seen as a consensual agreement between the Minister and the lease holder - an agreement, moreover, which, in terms of section 4(2)(a) must provide for certain prescribed matters. A failure to deal with these prescribed matters in the lease would obviously render such a lease invalid and unenforceable.

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Mr. Cohen conceded in his argument before us that the "prospecting leases" alleged in paragraph 3 of the particulars of claim to have been granted by the Minister to the appellant, did not, ex facie the pleadings, contain any of the terms and conditions required by section 4(2), and that he could therefore not contend that appellant held valid prospecting leases. But, he contended, since the Minister, acting in terms of section 4(1)(b), had purported to grant leases, he was now compelled to determine the conditions necessary to comply with the provisions of section 4(2). He sought support for this submission in the decisions in Commissioner for Inland Revenue v. City Deep Ltd. 1924 A.D. 298 at 307 and

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Stroud Riley & Co. Ltd. v. Secretary for Inland Revenue

1974 (4) SA 534 (E) at 539 D-E.

This submission cannot be sustained.

The two cases referred to both concerned the interpretation of certain provisions of the Income Tax Act - Act 41 of 1917 in the first case, and Act 58 of 1962 in the second - authorising the Commissioner (in the first case) or the Secretary (in the second) to refund to a taxpayer any tax overpaid where it has been proved to his satisfaction that the amount paid was in excess of the amount properly chargeable under the Act. In both cases it was held that the Commissioner or the Secretary was bound to consider the request for a refund, and, having considered it, to

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give effect to his decision either to refund the tax or not. If the taxpayer was entitled to claim a refund the official concerned was in duty bound to authorise such a refund.

The present case is, however, not such a case. A prospecting lease, as I have indicated, is a consensual agreement, and its validity depends on the inclusion of certain terms and conditions referred to in section 4(2). The fact that the manner in which such a lease is granted appears in section 4(1) and that the terms and conditions which it must contain appear in the next subsection, is merely a matter of convenience and cannot be construed as indicating two separate and distinct steps in the

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creation of a valid lease. Section 4(2) is merely descriptive of the lease referred to in section 4(1). The only way in which Mr. Cohen's submission that the section provides for two stages in the creation of a valid lease can be sustained, it seem to me, is if one were to read section 4(1)(b) as providing that "the Minister may without calling for such tenders grant a right to a prospecting lease .... to any person ...." The words "a right to" do not appear in the section, and I can see no justification for their inclusion. As the section reads, the requirements of sub-section 2(a) are peremptory and the grant of a "lease" which does not conform to the requirements of that sub-section is no grant at all. It is in

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fact a nullity, and no duty to act can flow from such a nullity. The fact that the Minister in such a case acts as a public official and that in that sense we have to do with public law, makes no difference. The words of the statute are plain. In fact it would seem to me that what the appellant is in effect asking us to do is to compel the Minister to grant him prospecting leases on the strength of some promise or expressed intention to do so. But his particulars of claim do not make out such a cause of action. In my view, therefore, the exception was well taken and correctly upheld by the Court a quo.

In argument before us, however, Mr. Cohen had another string to his bow - an argument which

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was not advanced before the Court a quo. He submitted that in view of the fact that, according to the particulars of claim as amplified by the further particulars supplied, the Minister had in writing at least purported to grant the appellant prospecting leases over certain specified portions of State land for a period of 50 years, the appellant had a legitimate expectation that the Minister would make such purported grant effective by determining such terms and conditions as were required by the Act. Mr. Cohen conceded that this matter had not been raised in his particulars of claim and that his pleadings, as they stand, may not contain sufficient allegations to make out such a cause of action, and he asked us to grant

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him leave to consider this aspect and to amend his pleadings so as to plead a legitimate expectation properly. Mr. Grobler who appeared on behalf of the respondent indicated that he would not oppose the granting of such a spatium deliberandi, but asked that the present appeal be dismissed with costs. In the case of Administrator, Transvaal and Others v. Traub and Others 1989 (4) SA 731 (A) this Court recognized the doctrine of a legitimate expectation as providing a legal remedy in certain cases. The doctrine as it has emerged in English law would appear to be closely linked to the audi alteram partem principle and is seen as a means whereby the Courts can ensure that administrative bodies or officials comply with

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their duty to act fairly. In giving recognition to the doctrine of legitimate expectation in our law the learned Chief Justice (Corbett, C.J.) who delivered the judgment in Traub's case remarked at p 761 F-G :

> "Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the Courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration."

In view of Mr. Cohen's expressed intention of amplifying his pleadings and Mr. Grobler's

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attitude of not opposing a spatium deliberandi I need not discuss the matter any further. I must say that I find it difficult to imagine how the doctrine of legitimate expectation could find application in the present case, but then there may conceivably be other facts not presently pleaded which might place a different complexion on the matter. I need say no more than that.

The appellant is granted leave to amend his particulars of claim as he may be advised within 21 days of this judgment. Otherwise the appeal is dismissed with costs, such costs to include the costs of two counsel.

J.P.G. EKSTEEN, JA

BOTHA, JA)
VIVIER, JA) concur
MILNE, JA)
KRIEGLER, AJA)