<u>IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA</u>
<u>HELD AT GABORONE</u>

<u>COURT OF APPEAL CIVIL APPEAL NO. CACLB-020-11</u>
<u>HIGH COURT CIVIL APPEAL NO. CAHLB-000016-10</u>

In the matter between:

B.C.L. LIMITED **APPELLANT**

and

COMMISSIONER GENERAL OF BOTSWANA UNIFIED REVENUE SERVICE **RESPONDENT**

Adv. J. Cane SC (with Mr F. Webb) for the Appellant
Mr Attorney K. Tshane for the Respondent

J U D G M E N T

CORAM: KIRBY J.P.
RAMODIBEDI J.A.
LORD ABERNETHY J.A.

<u>KIRBY J.P</u>.

1. This appeal concerns mining and Income Tax. It revolves in the final analysis, around the correct interpretation to be placed upon a single set of provisions in the Income Tax Act Cap 52:01 ("the I.T.A."). Those provisions are section 31(1)(a) and section 31(1)(b), the other parts of that section being immaterial for the purposes of the appeal.

2. The provisions read as follows:

> *"31 (1) Subject to Part VIII, where a person carries on a business of mining, the gross income of that person for any tax year from mining operations shall –*
>
> *(a) include all amounts accrued to him or her during that tax year from all mining and prospecting operations carried on by him or her;*
>
> *(b) notwithstanding section 9, be deemed to include all amounts, whether in cash or otherwise, accrued to him or her or to any associated person, during that tax year from processing, marketing, servicing, financial, or administrative operations whether –*
>
> *(i) any such operation is carried on in or out of Botswana;*
>
> *(ii) the source of any such amount is situate in or out of Botswana, to the extent to which the Commissioner General is of the opinion that such amounts are related to the mining operations."*

3. This provision is to be read as subject to the Selibe Phikwe Tax Agreement Ratification Act No. 6/1970 (as amended by Acts 28/71 and 34/72). This formalised the tax agreement entered

into between the parties at that time. It provides in its relevant clauses that:

- *"taxable income from the operations" means taxable income calculated in accordance with the Act and this Agreement but in respect of all amounts from the operations (whether the location of the source of any such amount is in or out of Botswana) received by or accrued to BCL/BCL Sales;"*

- *"the operations" means mining operations carried on by BCL within the area and all exploration carried out by BCL within Botswana, and processing, servicing, financial, administrative and marketing operations in or out of Botswana of BCL/BCL Sales related to such mining operations or such exploration."*

4. It will be noted that the only significant difference between that and the provision in the present ITA, which was promulgated in 1995, is that the subjective opinion of the Commissioner General is excluded.

5. The issue to be decided, as agreed by the parties, relates to the status of interest derived from surplus funds from mineral sales which were placed in a number of bank accounts. The appellant argues that this is income derived from financial or administrative operations related to mining operations. The

respondent submits that this is investment income from a source other than mining operations. If the appellant is right, it may set off its interest income against current and past mining losses. If the respondent is right, tax will be payable on the interest, regardless of BCL's current or past assessed mining losses, which are considerable.

THE FACTUAL BACKGROUND

6. In terms of a Case Management Report furnished to the court below in terms of Order 42 Rule 2(3) of the High Court Rules, the scope of the inquiry was limited (and is still limited), by the following agreement:

> "*THE ADMISSION OF FACTS AND OTHER EVIDENCE BY CONSENT OF THE PARTIES*
> *All the facts are common cause and will be as recorded in the statement filed in terms of section 91(4) of the ITA (which is to be amended as aforesaid) and supplemented with the following:*
>
> > *'the interest income in issue was earned on deposits made by the appellant of its surplus funds in various bank accounts (including bank accounts which were not its current account utilized for day to day business), which surplus funds arose as a result of metal sales consequent upon the appellant's mining operations.*

> *The appellant's letter of 17th March 2008 may be referred to as a correct recordal of the facts set out therein."*

7. The letter of 17th March 2008 sets out some of the historic background, as well as dealing with current matters, as at that date. It says, in the relevant parts:

> *"… BCL has a long history of trading and financial difficulties. That history has resulted in a heavy debt burden that has almost crippled the company in the past.*
>
> *Most of the debt is owed to the Government of Botswana, and in terms of the various loan covenants and agreements Government is entitled to any spare funds BCL accumulates above a certain "minimum cash" that is reserved to facilitate working capital.*
>
> *In the last three years, BCL's financial situation has improved as a result of better metal prices. This has meant that cash has accumulated above the agreed "minimum cash" for working capital. Consequently the cash was payable to Government.*
>
> *However, it was Government's decision to defer the payment of this cash to it, pending negotiations and other activities meant to facilitate a comprehensive financial restructuring of the company which would improve its prospects going forward.*
>
> *It was for these reasons that the excess cash was deposited in various banks in Botswana earning interest from which withholding tax was deducted. This is a normal treasury function for any company and is not a separate activity.*

> *As can be seen, the company did not pursue a deliberate investment strategy, but the cash deposits were a direct consequence of Government deferring payment of various loans as per agreements. This interest earned accrues for the eventual benefit of Government. The non-payment of loans also resulted in the growth of the company liabilities which should partially off set the interest on the bank deposits."*

8. It was and is thus common cause, being a formally admitted fact, that the interest earning bank deposits of excess cash were made as a normal treasury function of BCL, and constituted neither a separate activity nor a deliberate investment strategy. The appellant was relieved of its onus to prove this and no finding to the contrary could properly be made by the Court below, or by this Court.

9. The amended statement filed in terms of section 91(4)(F) of the ITA, together with its attached returns, assessments and objections, added the following further common cause facts (which I summarize below).

   - that the appellant is a resident company carrying on mining operations in the Selibe Phikwe area;

- that for the tax years ended 30th June 2006, 2007 and 2008 respectively, the appellant returned net aggregate losses (with no detail), of (P117,769,999), (P41,671,157), and P189,827,351);

- that the respondent, this notwithstanding and some years later, raised assessments of P8,724,587 for 2006, P14,292,082 for 2007 and P38,096,970 for 2008 against the appellant in respect of interest income received in the years in question, from deposits of excess cash made in various banks. These assessments arose, it is agreed, from interest income of a total of P81,032,000;

- for a number of prior years, the objection letters reveal, similar interest, but in smaller sums, had been set off against mining costs and assessed losses, and had been accepted as such by the respondent as a matter of practice;

- the objections were all disallowed, and the appeal to the Court a quo followed.

10. The admitted facts are noteworthy not only for what they include, but also for what they do not include. The court has no details of the Government loan agreements and no knowledge of their terms or interest rates, which could have relevance. It has no sets of annual accounts of the appellant to show how the deposits and interest receipts were treated in its books. It also has no particulars of the bank accounts,

including currencies and terms attached to each deposit. What is in the file, clipped to the respondent's heads of argument in the Court below (and improperly so, since these were not agreed) is a three page list of Banks, accounts, and sums of money said to have been deposited by the appellant over the three years in question. This is interesting, but is unexplained. It is impossible to say which accounts related to deposits of spare cash, and which to other deposits, such, for example, as provisions for closure costs, environmental reclamation, depreciation, and staff severance pay; or the proceeds of external sales; or even the amounts of working capital. Those lists were not part of the agreed facts upon which the case was to be decided.

11. To the extent that they were relied upon by the Judge a quo to show that there were a large number of dedicated accounts, and that spare cash was deposited off-shore and in foreign currency accounts, that was an error. The admitted fact is in the letter of 17th March 2008, and that is that the spare cash

was deposited in various banks in Botswana, where it earned interest.

12. It was agreed, and is still agreed, that if the appeal succeeds, the appellant will be entitled to off set the interest income of P81,032,000 against its mining losses. This will follow from a finding that the interest constituted income to be included in the appellant's gross income from its mining operations.

13. Tshosa J. held that depositing spare funds in interest bearing bank accounts was not a treasury function. The interest income did not stem from mining operations, but from a separate source. It could thus not be set off against the mining loss. He dismissed the appeal. I will deal with other aspects of his judgment later, but it was this finding which led to the present appeal.

MINING TAXATION – THE LEGISLATIVE FRAMEWORK

14. Botswana is a country which relies heavily upon the mineral sector to generate income for its development and progress.

Foreign investment is encouraged in this sector by favourable mining laws, and by an advantageous tax regime for mining investors. For this reason special privileges are accorded under the ITA to persons carrying on the business of mining.

15. By section 54 of the ITA tax agreements may be entered into on an individual basis with major investors. The appellant is a beneficiary of such an agreement. By section 43, as read with the Twelfth Schedule, capital expenditure incurred in a mining business is allowed at 100% immediately, with unlimited carry forward of losses. By section 46 assessed losses of such a business may be carried forward indefinitely until they are fully allowed. And by section 31(1)(b) defined categories of income, which would otherwise be considered as accruing from separate sources, are permitted to be included as part of the gross income accrued from mining operations. Generally, provided that a company sticks broadly to its business of mining, it will not be subjected to income tax until it has recovered the heavy initial cost of setting up a mine and

rendering it operational, and is in a net profit position. It is in that context and spirit that section 31(1) of the ITA, which lies at the heart of this appeal, must be construed.

SECTION 31(1) AND THE WESTERN PLATINUM CASE

16. Both parties and also the Judge *a quo* relied upon the South African case of **WESTERN PLATINUM LTD vs COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE 2004 (4) All S.A. 611 (SCA)** to justify their respective positions. To the extent that it deals with similar principles or with a statute that is *in pari materia* with our ITA, that will be a persuasive authority, but no more than that, as far as this Court is concerned.

17. The Judges in **Western Platinum** were called upon to decide whether various categories of interest earned by a mining company on bank deposits made from its mineral sales receipts were to be categorized as "income derived from mining operations." This was the phrase used in section 15(a) of the

Income Tax Act of that country. "Mining operations" were there defined to "… include every method or process by which any mineral is won from the soil …"

18. As in this case, the question was whether the interest could be said in each instance to derive, with mineral sales receipts, from a single source, namely mining operations, for tax purposes. If so, income from interest could be set off against mining expenditure or losses; if not, then tax would be levied on the interest income as being the fruits of investment, rather than of mining.

19. Under the South African Act there was no deeming provision similar to our section 31(1)(b).

20. Since both parties and the court a quo relied upon these, although for different reasons, I will set out the findings of the **Western Platinum** Judges in summary before considering

whether or not these should be followed in Botswana. The Judges held *inter alia* that:

- in determining the extent of 'class privileges' (such as those accorded to mining) a strict construction of the empowering legislation is to be adopted (citing **C.I.R. vs D&N PROMOTIONS (PTY) LTD 1995 (2) SA 296 A**);

- since mining operations cannot themselves produce income they must, being context dependent, accommodate commercial transactions, namely sales of minerals and payment therefor within the definition, thus postulating a business;

- to qualify as mining income, this had to be directly connected to the mining source. (Citing the following words from page 306 of **D&N PROMOTIONS** (supra)

  > *"… the income and the source from which the income arises must be directly connected. An indirect connection or a remote one will not suffice"*);

- An intermediate investment of mining income, putting it to work as capital, generally breaks the direct connection;

- Although "Direct connection is a flexible concept", only the sale proceeds of the extracted minerals would automatically be classed as having such a connection with mining operations.

21. Applying those principles, it was held, after a somewhat technical analysis, that:

    (i) Income from 'automatic' interest paid on sale proceeds held in a current account was directly connected to the mining source;

    (ii) Income from interest paid on such proceeds placed on overnight call was not directly connected and was from a different source;

    (iii) Interest gained from a "cash management system" utilizing different call accounts was not directly connected to mining operations – it was an investment scheme; and

    (iv) Interest on late payment for mineral sales was directly connected to mining.

22. Turning to the present case, and the present section –

<u>INTERPRETATION</u>

I have no quarrel with the proposition that clauses conferring privileges on miners, and indeed those in tax legislation generally, are to be strictly interpreted, although the modern approach is no longer as rigid as it was when **CAPE BRANDY SYNDICATE vs INLAND REVENUE COMMISSIONERS [1921] KB 64** was decided. There it was held (as cited by the respondent) that:

> *"In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

23. While it is true that there is no room for equity in tax legislation, this approach is altogether too strict, as conceded by counsel for the respondent, when he proceeded to argue for interpretation according to modern principles of statutory interpretation. These include the rule that a construction is to be preferred which accords both with the language used, and with the purpose of the legislature in enacting the provision in question. See **THOROUGHBRED BREEDERS ASSOCIATION vs PRICE-WATERHOUSE 2001 (4) S.A. 551 SCA**, and **COMMISSIONER OF SARS vs AIRWORLD CC & ANOTHER 70 SATC 48**. Further, "A statute should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant" (Cockburn C.J. cited by Kotze J.A. in **ATTORNEY GENERAL, TRANSVAAL vs ADDITIONAL MAGISTRATE FOR JOHANNESBURG 1924 AD 421**).

SECTION 31 (1) AND SECTION 2 OF THE ITA

24. Apart from the complete lack of a deeming clause in the South African Act, the differences between its relevant provisions and those of the Botswana ITA are not significant. In our section 2 "mining operations" is defined to mean

> *"mining operations carried on by any person on a mining property in Botswana for the extraction of minerals from their natural site, and their treatment, transport or storage."*

25. In our section 31(1)(a), the relevant words are:

> *"... all amounts accrued to him or her during that tax year from all mining and prospecting operations carried on by him or her."*

26. I have no doubt that "accrued to him from mining operations" has the same meaning in substance as "derived by him from mining operations" (as in South Africa). To that extent, I agree that to qualify as income accrued from mining operations for the purposes of section 31(1)(a) there must be a direct connection between the income in question and the mining operations. I also agree that in its context 'mining operations' must be construed as encompassing not only the extraction,

treatment, transport and storage of minerals, but also their sale and the recovery of the price therefor (as held in the **Western Platinum** case). This is particularly so in the context of section 31(1)(a) which is stated to apply to gross income accrued to a person who carries on a business of mining from mining operations. There can be no such income from mining operations, unless the sale of the extracted minerals is included in the definition of mining operations. I agree with the **Western Platinum** Judges that those words must be read in, and that income from such sales, as well as incidental interest derived from sale proceeds held in the taxpayers' current banking account are directly connected to mining operations. This is a necessary result of applying the principles of interpretation referred to above, and both sources of income are so directly connected to mining operations as to be derived therefrom or accrued therefrom.

27. But what of section 31(1)(b)? This provides for an additional set of income categories, which would not normally be

considered as being income from mining operations but are deemed by the section to be so. These comprise income accrued to the taxpayer from processing, marketing, servicing, financial or administrative operations, wherever these take place, and wherever the source of the funds, to the extent to which the Commissioner General is of the opinion that such amounts are related to the mining operations.

28. As I have said, the opinion of the Commissioner General is excluded from the terms of the tax agreement recorded in Act 6/1970. This provides simply that to qualify for inclusion in gross income from mining operations, those other receipts must be related to the mining operations. By section 93(3) of the ITA, both the High Court and this Court are given very wide powers on appeal – to confirm, increase, annul or order the reduction of any assessment; to make such other order as it deems fit; and to make such order as to costs as it deems fit. So this Court is not constrained in any way in interfering with a decision either of the Commissioner General or of the High

Court. It will re-examine the material, in this case the admitted material, that was before the High Court, and decide, with reasons, whether in its view the decision of the High Court was right or wrong, before substituting, if it sees fit, a revised order. There may be different considerations if the Judge *a quo* has heard *viva voce* evidence and has made findings of fact or credibility based thereon, but that is not the case here.

29. The trap into which both counsel and the Judge *a quo* have fallen, with respect, is in seeking to justify their respective positions on the strength of the principles set out in the **Western Platinum** case. Those principles are valid only when applied to income which accrues to a taxpayer in the business of mining from mining operations, in terms of section 31(1)(a), but not when applied to income deemed to be from mining operations in terms of section 31(1)(b). There is no equivalent provision in the South African Act.

30. Section 31(1)(a) income is income directly connected to the extraction (and sale) of minerals. It extends to proceeds from the sale of minerals, and casual interest earned when this is deposited in the taxpayer's current account. It goes no further. In terms of the **Western Platinum** case, indirect income earned in South Africa such, for example, as when the proceeds of mineral sales are placed, for whatever purpose, in interest bearing call accounts in banks (as here), is income from an independent source. It is income from investment which, according to the normal ITA Rules and particularly section 27(2), must be assessed and taxed separately. It is not part of the gross mining income which can be set off against historic and current assessed losses.

31. The respondent argues that the word 'source' is to be construed in the manner described by Murray C.J. in **M. LTD vs COMMISSIONER OF TAXES 1958 (3) SA 18 (S.R.) at 21**, namely

> *"The word 'source' in the Act does not denote the quarter from which the money is received by the taxpayer, but*

> *the originating cause of the receipt, i.e. the particular activity of the taxpayer which earns the money."*

32. It is counsel's view that the 'quarter' from which the interest derived in this case was the mining operations, but the originating cause, the particular activity of the taxpayer which earned the interest, was the making of deposits in the bank by way of investment. It could equally be argued that the quarter from which the interest was received was the bank, while its originating cause was the mining operations. On that construction it would be income directly connected to mining operations, as argued by the appellant. It is not necessary to make any finding on that score because, as will appear, the matter is placed beyond any doubt by section 31(1)(b), The appellant's counsel put it well when she said that the <u>actual</u> source of income (mineral sales) is from mining operations in terms of section 31(1)(a), while the <u>deemed</u> source of income is from mining operations in terms of section 31(1)(b), notwithstanding that the money actually comes in from financial, administrative, and other operations of the taxpayer.

33. The appellant argues that since cash management is part of the normal treasury function of a mining company, and this routinely takes the form of maximization of income by placing unused funds from mineral sales in call accounts, that should be held to be directly connected to mining operations as defined. That may be so, but it is not necessary, I think, to go as far as that, or to retrace the arguments of the **Western Platinum** Judges in order to show that income from its financial or administrative operations (which are the two categories relied upon here) qualify for inclusion in the taxpayer's gross income from mining operations. The taxpayer has merely, in terms of section 31(1)(b) to show that such amounts (and thus such operations) are <u>related to</u> mining operations, not that they are 'derived from' or 'accrue from', or are 'directly connected to' such operations. The latter expressions all imply a direct connection to the subject matter, whereas "relating to", depending upon its context, has a far wider reach, and can embrace indirect connections, provided that they are close enough with the subject as well. As Roper

A.J. said in **UNITED DOMINIONS CORPORATION (SA) LTD vs TYRER 1960 (3) SA 321 TPD at 323**:

> *"… the phrase 'relating to' may connote either a remote or a close relationship. It may be used in a wide sense, as embracing almost anything which has any reference to another matter, or in a more restricted sense."*

34. And Brett L.J., in **COMPAGNIE FINANCIÉRE vs PERUVIAN GUANO CO (11 QBD 55)** held that evidence "relating to" the matter in question may be such as will either directly or indirectly enable a party either to advance his own case or to damage the case of his adversary. So the reach of the phrases 'related to' or 'relating to', which connote the same thing, will depend upon the context in which the words are used. Since taxation provisions of this kind are to be restrictively interpreted, this range will not be wider than is reasonably required to achieve the purpose of the provision in question.

35. As I have said, the purpose of the provision, which favours those engaged in the business of mining, is to ensure that, provided they stick to mining, such taxpayers are permitted to

set off all the related income they receive against their current and historic losses and their current expenditure, including expenditure of a capital nature, until they reach a position of net profit, when income tax will be payable.

36. The appellant argues, with considerable force, that any mining company will have, among its financial and administrative operations, a normal treasury function. This involves, as I understand it, the day to day management of its cash resources derived from mineral sales. Its finance department will see to the timeous payment of bills, and will prudently deal with cash not immediately required for other purposes, such as repayment of debt or distribution as dividends to its shareholders, in the way that is of maximum advantage to the company. That is its fiduciary duty. The usual way of handling such funds is to place them in interest bearing call or term accounts with one or more banks, depending upon, for example, the limits imposed by the banks, or the desire to spread the risk.

37. In any mining operation there may also be accumulations of cash which are required, by law or by prudent accounting, to be kept available for use for their intended or legislated purpose. Such funds include provisions for closure costs, environmental reclamation, staff benefits, depreciation, and others. All of those, in my view, are clearly related to mining operations, and interest received from the holding or depositing of such funds either on call or on term deposits with banks is legitimately to be included in gross income from mining operations. So too is interest included which accrues from short term call deposits made of funds awaiting payment to creditors, or distribution to shareholders as dividends, or even of sums of available working capital.

38. In the present case, the funds in question are held not at the request of the appellant, but at the behest of the Government, to which they are due in repayment of debt. They are so held in order to enable the Government, in due course, to effect a financial restructuring of the appellant and its mining

operations so as to enable it to be more sustainable going forward. Those funds must be kept available for their intended purpose, which I have no doubt is also fully related to the appellant's mining operations, and they must be prudently managed by the appellant's finance department in the execution of its treasury function. In so managing the funds, the appellant has a duty to maximize the interest income derived therefrom without compromising the security or availability of such funds. The interest so received is, in my judgment, sufficiently related to the mining operations of the appellant to be included in its gross mining income. The size of the deposits or the magnitude of the interest sums received (which appear to have aroused the interest of the respondent in this case, causing him to deviate from his previous practice) do not affect this principle.

39. That is not to say that the treasury function extends to independent profit making or entrepreneurial investments which do not relate to the mining operation which is the

appellant's core business, even if the funds so utilized are from mineral sales. If, for example, interest or dividends were received from investments in shares on the stock exchange, or in subsidiary companies or business unrelated to the mining operation, such income could not validly be included in gross income from mining and would be independently taxed as deriving from a different source, in terms of section 27(2) of the ITA, notwithstanding mining losses incurred by the appellant. That is not the case here.

40. In my judgment the inclusion of income from financial operations in section 31(1)(b) was fully intended to include interest from bank call accounts and other deposits. Counsel for the respondent was unable to suggest any other types of income from financial operations which the section might have been intended to cover, although no doubt such others exist. They need not concern us in this case.

<u>THE JUDGMENT OF TSHOSA J</u>.

41. It is clear from what has gone before that the appeal must succeed. The Judge a quo erred in a number of respects, in an otherwise lucid judgment.

42. First, he applied the wrong test ("directly connected to" rather than "related to") in deciding that interest derived from surplus funds from mineral sales deposited in various bank accounts could not be deemed to be from mining operations. The learned Judge incorrectly held that:

> *"… the appellant has to demonstrate that indeed the interest income has a direct link with all its mining and prospecting operations. In other words, as it was stated in* ***CIR vs BP SOUTHERN AFRICA (PTY) LTD 1997 (1) SA 375*** *the interest income should have a direct link with the business of extracting minerals from the soil."*

That case, as was the **Western Platinum** case, was decided upon South Africa legislation where there is no deeming clause.

43. Second, he erred, for the same reason, in holding that:

> *"… the depositing of the spare funds in interest earning accounts with various banks broke the direct connection*

> *of interest income to the mining operations of the appellant. It was a stratagem, in my view that was meant to maximize the interest income whether or not one calls it an investment strategy. In fact, it was not a treasury function …"*

44. Third, the Judge *a quo* erred in holding that:

> *"On record, the appellant has not shown that the interest income in question was derived from the financial or administrative activities of the appellant so as to qualify for inclusion in its gross income as envisaged by section 31(1)(b) of the Act. The appellant did not indicate the nature of the financial or administrative activities or operations that it was engaged in."*

That is not so. The appellant maintained throughout, and it was an admitted fact on record, that in making the deposits of spare cash which earned the interest, it was executing its treasury function in the course of its normal financial operations.

In result:

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) The order of the Court below is replaced by the following order:

(a) It is declared that the interest income earned by appellant did not constitute income earned as a separate activity and constituted income to be included in appellant's gross income from mining operations.

(b) The appellant is accordingly entitled to off set the interest income against its mining loss.

(c) Each party shall bear its own costs.

DELIVERED IN OPEN COURT AT GABORONE THIS 27TH DAY OF JULY 2012.

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I.S. KIRBY
JUDGE PRESIDENT

I AGREE ____________________________

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I AGREE ____________________________

LORD ABERNETHY
JUSTICE OF APPEAL