

ANESU GOLD (PVT) LTD
versus
ONESIMO MAZAI MOYO N.O
and
TARIRO NDHLOVU N.O
and
GOLDEN REEF MINING (PVT) LTD
and
WINSTON CHITANDO N.O

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 27 June & 29 November 2023

Stated Case

Advocate T Zhuwarara, for the plaintiff
Prof L Madhuku, for the 1st, 2nd and 4th defendants
Prof W Ncube, for the 3rd defendant

MHURI J: On 29 September 2021 plaintiff issued summons against the defendants claiming the following:-

1. that Special Grant No 7321 (or its successors or extensions or renewal) be cancelled.
2. that the Forfeiture Notice No. 1 of 2019 and Forfeiture Notice No 2 of 2019 in respect of

Mining claims:-

Regn No 7342 BM

Regn No 7343 BM

Regn No 6633

Regn No 6634

Regn No 6635

Regn No 6636

Regn No 5906

(Mining Claims) be cancelled

3. that the first, second and fourth defendants jointly, severally and in solidum, the one complying the others to be absolved, be ordered to return to the plaintiff all rights and interest in the forfeited Mining Claims.
4. that third defendant be ordered to vacate forthwith the entire area of the Mining Claims.
5. that third defendant be ordered to return to plaintiff the forfeited Mining Claims.
6. that third defendant be ordered to account to plaintiff for all the gold which it mined from the forfeited Mining Claims.
7. that all defendants jointly, severally and in solidum, the one paying the others to be absolved be ordered to pay costs on a legal practitioner and client scale.

The matter proceeded to Pre-Trial Conference and the issues referred to trial were:-

1. whether plaintiff has *locus standi* to bring forth the claims.
2. whether the forfeiture of plaintiff's Mining Claims namely:-
Regn No 7342 BM
Regn No 7343 BM
Reg No 7344
Regn No 6633
Regn No 6634
Regn No 6635
Regn No 6636
Regn No 5906
was unlawful as alleged or at all.
3. whether the Special Grant No 7321 (or its extensions or renewal or its successor(s) should be cancelled as alleged or at all.

The claim was based on the grounds that the forfeitures of the Mining Claims were unlawful, illegal, wrongful and malicious. The issuance of the Special Grant No 7321 (the Special Grant) was similarly unlawful having been issued with the connivance of third defendant.

On 22 February 2023, it was agreed by Counsels that the matter proceeds in terms of r 52(1) of this Court's Rules SI 202/2021, as a stated case on the three (3) issues referred to trial.

The parties were to come up with a statement of agreed facts. On 27 June 2023, parties were directed to file their Heads of arguments; plaintiff to file on Wednesday 28 June 2023 and the defendants to file theirs on Monday 10 July 2023. It was agreed that upon filling of the Heads of arguments, the Court was then to determine the matter on the papers filed.

In compliance with what was agreed upon, the parties duly filed their statement of agreed facts and heads of argument.

Rule 52 on the basis of which this matter proceeded provides as follows:-

- “(1) The parties to any civil action or suit may, after summons has been issued, agree upon a written statement of facts or the questions of law arising therein in the form of a special case for the adjudication of the court.
- (2) The statement referred to in subrule (1) shall set out the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon.
- (3) Every such special case shall be divided into paragraphs numbered consecutively and shall concisely state such facts and documents as may be necessary to enable the court to decide the question raised thereby.
- (4).....
- (5) The special case may be set down for hearing in the manner provided for trial or opposed applications which ever may be more convenient.
- (6) Upon the argument of such case, the court and the parties shall be at liberty to refer to the whole contents of such documents and the court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial
- (7).....
- (8).....
- (9) When giving its decision upon any question in terms of this Rule, the court may give judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceedings which may be necessary for the final disposal thereof.
- (10).....”

The parties statement of agreed facts and documents to be used is as follows:-

1. On various dates between 10 November 1995 and 2 May 1996, a company called Boulder Mining Company (Pvt) Ltd (Boulder Mining) with address P O Box 77 Mberengwa registered seven of the eight Mining claims in dispute namely, 6633, 6634, 6635, 6636, 7342 BM, 7343 BM and 7344 BM.
2. On 12 July 1991 Munatsa Mpofo registered the 8th mining claim, namely 5906.

3. On three different dates between 8 November 1995 and 1st November 1996 Maple Leaf Mining Company (Pvt) Ltd (Maple Leaf) took transfer of the eight (8) mining claims from Boulder Mining and Manatsa Mpofo and registered its address as P O Box 8183, Bulawayo which is an address belonging to a company called Roger and Bennet (Pvt) Ltd of Bulawayo.
4. On 19 July 2006 Start Mining Service (Pvt) Ltd (Start Mining) took transfer of the eight (8) Mining Claims from Maple Leaf and duly registered the transfer with the Ministry of Mines and Mining Development (Ministry of Mines) but did not register an address with the Ministry.
5. Sometime on or about 31 March 2011 Start Mining obtained from the Registrar of Companies a Certificate of change of Name from Start Mining to Anesu Gold (Pvt) Ltd.
The change of name was not communicated or registered with the Ministry of Mines until 16 July 2020.
6. On 18 January 2019 the Ministry of Mines caused to be published on its Notice Board in Gweru Forfeiture Notice No 1 of 2019 which stated that 4 of the 8 Mining claims namely 6636, 7342 BM 7343 BM and 7344 BM belonging to Start Mining had “been forfeited in terms of s 260 of the Mines and Minerals Act [*Chapter 21:05*] and will be subject to provisions of ss 31 and 35 of the said Act, be open to relocation on 21 February 2019 unless revoked on or before 7 February 2019.”
7. The 4 of the 8 said Mining Claims had last been inspected by plaintiff on 2 May 2011 in respect of 7343 BM; 10 November 2016 in respect of 6636; and 2 May 2017 in respect of 7342 BM and 7344 BM.
8. On 28 January 2019 the Ministry of Mines caused to be published on its Notice Board in Gweru Forfeiture Notice No 2 of 2019 which stated that the remaining 4 of the 8 mining claims namely 6633, 6634, 6635, and 5906 belonging to Start Mining had “been forfeited in terms of s 260 of the Mines and Minerals Act.”
9. The said 4 mining claims had last been inspected on 12 July 2016 in respect of 5906 and 10 November 2016 in respect of 6633, 6634 and 6635.

10. Between the last inspection dates of the 8 Mining Claims and dates of forfeiture no protection certificates were obtained.
11. On 14 May 2019, the Secretary for Mines and Mining Development, acting in terms of s 291 of the Mines Act issued a Special Grant No. 7321 expiring on 14 May 2021 in favour of third defendant covering the entire area of the 8 forfeited Mining Claims.
12. The Special Grant was renewed and is to expire on 19 December 2023.
13. The Special Grant affords third defendant the right to carry out gold mining operations over the area falling under the eight mining claims.

It is on the basis of these agreed facts and documents filed of record, the Court is to determine:-

- a) whether the plaintiff has *locus standi* to bring the present claims.
- b) whether the forfeiture of plaintiff's mining claims under Registration Certificates 6633, 6634, 6635, 6636, 5906, 7342 BM, 7343 BM and 7344 BM was lawful and
- c) whether Special Grant No 7321 or its extensions or renewals or its successor(s) should be cancelled.

Apparently, these were the same issues, which were referred to trial at Pre-Trial Conference as alluded to earlier.

As mentioned earlier, the plaintiff, first, second and fourth defendants and third defendant filed their heads of argument in motivating their respective positions.

The plaintiff's submissions in summary were that it seeks to impugn the forfeitures of the said mining claims as the forfeitures were done in breach of the provisions of the Administrative Justice Act [*Chapter 10:28*]. It also seeks the invalidation of the Special Grant No 7321 which followed the forfeitures.

As regards plaintiff's *locus standi* it submitted that the mining claims which were forfeited were in the name of Start Mining Services Pvt (Ltd) which name was later changed to Anesu Gold Pvt (Ltd) on 31 March 2011 as such plaintiff has a direct interest in the matter as it is personally affected by the forfeitures. In the result, it was submitted, the matter is properly before the Court as plaintiff has standing to bring the suit to recover its mining claims.

As regards the second issue, it was plaintiff's submission that the forfeitures of the mining claims were done in breach of the provisions of the Administrative Justice Act in particular s 3 of the Act which enjoins an administrative authority to act lawfully, reasonably and fairly. It

submitted that there was no prior notification to plaintiff prior to the forfeiture. Reliance was made on the case of *Fidelity Printers and Refiners Pvt Ltd v The Minister of Mines and 2 Ors* SC 107/22.

Further, it was plaintiff's submission that the procedure to be followed before a mining claim is forfeited for failure to obtain an inspection certificate in terms of the Mines and Minerals Act [*Chapter 21:05*] is clear. In terms of s 260 of the said Act, the failure to obtain an inspection certificate does not automatically render the mining claim forfeited but merely becomes susceptible to forfeiture later and also that in terms of s 271(1) of the said Act, defendant was enjoined to issue out a declaration of the forfeiture. The second defendant ought to have given plaintiff prior notice of its intention to declare the mining claims forfeited before the actual forfeiture as provided in s 271(1) of the Act. Plaintiff's right to be heard was flouted so argued plaintiff thereby contravening the provisions of the Administrative Justice Act. In the result the decision to forfeit the mining claims was a nullity at law the result of which the Special Grant No 7321 issued is also a nullity. To support this, reliance was made on the case of *MacFoy v United Africa Co Ltd* (1961) 3 All ER 1169. Plaintiff's prayer was that its cause succeeds with costs and the decision to forfeit the plaintiff's mining claims be set aside.

In their heads of argument, first, second and fourth defendant's submitted that reliance by plaintiff on the case of *Fidelity Printers and Refiners (Private) Limited (supra)* to support its case, is misplaced as the case is distinguishable from the one *in casu* in that in the *Fidelity Printers* case, no opportunity to make representations was availed whereas in the case *in casu* plaintiff did not provide the Ministry of Mines with its address for communication and therefore in terms of s 60(3) of the Act in the absence of a registered address posting of notices in the office of the mining commissioner is deemed personal service. Plaintiff was therefore given personal service in terms of s 31 and 35 of the Act and therefore given an opportunity to make representations.

Further, they argued that plaintiff did not pay its annual fees, did not inspect its mining claims and for the efficient and good governance of the mining industry and public interest persons behaving like the plaintiff would only have their claims forfeited. On that note, the defendants finally submitted that the forfeiture of plaintiff's mining claims was lawful and the Special Grant No 7321 cannot be cancelled.

In its heads of argument, third defendant's position was the same as first, second and fourth defendants' position. Relying on s 60 of the Mines and Minerals Act, third defendant

submitted that when Start Mining took transfer of the claims it did not register any address with the Ministry of Mines and Mining Development. As a consequence of this failure to register an address, the Ministry was entitled to post any notices to Start Mining at the offices of the Ministry in Gweru. In terms of s 60 of the Act, such posting is deemed to be personal service. Plaintiff, by such service, had the onus to take the requisite legal steps to prevent the claims from being open to relocation; it did nothing hence the claims were relocated by way of a Special Grant.

Third defendant submitted also that the case of *Fidelity Printers and Refineries (Pvt) Ltd (supra)* is distinguishable from the present case in that *in casu* the plaintiff is deemed to have received personal notification of the forfeiture notices and plaintiff failed to prevent complete forfeiture within the period of 35 days. To that end, the provisions of the Administrative Justice Act are not applicable, further argued third defendant. It urged the Court to dismiss the claim with costs.

As alluded to earlier three issues are for determination, namely, in brief plaintiff's *locus standi*, lawfulness of the forfeiture of plaintiff's mining claims and cancellation of the Special Grant.

With regards to the issue of plaintiff's *locus standi*, although the defendants made it an issue for determination, the defendants did not motivate it in their Heads of argument at all. Be that as it may, it is common cause that the mining claims in question were in the name of Start Mining Services (Pvt) Ltd. On 31 March 2011 Start Mining Services (Pvt) Ltd had its name changed to Anesu Gold (Pvt) Ltd, the plaintiff. The certificate of Change of Name issued by the Registrar of Companies forms part of plaintiff's supplementary Bundle of Documents.

Section 26 of the Companies and Other Business Entities Act [*Chapter 24:31*] provides for change of name by a company or private business corporation. In particular, subsection (5) thereto provides for the rights of companies pursuant to such change of name. It reads:-

“The change of name of a registered business entity, shall not affect any right or obligation of the registered business entity or render defective any legal proceedings by or against the entity, and any legal proceedings that might have been continued or commenced by or against it under its former name may be continued or commenced under its new name.” (emphasis added)

The above provision is plain and unambiguous. Plaintiff has the right to institute these proceedings. It goes without argument that *locus standi* means the capacity or the right to bring an action or to be heard in a given forum. In view of the change of name from Start Mining

Services (Private) Ltd (which owned the Mining claims in question) to Anesu Gold (Private) Ltd (which now owns the said mining claims) , plaintiff has a direct and substantial interest in the matter *in casu*. MALABA JA (as he then was) had this to say in the case of *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* 2008 (1) ZLR 181(S) at 185 D – E.

“The common law on *locus standi in judicio* of a party instituting proceedings in a court of law is that to justify participation in the action the party must show that he or she has a direct and substantial interest in the right which is the subject matter of the proceedings and the relief sought and not merely a financial interest which is only an indirect interest in the litigation.”

As stated earlier, no argument was advanced by defendants in their Heads of argument controverting that plaintiff has a direct and substantial interest in this matter.

In the result, therefore plaintiff is properly before this Court.

Section 3 of the Administrative Justice Act [*Chapter 10:28*] AJA enjoins every administrative authority to act lawfully, reasonably and in a fair manner. It provides as follows:-

“(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall-

a) act lawfully, reasonably and in a fair manner;

and

b) act within the relevant period by period specified by law... within a reasonable period after being requested to take action by the person concerned;

and

c) where it has taken action, supply written reasons, therefore within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

2) In order for an administrative action to be taken in a fair manner as required by para 9 (a) of subsection (1) an administrative authority shall give a person referred to in subsection (1)-

a) adequate notice of the nature and purpose of the proposed actions;

and

b) a reasonable opportunity to make adequate representations;

and

c) adequate notice of any right of review on appeal where applicable.

3)

See *Marufu v Minister of Transport* 2009 (2) ZLR 458.

In the present matter, the Ministry of Mines acting through the first and second defendants were enjoined to comply with s 3 of the Administrative Justice Act particularly subsection (2) thereof.

The question is, was this subsection complied with before the forfeiture of plaintiff's mining claims was done?

Section 60 of the Mines and Minerals Act [*Chapter 21:05*] makes it mandatory for a holder of a mining location to furnish an address to the Mining Commissioner at which all notices, orders or other processes are to be served.

It provides as follows

“(1) Every holder of a mining location on registration of such location in his name at the office of the mining commissioner and every lessee and assignee of such holder shall furnish such mining commissioner with an address in Zimbabwe at which all notices, orders or other processes shall be served by the mining commissioner or other officer duly appointed for the purposes of this Act, and any such holder, lessee or assignee may at any time change such address by registering at the office of such mining commissioner any other address within Zimbabwe.

(2) Service of any such notice, order or other process at such registered address shall be deemed to have the same effect as personal service.

(3) In default of any address being registered as by this section required the posting in the office of the mining commissioner of any such notice, order or other process shall be deemed to have the same effect as personal service.

(4).....”

It is an established legal position that anything done in contravention of the law is null and void.

It is common cause, as per the statement of agreed facts that when Start Mining – took transfer of the 8 mining claims from Maple Leaf in 2006, it did not communicate or register with the Ministry of Mines until July 2020. It is also common cause that Forfeiture Notices Number 1 and 2 were published on the 18 and 28 January 2019 respectively. This was well before the communication and registration with the Ministry of Mines was done.

It is also common cause that the notices were published on the Notice Board in Gweru. The Notices read;

“The following mining locations have on this 18th day of January 2019 been forfeited in terms of s 260 of the Mines and Minerals Act [*Chapter 21:05*] and will be subject to provisions of section 31 and 35 of the said Act, be open to relocation on 21st February 2019 unless revoked on or before 7th February 2019.”

Forfeiture Notice No. 2 was similarly worded except for the dates.

It is not in issue that the plaintiff's mining blocks had not been inspected after 2016 as is apparent from paragraph 2.10 of the statement of agreed facts, it is stated that between the last inspection dates of the 8 mining claims and the dates of forfeiture, no protection certificates were obtained.

Section 260 of the Act provides for forfeiture for failure to obtain inspection certificate. It reads as follows:

“Failure to obtain an inspection certificate within the period prescribed therefor shall, unless a protection certificate has been obtained under section two hundred and seventeen in respect of such block render liable to forfeiture the block in respect of which such failure has taken place.”

Plaintiff argues that the above section was not complied with and also that before declaring the mining claims forfeited it was not given the requisite notice and an opportunity to make representations.

In terms of section 60 subsection (3) of the Act, personal service of the two Notices of forfeiture on plaintiff was effected. A reading of these Notices clearly shows that what plaintiff was being notified of was the forfeiture of its mining claims and not the intention to forfeit. The notices were however giving plaintiff notice that they will be open to relocation on 21st February 2019 unless the forfeitures are revoked by the 7th February 2019. The forfeiture as per the Notices were done in terms of sections 260 of the Act which render the mining block liable to forfeiture. The wording of section 260 is different from other sections where forfeiture is to be done, for example sections 261, 262, 264 which read, “..... the block shall be liable to forfeiture” I am in agreement with the plaintiff's interpretation of section 260 of the Act to the effect that the use of the words render liable to forfeiture does not mean automatic forfeiture of the mining claims. *In casu* there was automatic forfeiture of the mining claims and without regard to the provisions of section 3 of AJA particularly subsection (2). The point was clearly articulated in the case of *Fidelity Printers and Refineries (Pvt) Ltd v*

- (1) *The Minister of Mines and Mining Development N.O.*
- (2) *The Provincial Mining Director for Midlands Province and*
- (3) *Jonah Nyevera SC 107/22.*

In his analysis of section 260, CHIWESHE JA had this to say on the meaning of the words: “render liable to forfeiture”. “It also hinges on the interpretation of sections 272 of the Act as read with section 3 of Administrative Justice Act. Given their ordinary grammatical meaning these words do not connote automatic forfeiture by operation of law as contended by respondents. The

words used by the legislature in this section simply mean that the block in respect of which the statutory fee has not been paid is susceptible to forfeiture. We are fortified in this regard by the provision of section 271 which state that:

“Where any mining location is liable to forfeiture in terms of this Act, the mining commissioner may declare such location to be forfeited.” (emphasis added)

Considering the use of the word may in section 271, first and second defendants ought to have used its discretion and not to summarily declare forfeiture of the mining claims. The provisions of section 3(2) of AJA ought to have been followed first. This failure to comply with the provision of Administrative Justice Act renders the forfeitures unlawful and they cannot be allowed to stand. First and second defendants did not act fairly, reasonably or lawfully as is required of an administrative authority.

See *Metsola v Chairman, Public Service Commission & Anor* 1989(3) ZLR 147(S) and *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 772(S) in which emphasis on the observance of the rules of natural justice (*audi alteram partem*) was emphasised.

As a consequence of the forfeitures of plaintiff’s mining claims which forfeitures I have found to have been unlawfully done hence are void, a Special Grant No. 7321 was issued to third defendant and thereafter extended. Following dicta succinctly put by LORD DENNING MR, the subsequent relocation of the mining claims and issuance of the Special Grant No. 7321, are equally afflicted by the irregularity which affected the forfeitures in the case.

MacFoy v United Africa Co. Ltd 1961(3) All ER 1169 at 1172. LORD DENNING MR had this to say:

“If an act is void then it is in law a nullity. It is not only bad but incurably bad And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The Special Grant issued in favour of 3rd defendant therefore, similarly cannot be allowed to stand.

In the result, all the three issues referred for determination are determined in favour of plaintiff. The plaintiff ‘s claim as per its summons is hereby granted with costs.

It is therefore, **ORDERED THAT:**

1. The forfeiture Notice No. 1 of 2019 and Forfeiture Notice No. 2 of 2019 in respect of Mining Claims:

Regn No. 7342 BM

Regn No. 7343 BM

Regn No. 6633

Regn No. 6634

Regn No. 6635

Regn No. 6636

Regn No. 5906

Regn No. 7344 BM

be and are hereby cancelled.

2. The first, second and fourth defendants jointly, severally and in *solidium*, the one complying the others to be absolved, they return to plaintiff all the rights and interest in the said forfeited mining claims.
3. The Special Grant No. 7321 or its successors or extensions or renewals be and is hereby cancelled.
4. The third defendant returns to plaintiff the said forfeited mining claims.
5. The third defendant vacates forthwith, the entire area of the forfeited mining claims.
6. The third defendant accounts to the plaintiff for all the gold which it mined from the said forfeited mining claims.
7. The first, second, third and fourth defendants, jointly severally and in *solidium*, the one paying the others to be absolved pay legal costs on a legal practitioner and client scale.

Tavenhave & Machingauta Legal Practitioners, plaintiff's legal practitioners

Civil Division of the Attorney-General's Office, first, second and fourth defendant's legal practitioners

Thompson Stevenson & Associates, third defendant's legal practitioners