

SOUTH AFRICA / JUDGMENT

Trans Hex Group Ltd v Matsapa Trading 609 CC NO and Others (09/42044) [2010] ZAGPJHC 179 (10 December 2010)

[2010] ZAGPJHC 179

COURT

South Gauteng High Court, Johannesburg

BEFORE

Meyer

CASE / FILE NUMBER

09/42044

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SOUTH

GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC

OF SOUTH AFRICA

Case

No: 09/42044

Date:10/12/2010

In

the matter between:

TRANS
HEX GROUP
LIMITED.....Applicant
and
MATSAPA
TRADING 609 CC
N.O.....First
Respondent
SEKWATI
DONALD HLAKUDI
N.O.....Second
Respondent
CONRAD
DINTWE BENN
N.O.....Third
Respondent
THE
STATE DIAMOND
TRADERFourth
Respondent

THE
SOUTH AFRICAN DIAMOND AND PRECIOUS
METALS
REGULATOR.....Fifth
Respondent
THE
MINISTER OF
MINERALS.....Sixth
Respondent

JUDGMENT

MEYER, J

- [1] The applicant ('Trans Hex') is a diamond mining company which produces and sells unpolished diamonds. The Diamonds Act¹ inter alia regulates the buying, selling, importing and exporting of unpolished diamonds. It also aims at securing for local beneficiation a supply of diamonds at fair market value.
- [2] The South African Diamond and Precious Metals Regulator, which is the fifth respondent ('the Regulator'), and the State Diamond Trader, which is the fourth respondent ('the Trader'), are juristic persons that were established under the provisions of the Diamonds Act.²
- [3] The objects of the Regulator are inter alia to 'ensure that the diamond resources of the Republic are exploited and developed in the best interests of the people of South Africa' and to 'promote equitable access to and local beneficiation of the Republic's diamonds'.³ The objects of the Trader 'are to promote equitable access to and local beneficiation of the Republic's diamonds'.⁴
- [4] The Regulator and the Trader are clothed with specific functions in respect of the buying and selling of diamonds. Those of the Regulator are to 'implement, administer and control all matters relating to the purchase, sale, beneficiation, import and export of diamonds' and to 'establish diamond exchange and export centres, which shall facilitate the buying, selling, export and import of diamonds and matters connected therewith'.⁵ A producer of unpolished diamonds may only sell its stones to licensed persons at such diamond exchange export centre ('DEEC')⁶ and may not export diamonds inter alia unless and until they have been offered for sale to licensed purchasers locally at a DEEC.⁷ The DEEC in Johannesburg, which has replaced the old Diamond Bourse, is presently the only licensed forum established by the Regulator at which a South African producer may offer its unpolished diamond production for sale if it intends thereafter to effect export sales of such diamonds as are not sold locally after they have been offered for sale locally.

[5] The Trader is enjoined to ‘acquire and supply unpolished diamonds to local diamond beneficiaries’.⁸ Producers are in the first instance obliged to offer all the unpolished diamonds produced in a particular production cycle to the Trader and the latter may select and buy a representative sample thereof up to the prescribed percentage. S 59B of the Diamonds Act reads:

‘(1) (a) The Minister shall from time to time by notice in the Gazette determine such percentage of diamonds produced in a production cycle as may be required for local beneficiation and that the State Diamond Trader may buy.

(b) The percentage contemplated in paragraph (a) may be based on carats and value, and shall be a representative sample of a production cycle of any diamond producer.

(2) At the end of every production cycle a diamond producer shall offer all the unpolished diamonds produced by him or her in that production cycle to the State Diamond Trader and specify the fair market value of those diamonds, to enable the State Diamond Trader to inspect such diamonds for the purpose of selecting diamonds for purchase as contemplated in subsection (1).

(3) The State Diamond Trader has one week after the verification contemplated in subsection

(5) or the fixing of the price in terms of subsection (7) to buy diamonds up to the percentage contemplated in subsection (1).

(4) If the State Diamond Trader fails to buy the diamonds within the period contemplated in subsection (3) the producer may withdraw all his or her diamonds offered in terms of subsection (2).

(5) The government diamond valuator shall verify the prices specified in terms of subsection (2).

(6) If the producer and the government diamond valuator cannot agree on the prices, the Regulator shall appoint an independent valuator acceptable to the producer.

(7) The independent valuator shall fix the price of the unpolished diamonds within five working days after appointment, which price shall be regarded as the fair market price of the unpolished diamonds in question.

(8) The cost of such independent valuation shall be borne equally by the State Diamond Trader and the producer concerned.

(9) For the purposes of this section “production cycle” means a period mutually agreed upon between the producer concerned and the State Diamond Trader before the commencement of a producer’s operations or before the commencement of a new production cycle, as the case may be.’

[6] Regulation 3A9 is also relevant. It reads:

- (1) A diamond producer must, at the end of every production cycle, offer for sale all unpolished diamonds produced to the State Diamond Trader at a place or premises to be determined by the State Diamond Trader.
- (2) The producer shall sort the unpolished diamonds according to value, gem and caratage for the purposes of sub-regulation (1).
- (3) The State Diamond Trader may then purchase up to 10 percent in value and caratage of the unpolished diamonds offered in terms of sub-regulation (1).
- (4) Any amendment of the percentage referred to in sub-regulation (3) shall be determined from time to time by the Minister subject to the concurrence of the Ministers of Finance and that of trade and Industry.
- (5) Any diamond producer who fails to offer all diamonds produced in the production cycle to the State Diamond trader shall be guilty of an offence.'
- [7] This case concerns Trans Hex's production cycle 186. The third respondent is a senior government diamond valuator in the employ of the Trader and manager of its diamond valuation department ('the GDV'). The first respondent is an independent valuator and the second respondent its only member ('the IDV'). Trans Hex offered the unpolished diamonds produced in that cycle to the Trader. A representative sample of 10 percent was selected on behalf of the Trader. Trans Hex and the GDV did not agree on the price and the IDV fixed it. Trans Hex seeks the review and setting aside of the GDV's verification and of the fixing of the price by the IDV. Trans Hex also seeks declaratory relief relating to the performance of their statutory functions by the GDV and the IDV. The Trader (fourth respondent) and the minister (sixth respondent) are not opposing the application and abide the decision of this court. The order prayed for reads:
1. reviewing and setting aside the "fixing" by the first alternatively second respondent on or about 5 August 2009 of the price of \$788.84 per carat in respect of the 10% representative sample selected by the fourth respondent and offered for sale by the applicant to the fourth respondent ("the SDT parcel") in respect of the applicant's production cycle 186;
 2. declaring that, for purposes of fixing the prices of unpolished diamonds in terms of section 59B(7) of the Diamonds Act, the independent diamond valuator shall, in addition to assessing the inherent properties and characteristics of the stones, take into account all relevant information including the fair market value specified by the producer in terms of section 59B(2), the market prices recently achieved by any producer in respect of comparable stones and the market prices achieved by the relevant producer in respect of the lots of stones from which the stones comprising the SDT parcel were selected for prospective purchase by the fourth respondent, adjusted where appropriate to take account of market trends;

3. reviewing and setting aside the third respondent's purported valuation on 18 June 2009 of the SDT parcel offered for sale by the applicant to the fourth respondent in respect of the applicant's production cycle 186;
4. declaring that, for purposes of verifying the prices of unpolished diamonds in terms of section 59B(5) of the Diamonds Act, the government diamond valuator is not tasked with valuing the stones per se but with verifying that the prices specified by the producer are fair having regard, in addition to the inherent properties and

characteristics of the stones, to all relevant information including the market prices recently achieved by any producer in respect of comparable stones and the market prices achieved by the relevant producer in respect of the lots of stones from which the stones

comprising the SDT parcel were selected for prospective purchase by the fourth respondent, adjusted where appropriate to take account of market trends.

[8] At the end of its production cycle 186, which commenced on 16 April 2009 and ended on 8 June 2009, Trans Hex, by letter dated 17 June 2009, advised the Trader as follows:

'You will appreciate that it is difficult for Trans Hex to specify the fair market value of the current Cycle Tender 186 production absent of having obtained any indication from the market itself as to such value. Nevertheless, in accordance with Section 59B(2) and since, on a previous production cycle (182), the State Diamond Trader was unwilling to complete the inspection of our production and select the representative sample therefrom unless we departed from established industry practice in determining fair market value, without prejudice to any of our rights, we set out below our best estimate of the fair market value of the entire production cycle so as to avoid any delays and invite the State Diamond Trader's representative to complete its inspection of the sorted production and select therefrom a representative sample of up to 10 percent.

Cycle Tender 186: US\$ 15 942 991.'

[9] On 17 June 2009, the Trader, through its representative, inspected the diamonds produced in production cycle 186 ('production cycle 186') and selected a representative sample of 10% ('the SDT parcel'). Trans Hex was advised by letter dated 22 June 1999, that the GDV had 'done a valuation on the 10 percent offered to SDT (the Trader) on the 18th June 2009 to verify that the prices are market related.' The results of the GDV's prices were attached to this letter.

Trans Hex was advised that the GDV 'declared' the fair market value of the SDT parcel at \$730.00 per carat.

[10] Trans Hex offered to sell the remaining 90 percent of its production cycle 186 locally to licensed purchasers by means of the confidential tender process at the DEEC. This process opened on 22 June 2009 and closed on 8 July

2009. Trans Hex set reserve prices for its unpolished diamonds at what its chief executive officer describes as ‘realistic international levels’. On 8 July 2009, Trans Hex received from the DEEC a ‘seller complete tender results report’ in respect of the DEEC tender process relating to production cycle 186 (‘the DEEC tender results report’). This report details amongst others the reserve prices in respect of each lot, all bids submitted, the highest bid submitted, the total carats comprising the lots, the number of stones comprising the lot, and whether or not the lot was sold. It appears from this report that out of the 130 parcels or lots that were put out on tender 34 were sold to successful bidders. Most of the unpolished diamonds comprising this

production cycle were thereafter sold in the export market.

[11] The chief executive officer of Trans Hex states in its founding affidavit that ‘[h]aving regard to the bids and the resultant prices at which sales of its production cycle 186 were subsequently concluded, it became apparent to Trans Hex that it had under-estimated the value of the stones on 17 June 2009.’ By letter dated 10 July 2009, Trans Hex advised the GDV and the acting chief executive officer of the Trader as follows:

‘You will recall that in connection with Trans Hex’s production cycle for Cycle Tender at the time you selected therefrom a representative sample for prospective purchase, Trans Hex indicated, on a ‘best-estimate’ basis that the fair market value of its total production was \$15, 942, 991 resulting in an indicated price of \$1, 594, 299.10 (\$879.85 per carat) for the SDT’s representative sample (‘SDT parcel’). We refer in this regard to our letter dated 17 June

2009. We have now completed Cycle Tender 186 pursuant to which we hereby advise of an upward revision in the fair market value for the SDT parcel to \$1, 662, 464.17 (\$917.47 per carat). We attach a breakdown of price per parcel as forwarded to the Government Diamond Valuator.’

[12] The GDV considered Trans Hex’s upward revision from \$879.85 to \$917.47 per carat, but insisted that \$730 per carat constituted the fair market value of the SDT parcel. By letter dated 16 July 2009, the Regulator’s acting chief executive officer advised Trans Hex’s chief executive officer that the GDV did not agree with Trans Hex’s price, that the Regulator was accordingly obliged to appoint an independent valuator acceptable to Trans Hex, and curriculum vitae’s of independent valuers were attached to assist Trans Hex in the selection of an appropriate independent valuator.

[13] The second respondent was acceptable to Trans Hex as an independent valuator and the first respondent, which the second respondent represented, was so appointed on 30 July 2009. Trans Hex addressed a letter dated 4 August 2009 to the IDV and annexed to its letter a list of the individual prices specified by Trans Hex in respect of its production cycle 186 as well as the DEEC tender results report. This letter reads:

‘Further to your appointment as independent valuator in respect of the pricing of the 10% parcel of Trans Hex’s Cycle 186 production offered to the State Diamond Trader, and to assist you in your evaluation thereof, please find enclosed herewith details of the individual lot prices specified by Trans Hex in respect of its Cycle 186 production, as well as full particulars of the DEEC tender results in respect of the balance of 90% of the Cycle 186 production run.

As you know, the unpolished diamonds comprising the State Diamond Trader parcel which you are required to evaluate constitute a representative sample of Trans Hex’s Cycle 186 production, as sorted by value, gem and caratage. We accordingly expect the total value of the parcel to be materially consistent with actual market prices realized in respect of the remainder of this production run.

Kindly note from the enclosed that, save for four retained lots, being Lots No. 1419, 1452, 1454 and 1468, which did not achieve the required reserve price, all of the other lots comprising our Cycle 186 production run were sold either locally or abroad at prices equal to or greater than Trans Hex’s reserve prices. The proceeds from such sales, including export sales, have since been received in full and, where applicable, repatriated to South Africa.’

[14] Trans Hex’s representative handed these documents to the IDV before he commenced with his inspection of the SDT parcel, but he declined to accept them saying that he wished in the first instance to inspect the stones and to make his own calculations regarding their worth. It is undisputed that the IDV’s determination was made in the absence of any input from Trans Hex despite its repeated efforts to draw information to the IDV’s attention and without reference to the documents tendered to the IDV by Trans Hex. On 5 August 2009, the IDV produced a ‘certificate of valuation’ in respect of the SDT parcel. It reads:

‘MATSAPA TRADING 609, officially appointed as the independent valuator for and on behalf of “The South African Diamond and Precious Metal Regulator”, attest to the following:-

The valuation of rough diamonds is based on the four C’s methodology.

Lots received : 33

Carats received : 1812.01

Cut/Shape : Mix

Country of origin : South Africa

Conclusion

Taking into account the details of the above mentioned diamond(s) the expected result of the processing including all costs, profit and risk calculations, the current fair market value of a similar diamond or diamonds would be:-

Valuation: US \$ 788.84

I hereby certify that I have examined and valued the above diamond(s) to the best of my knowledge and ability. In my opinion the above valuation is true and correct.'

[15] The IDV valuation of \$788.84 per carat is 16 percent below that of Trans Hex and amounts to an aggregate difference in sale price of \$233,750.00 or of almost R2 million in respect of the SDT parcel. On 5 August 2009, the Trader confirmed to Trans Hex that it was willing to purchase the SDT parcel of 1.812.01 carats from Trans Hex at the price fixed by the IDV, which was \$1, 429, 385.97 (\$788.84 per carat). By letters dated 6 August 2009, Trans Hex disputed the IDV's determination, inter alia saying:

'In our view, you failed properly to apply your mind in making your determination. In particular, you failed to take into account the market prices actually offered and paid for the various lots making up the balance of our Cycle 186 production. Having regard to the fact that the parcel in question comprises a 10 percent representative sample of the entire Cycle 186 production, such market-related prices constitute best evidence of current fair market values and prices.'

[16] Trans Hex also informed the Trader that pending a resolution of the matter, or, if applicable, the final determination of review proceedings, it would not proceed with a sale of the SDT parcel to the Trader. In response, the acting chief executive officer of the Trader adopted the stance that 'according to the law' the IDV 'is the sole arbiter in the determination of the fair market value' and that '[t]here is no recourse to review proceedings, such as being considered by Trans Hex, other than to challenge the law itself.' This contention has, quite correctly in my view, been abandoned in the answering affidavit of the Regulator and the GDV. The IDV also seems to have adopted a similar stance to the one originally adopted by the Trader and now abandoned.

[17] On 14 August 2009, Trans Hex requested the IDV in terms of s 5 of the Promotion of Administrative Justice Act¹⁰ ('PAJA') to furnish written reasons for its determination of the price. The IDV was also asked for copies of any documents to which he had regard and for an outline of the nature and scope of any oral evidence on which reliance was placed. The letter addressed to the IDV concludes as follows:

'In light of the economic implications of any delays in resolving the matter, we ask that your written reasons and any documents are furnished to us by no later than 31 August 2009. This affords you more than two weeks to respond to our request, a period which we trust you will find adequate in the circumstances. Your co-operation in this regard would be sincerely appreciated.'

There was no response to Trans Hex's requests for reasons and documents.

[18] The issues between the parties raise the interpretation of s 59B of the Diamonds Act. Its wording is clear and unambiguous. The production cycle of a producer of unpolished diamonds is the period mutually agreed between the Trader and the producer. The Trader may buy a representative sample of up to the prescribed percentage in value and caratage of the unpolished diamonds produced in any production cycle. At the end of a production cycle the producer is obliged to offer all the unpolished diamonds produced in that cycle to the

Trader and to specify the fair market value of those diamonds. The trader inspects the diamonds offered to it and selects a representative sample of up to the prescribed percentage for potential purchase. The price to be paid by the Trader for the selected representative sample is determined with reference to the fair market value of all the unpolished diamonds produced in the particular production cycle as at the applicable date at the end of that cycle. The producer's specification of the fair market value accompanies its offer to the Trader of all the unpolished diamonds produced at the end of a production cycle. The government diamond valuator is enjoined to 'verify' the price specified by the producer. If there is a coincidence of the values specified by the producer and verified by the government diamond valuator or if they agree on a price, the Trader is afforded one week within which to buy the selected represented sample up to the prescribed percentage at such price. If it fails to buy the diamonds within this period the producer may withdraw all the diamonds offered to the Trader. The Regulator is enjoined to appoint an independent valuator acceptable to the producer to fix the valuation where a producer and the government diamond valuator were unable to fix the price, either through a coincidence of the values specified by the producer and verified by the government diamond valuator or by agreement between them. The independent valuator is obliged to 'fix' the price of the unpolished diamonds within five working days after his or her appointment. The price thus determined by the independent valuator is final and is regarded as the fair market value. The Trader is afforded one week after such fixing of the price to buy the unpolished diamonds up to the prescribed percentage at that price. If it fails to buy the diamonds within this period the producer may withdraw all the diamonds offered to the Trader at the end of the particular production cycle.

- [19] Trans Hex relies on the provisions of s 6(2)(a)(i), 6(2)(c), 6(2)(d) and 6(2)(e)(i) of PAJA for the review and setting aside of the GDV's valuation of the SDT parcel on 18 June 2009. A court, in terms of these provisions, has the power to review an administrative action if the administrator who took it was not authorised to do so by the empowering provision, the action was procedurally unfair, was materially influenced by an error of law, or was taken for a reason not authorised by the empowering provision. Trans Hex also relies on the principle of legality if the GDV's verification is not reviewable under PAJA.¹¹ The GDV remains bound by the principle of legality to exercise no power and to perform no function beyond that conferred by law. The exercise by the GDV of the power to verify the fair market value specified by Trans Hex is accordingly constrained by the principle of legality. If the GDV ventured outside the confines of s 59B(5) of the Diamonds Act, his verification may be set aside. The GDV and the Regulator accept this. Trans Hex, in its replying affidavit, also relies on further grounds for reviewing and setting aside the GDV's verification of the prices specified by Trans Hex. 'A party is in principle not entitled to rely on new matter, even if it has not been struck out ...'¹² Trans Hex expressly elected not to amend or supplement its founding papers and there seems to be no reason why a deviation from the general principle should be permitted.

[20] It is common cause that the GDV undertook its own valuation of the SDT parcel on 18 June

2009. Trans Hex contends that the GDV was not authorised by s 59B(5) of the Diamonds Act 'to value' the SDT parcel at \$730 per carat, but only 'to verify' the price specified by Trans Hex. It also contends that the GDV's valuation was brought about or materially influenced by an error of law since s 59B(5) of the Diamonds Act requires a verification by the GDV and not a fresh valuation of its own. There is no merit in these contentions. The government diamond valuator must verify the price – the fair market value - specified by the producer. The word 'verify' is not defined in the Diamonds Act. Some of the dictionary meanings

in the New Shorter Oxford English Dictionary¹³ which could apply to the word 'verify' in this context are: 'Ascertain or test the accuracy or correctness of, esp. by examination or by comparison of data etc.; check or establish by investigation.' The government diamond valuator is obliged to take reasonable steps to make sure of the accuracy of the fair market value specified by a producer.¹⁴ The process of ascertaining or testing the accuracy or correctness of the price that a producer has specified as the fair market value obviously entails an establishing by it of the fair market value of the diamonds concerned through its own investigation. The valuation done by the GDV formed part of its execution of its statutory power and duty to verify the price that had been specified by Trans Hex as the fair market value of the diamonds.

[21] Trans Hex contends that it was not afforded the opportunity to inform the GDV of the basis of its specification of an estimated price of \$879.85 per carat or to justify its adjusted price of \$917.47 per carat or to make representations to the GDV prior to the GDV's valuation of the stones at \$730 per carat. The chief executive officer of Trans Hex states that once Trans Hex had offered all diamonds comprising a production cycle to the Trader and the Trader had selected a representative sample, Trans Hex offers the balance of the production cycle for sale at the DEEC and then turns to export sales. In specifying the fair market value when it offers the unpolished diamonds produced by it in a production cycle to the Trader, Trans Hex has regard to comparative market information, including prices achieved on the open market in respect of previous production cycles and adjusted where appropriate to take account of market trends. Trans Hex contends that the best evidence or most reliable indicator of the fair market value will ordinarily be the prices attracted by the balance of the production cycle from which the representative sample was selected, at the DEEC and/or on export. It contends that since s 59B of the Diamonds Act sets no time limit for the verification of the specified fair market value, the government diamond valuator should await the outcome of the DEEC tender and export sales processes so as to be able to test the fairness of the specified value against the prices actually achieved at the DEEC and/or on export. Trans Hex contends that the GDV did not await the outcome of the DEEC tender and export sales processes in respect of the balance of production cycle 186 and accordingly failed to take relevant considerations into account in the verification of the specified fair market value.

[22] I have mentioned earlier in this judgment that production cycle 186 ended on 8 June 2009. Trans Hex invited the Trader to inspect this cycle and to select a representative sample of up to 10% on 17 June 2009. The Trader's representative did so on 17 June 2009. The GDV undertook its verification of the price specified by Trans Hex on 18 June 2009, and it notified Trans Hex of the outcome thereof on 22 June 2009. The DEEC tender process relating to the remaining 90 percent of production cycle 186 only opened on 22 June 2009 and ended on 8 July

2009. The DEEC tender results report became available on this latter date, which was well after the verification undertaken by the GDV had been completed. These facts support the statement of the Regulator's

acting chief executive officer in the answering affidavit of the Regulator and of the GDV that the GDV would already have verified the specified market value of the diamonds by the time the DEEC tender process is closed.

[23] The clear and unambiguous provisions of s 59B of the Diamonds Act do not entitle a producer, such as Trans Hex, to specify a mere estimate of the fair market value of the diamonds concerned, thereafter to test the market, and to revise its estimated value at a later stage once the outcome and results of the DEEC tender process and of subsequent sales have become available. The price to be paid by the Trader for the selected representative sample or part thereof is determined with reference to the fair market value of all the unpolished diamonds produced in the relevant production cycle as at the applicable date at the end of that cycle. The price to be verified by the government diamond valuator and the one to be fixed by the independent valuator if there was no agreement on the price between the producer and the government diamond valuator is the fair market value of the diamonds

concerned at the relevant time at the end of the particular production cycle. It is correct that the Diamonds Act does not stipulate a period within which the GDV's verification is to take place. It must therefore take place within a reasonable period of time and the GDV is required to act with the necessary promptitude and expedition as it did in its verification in this instance.

Otherwise producers such as Trans Hex may be seriously prejudiced. The wording of s 59B does not oblige the GDV to await the outcome of the DEEC tender process or of subsequent export sales before carrying out a verification of the fair market value that was stipulated by the producer at the time when all the diamonds in a particular production cycle were offered to the Trader. If the legislation intended that the price be determined with reference to the results of the DEEC tender process or the actual prices achieved for the balance of the production cycle from which the representative sample was selected, such would have been provided for in specific terms. The contentions of Trans Hex in this regard are irreconcilable with the clear and unambiguous wording of s 59B of the Diamonds Act.

[24] In any event, the verification undertaken by the government diamond valuator in terms of s 59B(5) of the Diamonds Act of the price – the fair market value – specified by a producer in terms of s 59B(1) does not have direct external legal effect and does not amount to

administrative action within the meaning of s 6(2) read with s 1 of PAJA. It is only the price fixed by the independent diamond valuator in terms of s 59B(7) of the Diamonds Act - if the producer and the government diamond valuator did not agree on a price - that has the required direct external legal effect and finality in order to be subject to judicial review. The verification of the price by the government diamond valuator constitutes a mere intermediary step in the determination of the price that the Trader is obliged to pay if it elects to buy the selected representative sample or part thereof and such verification of the price is not binding on the producer. I am also unable to hold on the facts presented in this application that the GDV ventured outside the confines of s 59B(5) of the Diamonds Act. The relief claimed in prayer 3 of the notice of motion must accordingly fail.

- [25] It follows that the declaratory relief which Trans Hex seeks against the GDV in terms of prayer 4 of its notice of motion must also fail for the reasons that I have given. The gravamen of Trans Hex's objection and also for seeking the declaratory relief is that the GDV failed to take into account '... the market prices achieved by the relevant producer in respect of the lots of stones from which the stones comprising the SDT parcel were selected for prospective purchase by the fourth respondent [the Trader], adjusted where appropriate to take account of market trends.' I should also add that the verification of the price by the government diamond valuator is an expression of an expert opinion by him or her as to whether or not the fair market value of all the unpolished diamonds produced by a diamond producer in a particular production cycle as specified by the producer constitutes the fair market value for those diamonds. Had the Legislature intended to prescribe how the government diamond valuator should go about the execution of his or her statutory function, which requires skill and expertise, it would have done so in express terms.
- [26] In support of the relief claimed by it for the review and setting aside of the 'fixing' by the IDV of the price of \$788.84 per carat for the diamonds in issue, Trans Hex in the first instance avers that the IDV is reasonably suspected by it of bias within the meaning of s 6(2)(a)(iii) of PAJA.¹⁵ The grounds upon which Trans Hex relies in support of its alleged reasonable suspicion of bias form the subject of various disputes of fact that are not capable of resolution on the papers. Trans Hex further relies on the provisions of s 6(2)(c) and 6(2)(e) (iii) of PAJA, which provide for the judicial review of an administrative action that was procedurally unfair or taken because irrelevant

considerations were taken into account or relevant ones not considered. A matter that is also raised on the papers is the failure of the IDV to have furnished reasons for its decision.

- [27] Trans Hex contends that in fixing the price the independent valuator must have regard to the debate between the producer and the government diamond valuator. He or she must, so it is contended, know each side's position in order to come down in favour of one of them or to reject both in favour of a third view. I disagree with this contention. It ignores the distinction between arbitration and valuation. The independent valuator envisaged in ss 59B (6) and (7) of the Diamonds Act is appointed merely to fix the valuation, which the producer and the government diamond valuator could not do. It is not the function of the

independent valuator to reconcile the different points of view of the producer and of the government diamond valuator. No dispute had arisen between the producer and the Trader prior to the independent valuator fixing the price. Apposite is the following passage in the judgment of Kuper J in *Sachs v Gillibrand and Others*:¹⁶

‘I have come to the conclusion that Mr. Frankel is correct in his contention that the appointment envisaged in the article is not an arbitrator but merely a person to fix the valuation. The distinction between an arbitration and a valuation was clearly drawn in the case of *Carus-Wilson and Greene* (1886), 18 Q.B.D. 7, in the following passage in the judgment of LORD ESHER, M.R., at p. 10:

‘I think that this case was clearly not one of arbitration, and that it falls within the class of case where a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any dispute. At the time when the umpire was appointed, it cannot be pretended that any dispute had arisen. The vendor and purchaser had respectively agreed to sell and to purchase the timber at a price to be fixed by valuation, and, the price not yet being fixed, there was nothing in dispute between them. If the valuers could not agree as to the price an umpire was to be appointed, but nothing need be known to the vendor and purchaser about the matter; there cannot be said anything in dispute between them. ... My reason for holding that the umpire was not an arbitrator is that he was, in my opinion, merely substituted for the valuers to do what they could not do, viz. fix the price of the timber. He was not to settle a dispute which had arisen, but to ascertain a matter in order to prevent disputes arising.

This extract was cited with approval in the case of *Heymann’s Estate v. Featherstone*, 1930 E.D.L. 105. In my view the ‘arbitrator’ mentioned in the article is merely the valuator referred to in that judgment.’

[28] In considering the requirement of procedurally fair administrative action under the Interim Constitution, O’Regan J, writing for the Constitutional Court in *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*¹⁷ said this: ‘It needs to be emphasised that s 24(b) requires that administrative action which affects or threatens legitimate

expectations be procedurally fair. That does not mean that in all circumstances a hearing will be required. It is well-established in our legal system and in others that what will constitute fairness in a particular case will depend on the circumstances of the case.’¹⁸ S 3(2) of PAJA also provides that ‘... fair administrative procedure depends on the circumstances of each case.’ Taking into account the factors referred to in s 4(b) of PAJA, it is reasonable and justifiable in the circumstances for an independent

valuator appointed in terms of s 59B(6) of the Diamonds Act to get on with his or her work by collecting and interpreting all relevant

facts and to reach his or her conclusion on such facts and interpretations without affording the parties an opportunity to make

representations and seeking to reconcile different points of view. Neither the wording of s 59B of the Diamonds Act, expressly or by necessary implication, nor the circumstances of this case nor the factors referred to in s 3(4) of PAJA require the procedure contended for by Trans Hex.

[29] This does not mean that the independent valuator may ignore information relevant to his or her independent valuation. It is common cause that Trans Hex attempted to appraise the IDV of information relating to the DEEC tender results in respect of the balance of production cycle 186 and to the actual prices realized locally and abroad in respect of the remainder of that production cycle before and at the time when the IDV had undertaken the determination of the fair market value of the unpolished diamonds in issue. It is also common cause that the IDV's determination of the price was made without reference to this information. Although this information relates to transactions which took place after the date of valuation, information of such subsequent transactions is relevant in the determination of the fair market value if it is adjusted, where appropriate, and related back to the time of valuation. Such information is indicative market trends.¹⁹ No plausible reason is given in the answering affidavits as to why this information was not taken into account. Relevant considerations

within the meaning of s 6(2)(e)(iii) of PAJA were accordingly not considered by the IDV when he fixed the price for the diamonds in issue.

[30] A valuator usually substantiates his or her valuation in a written valuation report.²⁰ The IDV has not furnished an adequate substantiated report of its valuation at the time when it was done nor has it complied with the request of Trans Hex in terms of s 5(1) of PAJA to furnish written reasons for the determination of the value of the diamonds in issue. The IDV has also not established that its departure from the requirement to furnish adequate reasons had been reasonable and justifiable within the meaning of s 5(4) of PAJA. The conclusion of the IDV is not even properly substantiated in its answering

affidavit. Its conclusion is simply not capable of logical analysis. It must accordingly, in terms of s 5(3) of PAJA, be presumed '... that the administrative action was taken without good reason.'

[31] Finally, the declaratory relief which Trans Hex seeks in terms of prayer 2 of its notice of motion, should in my view fail. Specific statutes sometimes require particular factors to be taken into account for the determination of market value, what a willing buyer will pay and a willing seller will take. S 59B of the Diamonds Act does not so require. The independent valuator must accordingly use his or her knowledge and experience and make a reasoned determination of the fair market value on relevant facts and data and by the application of approaches and techniques appropriate to the valuation of unpolished diamonds. He or she must collect and interpret all relevant information and data and reach a skilful and independent valuation thereon.²¹ The independent valuator must obviously assess the inherent properties and characteristics of the stones and adequately investigate and analyse

all available comparable transactions and data. There appears to be no dispute about this. Had the Legislature intended to prescribe how an independent valuator who must be acceptable to the producer concerned should go about the execution of his or her statutory function under S59B(7), it would have done so in express terms.

[32] In the result:

1. The 'fixing' by the first respondent on 5 August 2009 of the price of \$788.84 per carat in respect of the 10% representative sample selected by the fourth respondent and offered for sale by the applicant to the fourth respondent in respect of the applicant's production cycle 186, is reviewed and set aside.
2. The relief prayed for in terms of prayers 2, 3, and 4 of the notice of motion is refused.
3. The first, third, and fifth respondents are ordered to pay the applicant's costs of this application jointly and severally, including the costs attendant upon the engagement of two counsel, one of whom a senior counsel.

P.A. MEYER

JUDGE OF THE HIGH COURT

10 December 2010.

1 Act no 56 of 1986.

2 Sections 3 and 14 of the Diamonds Act.

3 Sections 4(a) and (b) of the Diamonds Act.

4 Section 14(1) of the Diamonds Act.

5 Section 59 of the Diamonds Act.

6 Chapter III of the Diamonds Act, and especially ss 19 – 21.

7 Section 48A of the Diamonds Act reads: 'All unpolished diamonds intended for export purposes must first in the prescribed

manner be offered at a diamond exchange and export centre.'

8 Section 59A(a) of the Diamonds Act.

9 Government Gazette No. 30061 (GNR 569 dated 9 July 2007).

10 Act No 3 of 2000.

11 See: *Competition Commission v Telkom* (623/2009) [2009] ZASCA 155 (27 November 2009), para [12]; *Eskom Holdings Ltd & Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA), para [9]; *Masetha v President of the Republic of South Africa & Another*

[2007] ZACC 20; 2008 (1) SA 566 (CC), paras [80] – [81]; Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae) 2006 (2) SA 311 (CC), para [97].

12 See: Van Zyl v Government of the Republic of South Africa 2008 (3) SA 294 (SCA), para [42] fn 17.

13 1993 Edition, Vol 2 at p 3 564

14 See: S v South African Associated Newspapers 1970 (1) SA 469 (W) at pp 478H – 479A.

15 This section of PAJA inter alia provides that a court has the power to judicially review an administrative action if the administrator who took it ‘was biased or reasonably suspected of bias.’

16 1959(2) SA 233 (W), at pp 235G – 236A.

17 1999 (2) SA 91 (CC), para [39].

18 In the footnote to this passage, reference is made to Administrator, Transvaal and Others v Traub and Others [1989] ZASCA 90; 1989

(4) SA 731 (A), at 758I – J, and to Du Preez and Another v Truth and Reconciliation Commission [1997] ZASCA 2; 1997 (3) SA 204 (A), at 231I – 232C.

19 See: Bonnet v Department of Agricultural Credit & Land Tenure 1974

(3) SA 737 (T), at p 753A – F.

20 Joubert: LAWSA Vol 30 (1st Reissue) para 206.

21 See: Estate Milne v Donohoe Investments (Pty) Ltd 1967 (2) SA 359 (A), at p 373H; Ingersoll-Rand Co (SA) Ltd v Administrateur, Tvl 1991

(1) SA 321 (T), at p 339E.

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