REPORTABLE (30)

AFROCHINE SMELTING (PRIVATE) LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, BHUNU JA & MWAYERA JA
HARARE 17 SEPTEMBER 2024 & 27 MARCH 2025

T. Mpofu, for the appellant

S. Banda, for the respondent

MAVANGIRA JA:

INTRODUCTORY

1. This is an appeal against the whole judgment of the High Court (the court *a quo*) dated 29 February, 2024 dismissing the appellant's urgent court application in which it sought declaratory and consequential relief.

2. Before the court *a quo*, the appellant sought an order in the following terms:

> "**IT IS ORDERED AS FOLLOWS**:
> 1. It be and is hereby declared that:
>   a. The applicant having sold its product FCA EX-works the "gross fair market value" for purposes of s 37 (9) of the Finance Act [Chapter *23:04*] is the face value of the invoice or price the mineral was sold at the place of such sale, namely in Zimbabwe.
>
>   b. The exclusion of the cost of freight by reason of the terms of sale was not a deduction made by the applicant, neither would it have been impermissible had it been a deduction made by the applicant.
>
> 2. In the result, the applicant is not liable for the amount, penalty and interest assessed by the respondent as being due from it for mining royalties in the total

sums of USD 2 872 897,89 and ZWL 97 682 345,37 respectively and the assessments to the effect are set aside.

3. Alternatively, it is declared that reference to double the amount of royalties payable "does not mean 200% penalty but rather the principal amount due for royalty plus 100%. (*sic*)

4. Consequently, that the penalty calculated at 200 % is set aside and the respondent is directed to amend its assessments accordingly."

<u>FACTUAL BACKGROUND</u>

3. The appellant is a private company with limited liability, duly registered in terms of the laws of Zimbabwe. It is a large-scale producer and exporter of ferrochrome, an alloy of chromium, iron and carbon used in steelmaking.

4. The respondent is a statutory body established in terms of the Revenue Authority Act, [*Chapter 23:11*]. It is responsible for assessing, collecting and accounting for revenue on behalf of the State.

5. Sometime in June 2023, the appellant received a letter dated 16 June, 2023, authored by the respondent's "Head International Taxation." The subject matter of the letter was "Presentation of Tax Review Findings for the Period 2019 – 2021: Afrochine Smelting Pvt Ltd BP No. 200116318." The letter stated, in paragraph 1 headed "Under Declaration of Royalties on Minerals" that analysis of documents submitted to the respondent's office concerning the payment of royalties on minerals by the bank, on behalf of the appellant showed that the royalties on minerals were under declared. It also stated that the appellant should have, in accordance with s 37 (9) of the Finance Act, [*Chapter 23:04*] (the FA), paid royalties on minerals based on the gross value, as shown in a sales schedule from 2019 to 2021. Further, that this resulted in some periods having under declared royalties on minerals. An attached

schedule was said to show that the difference between the declared royalties and the calculated royalties either resulted in over stated or under declared amounts.

6. In para 2 headed "Adjustment of the Ocean Freight Charges" the letter stated that, based on the sales contract Ref No. 166/2020 part 3.1; "an ocean freight charge of US$0.10/lb was deducted Fastmarkets Ferro-Alloy price which was used as a benchmark for pricing ferrochrome price to reach an ex-work price of US$0.60/lb." (*sic*) Further, that the deducted amount (ocean freight) was then added back to the ex-works price and the royalties were recalculated based on the gross fair market price according to s 37 (9) of the FA. It further stated that the tax review for royalties on minerals established an amount of US$2 872 895,89 which amount included a principal amount of US$880 361,54 and a penalty of US$1 760,09 charged at 200% in accordance with s 37 (5) of the FA and interest of US$227 772,24. The local currency debt, due to the Reserve Bank of Zimbabwe retention policy in apportioning of payment of royalties on minerals in local currency, was in the sum of ZWL97 682 345, 37. This amount included a principal amount of ZWL22 507 851,49, a penalty of ZWL45 015 702,97 charged at 200% and interest of ZWL30 154 751,91.
7. Aggrieved by this assessment and in a letter dated 20 June, 2023, the appellant queried the liability alleged by the respondent. The appellant's view was that in terms of Clause 2.3 of the agreement that it had with its customer, the sale was ex-works and therefore the sale took place in Zimbabwe and not outside the country. It contended that the price declared was therefore the price at the place of sale, and not at the eventual destination, and this was the amount on which royalties were correctly computed. The appellant further contended that in terms of s 37A (1) of the FA, royalties are deducted from the minerals at source, based on the face value of the invoice. Further, that the respondent was incorrect in its reading or interpretation of s 37A (4)

of the said Act to the effect that "double the amount of royalties payable" meant that it could impose a penalty of 200 % over and above the amount due. The differing and competing contentions culminated in the appellant instituting legal proceedings.

8. On 23 October, 2023, the appellant filed an urgent court application in terms of s 14 of the High Court Act, [*Chapter 7:06*] for the declaratory relief set out in para 1 above.

9. The respondent opposed the application. It contended that during the period in issue the appellant was invoicing customers a price that was less than the gross fair market value of the mineral as determined on the international market by the Fast Markets Ferro Alloys price, by deducting US$0,10. The respondent alleged that the appellant was using a benchmark of US$0,60/lb instead of the international benchmark of US$0,70/lb. As a result, the appellant calculated its mining royalties based, not on the gross fair market value of the mineral, but on the reduced amount which it called "ex-works price." According to the respondent, the appellant's method of applying rates of royalties on a discounted price was therefore incorrect.

10. It was also the respondent's position that in terms of s 244 of the Mines and Minerals Act [*Chapter 21:05*] (the MMA), the appellant was liable to pay royalties on the minerals or mineral-bearing products it won in Zimbabwe and sold to foreign markets. It contended that the Schedule to Chapter VII, s 37 of the Finance Act provided the rates applicable in calculating royalties. It submitted that the appellant's calculation of royalties on a value which had been subject to a deduction was unlawful and that the deductions made by the appellant were proscribed by s 37 (9) of the FA. Regarding the issue of penalty, the respondent's position was that the FA required that the appellant pay double the amount of royalties due, as the primary civil penalty.

11. In dismissing the application, the court *a quo* found, firstly, that the appellant erred in declaring royalties on the face value of the invoice based as it was on the ex-works price of US$0.10 less than the Fast Markets Ferro Alloys price. Secondly, that the exclusion of the cost of freight from the invoice value is a deduction from the gross fair market value and that it is proscribed by s 37 (9) of the FA. Thirdly, that the reference to double the amount of royalties payable as the primary civil penalty means 200% penalty over and above the royalties due.

12. The court *a quo* also held that the legislature was alive to the possibility of other deductions which could be made that would defeat its purpose, hence the inclusion of the catch all phrase "or other costs whatsoever incurred in the production of the minerals concerned" in s 37 (9) of the FA.

13. As to the 200% penalty, it held that the principal amount could not be subsumed into the primary civil penalty. It opined that the legislature was clear that the primary penalty on its own would be 200%. While the principal debt stands due and payable, under s 37 (5) of the FA, a penalty is imposed for failure to pay the royalty due as the principal debt. The principal debt is important in calculating the quantum of the primary civil penalty at double the amount due. It thus found that the phrase "double the amount of royalties payable" as the primary civil penalty means a 200% penalty over and above the royalties due. The court *a quo* accordingly dismissed the urgent court application.

14. The appellant was aggrieved and filed this appeal on the following grounds:

    1. The court *a quo* erred in concluding that the "gross fair market value" of minerals on which royalties are computed includes costs unrelated to the actual value of such minerals or those relative to their production such as costs of freight and insurance.

2. *A fortiori*, the court *a quo* erred in not concluding that the *ex-works* value of the minerals as shown on the invoices constitutes the standard benchmark for the computation of royalties, would not result in miners computing royalties differently but would meet the objective of compensating the State for the depletion of its finite resources.

3. The court *a quo* therefore erred in not concluding that the imposition of royalties on a CIF as opposed to an ex-works price not only amounted to royalties being improperly computed but also resulted in the court dictating to appellant how it is to conduct its business.

4. The court *a quo* erred in not finding that the exclusion of insurance and freight is not a deduction on the value of the mineral and that such costs would at any rate, not constitute a cost for the production thereof as contemplated by provisions of s 37 (9) of the Finance Act [*Chapter 23:04*].

5. The court *a quo* erred at any rate in not concluding that the royalties having been determined by respondent's agent in terms of a statutory process, respondent had no right to *ex mero motu* revisit such determination and impose a penalty in the absence of a court order.

15. The relief sought by the appellant is in the following terms:

<u>RELIEF SOUGHT</u>

"**TAKE FURTHER NOTICE THAT** appellant seeks the following relief:

1. That the appeal is allowed with costs.

2. That the judgment of the court *a quo* in HC 6881/23 is set aside and in its place is substituted the following:

   '1. It be and is hereby declared that:

   a. The applicant having sold its product FCA EX-works the 'gross fair market value' for purposes of s 37 (9) of the Finance Act [*Chapter 23:04*] is the face value of the invoice or price the mineral was sold at the place of such sale, namely in Zimbabwe.

   b. The exclusion of the cost of freight by reason of the terms of sale was not a deduction made by the applicant, neither would it have been impermissible had it been a deduction by the applicant.'

3. In the result, the applicant is not liable for the amount, penalty and interest assessed by the respondent as being due from it for mining royalties in the total

sum of USD2 872 897,89 and ZWL97 682 345,37 respectively and the assessments to the effect are set aside.'"

APPELLANT'S SUBMISSIONS BEFORE THIS COURT

16. Mr *Mpofu*, for the appellant, submitted that it is important to define what a royalty is. He submitted that royalties are claimable on and are limited to natural resources. As freight charges are not a natural resource, royalties are not claimable thereon and the court *a quo* therefore misdirected itself. He cited s 244 (1) of the MMA as the starting point, providing for the charging of royalties on minerals or mineral bearing products. He also submitted that royalties are deducted by the Commissioner General and not the appellant as the Commissioner General appoints an agent who acts on his or her behalf. He averred that the Minerals Marketing Corporation of Zimbabwe (MMCZ) is the Commissioner General's agent and it acted as such in calculating the royalties due to the respondent by the appellant. It was also his submission that s 244 (1) of the MMA accepts that there can be a sale in Zimbabwe or outside Zimbabwe and that the price cannot therefore be the same for the two different places. Further, that if the respondent accepts that 10 cents is the freight charge, that should be the end of the matter and the appeal should succeed.

17. Counsel also submitted that royalties are deducted at source and *in casu*, that was at Selous, Zimbabwe. Further, that a deduction is made on the face value of the invoice showing the price at which the mineral was sold and the deduction is made by the MMCZ. Thus, in effect, it is the respondent, through MMCZ, which makes the deduction, using the invoice value. The respondent, so he argued, misunderstood and failed to appreciate that royalties are claimable only on the value of the mineral and nothing else.

18. It was counsel's further submission that it is not in dispute that the alloy costs 60 cents and that the conveyance is 10 cents. Thus, royalties are calculated on 60 cents which is the gross fair market value of the mineral. Costs of conveyance are not added onto that amount. He submitted that in terms of s 244 of the MMA, minerals can be sold within or outside Zimbabwe and the appellant, having a market in Zimbabwe, sold within Zimbabwe, at Selous. As there is an international benchmark for the price, there is no danger of having different computations.

19. Counsel argued that, as it was the respondent which computed the royalties through the MMCZ, the law forbids it from setting its computation aside without first obtaining an order of court. He further submitted that the respondent, was in effect telling the appellant how to conduct its business. This, it was argued, was because it was effectively saying that the appellant should "not sell FCA ex Selous but must sell FCI Hong Kong." This, in counsel's submission, was confirmed by the judgment of the court *a quo* dismissing the appellant's application. Counsel thus argued that the effect of the judgment of the court *a quo* is that there can be no sale for 60 cents. Counsel contended that the respondent has no right to tell the appellant how to conduct its business. Further, that the recognition of 10 cents of freight does not amount to a deduction and therefore does not interfere with 60 cents being the gross market value as there is no deduction from the 60 cents.

20. With regard to penalty, counsel submitted that the reference in s 37 (5) of the FA to payment of "double the amount payable" means twice the amount and not three times that amount as interpreted by the respondent as well as the court *a quo*. In addition, in view of the *contra fiscum* rule, a party who has not calculated the royalties ought not to be penalized. He thus

contended that the appellant should not be penalized in circumstances where it did not calculate the royalties, which have now purportedly been corrected.

21. *Per contra,* counsel for the respondent, Mr *Banda,* made submissions to the following effect. Although five grounds of appeal have been raised, the matter can be resolved by the answers to two questions. Firstly, is the gross fair market value of a mineral arrived at after deducting freight charges, or is it free from such deductions? Secondly, is the primary civil penalty 100% or 200%? He submitted that in terms of the FA, the gross fair market value is free of deductions and that it is in fact per the benchmark reflected and acknowledged in clause 3.1 of the agreement of sale between the appellant and XHF Hongkong Limited. The clause accepts the international benchmark as US70 cents/lb but proceeds to reduce the gross fair market value by 10 cents. He submitted that the agreement is in fact an agreement to reduce the gross fair market value from which the ex-works price is arrived at after deducting 10 cents from it.

22. It was counsel's submission that deducting freight charges militates against the intention of the legislature. This is so because the obligation to pay royalties is in place notwithstanding the disposal of the mineral. Further, the gross fair market value is the same across the board. The court *a quo* was thus correct in finding that the deduction of 10 cents is proscribed by statute. Regarding the suggestion that the respondent is dictating to the appellant how to conduct its business, counsel submitted that what the respondent is in fact doing is insisting that the appellant obeys the law and the values on its invoices must represent the gross fair market value. If there is a misrepresentation on the invoice, the respondent would not know off hand until investigations are conducted. In *casu*, investigations revealed the deduction of

10 cents. He submitted that s 37 (9) of the FA is a "for the avoidance of doubt" provision. He urged the court to uphold the court *a quo*'s decision.

23. As to penalty, Mr *Banda* contended that s 37 (5) of the FA is a standalone clause creating an obligation of a primary civil penalty of 200 %. He submitted that s 37 (7) of the said Act provides that it is a standalone debt recoverable from a party. Regarding hardship caused by such a formula or interpretation, counsel submitted that such is the essence of a penalty and thus it does not matter that it causes hardship. The law must be obeyed. He prayed for the dismissal of the appeal, leaving the issue of costs to the court's discretion with the further submission that if the court finds the appeal to be patently vexatious, then costs can follow.

<u>THE ISSUES FOR DETERMINATION</u>

24. The issues that emerge for determination are the following:

    1. Whether or not the court *a quo* erred in finding that the exclusion of freight charges on the invoice was a deduction proscribed by law.

    2. Whether or not the court *a quo* erred in upholding the respondent's revision of the calculation of royalties payable by the appellant and enforcement or collection of the same without first obtaining a court order.

    3. Whether or not the court *a quo* erred in finding that the words "double the amount of royalties payable" means 200% over and above the royalties due.

<u>THE LAW</u>

25. Section 244 (1) of the principal Act, that is, the MMA, is headed "Royalty." It provides as follows:

> "Subject to this Part, the miner of a registered mining location shall pay royalty on all minerals or mineral-bearing products won from such location which have been disposed of by him or on his behalf, whether within or outside Zimbabwe, during any month, at such rate per unit of mass as may be fixed in terms of section two hundred and forty-five."

Thereafter, s 245 (1) of the said Act, headed "Fixing of royalty", provides:

> "The rate of royalty payable in terms of section 244 shall be fixed by the National Assembly in the Schedule to Chapter VII of the Finance Act [*Chapter 23:04*]."

26. Attendant to s 245 (1) of the MMA the next port of call is the Schedule to Chapter VII of the FA, [*Chapter 23:04*], headed "Rates of Mining Royalties, Duty and Fees." Under item 1, it cross-references "Section 245 (Royalties)" and sets out two columns. The first describes and lists the different minerals or mineral-bearing products covered by the said section. The second provides for the "Percentage of gross fair market value of mineral produced" relevant to each such description. The heading of the said Schedule also cross-references s 37 of the FA.

27. Section 244 (4) of the MMA provides as follows:

> "There shall be a full rebate of royalty in respect of all minerals or mineral-bearing products used within Zimbabwe"

28. The period that was reviewed by the respondent was 2019 – 2021. The year 2019 thus fell under the relevant provisions of Chapter VII of the FA as at 31 December, 2019, while the years 2020 and 2022 fell to be governed by the relevant provisions of the said Chapter as repealed and substituted by the FA No. 8 of 2020. Chapter VII of the FA as at 31 December, 2019 provided as follows:

"**CHAPTER VII**
MINING ROYALTIES AND DUTIES

36. Interpretation in Chapter VII

(1) In this Chapter-
(a) 'principal Act' means the Mines and Minerals Act [*Chapter 21:05*];
(b) every expression has the same meaning it would have when used in the principal Act.

……

(2) The expression 'this Act' when used in the principal Act shall be construed as including a reference to this Chapter.

37 Rates of mining royalties;

For the purposes of the provisions of the principal Act specified in the Schedule the rates of royalties, duty and fees shall be as therein shown.

37A Collection of mining royalties;

(1) With effect from the 1st January, 2010, and every subsequent year of assessment, the following persons shall, as agents for and on behalf of Commissioner-General of the Zimbabwe Revenue Authority, deduct royalty on the following minerals at source, based on the face value of the invoice therefor-

(a) in respect of precious stones, precious metals (other than gold), base metals, industrial metals, coalbed methane and coal, the Minerals Marketing Corporation established in terms of the Minerals Marketing Corporation Act [*Chapter 21:04*], or any person authorized by the Minerals Marketing Corporation to export such minerals in its own right;

(b) in respect of gold, the Minerals Marketing Corporation established in terms of the Minerals Marketing Corporation Act [*Chapter 21:04*], any person authorized by the Minerals Marketing Corporation to export gold in its own right and every financial institution.

(2) Royalties deducted in terms of subsection (1) shall be remitted by the person deducting them to the Zimbabwe Revenue Authority no later than the tenth day of the month following the month in which the proceeds from which the royalties were deducted were received.

(3) If royalties are not remitted timeously in terms of subsection (2), interest, calculated at a rate to be fixed by the Minister by statutory instrument, shall be payable on so much of the royalties as remain unpaid during the period beginning on the day next following the last day provided for its remittance and ending on the date the royalties are remitted in full:

Provided that in special circumstances the Commissioner-General of the Zimbabwe Revenue Authority may extend the time for the remittance of royalties without charging interest."

29. The said Chapter VII of the FA, after the repeal and substitution by the FA No. 8 of 2020, governing the assessments for the years 2020 and 2021, provides as follows:

"**36 Interpretation in Chapter VII**

(1) In this Chapter-

(a) "principal Act" means the Mines and Minerals Act [*Chapter 21:05*]
…..

(2) The expression "this Act" when used in the principal Act shall be construed as including a reference to this Chapter."

"37 **Rates of mining royalties, duty and fees and collection thereof**;

(1) For the purposes of the provisions of the principal Act specified in the Schedule the rates of royalties, duty and fees shall be as therein shown.

(2) With effect from the 1st January, 2010, and every subsequent year of assessment, the following persons shall, as agents for and on behalf of the Commissioner-General of the Zimbabwe Revenue Authority, deduct royalty on the following minerals at source, based on the face value of the invoice therefor-

(a) in respect of precious stones, precious metals (other than gold), base metals, industrial metals, coalbed methane and coal, the Minerals Marketing Corporation established in terms of the Minerals Marketing Corporation Act [*Chapter 21:04*], any person authorized by the Minerals Marketing Corporation to export such minerals in its own right;

(b) in respect of gold, the Minerals Marketing Corporation established in terms of the Minerals Marketing Corporation Act [*Chapter 21:04*], any person authorized by the Minerals Marketing Corporation to export gold in its own right and every financial institution"

(3) Royalties deducted in terms of subsection (1) shall be remitted by the person deducting them to the Zimbabwe Revenue Authority no later than the tenth day of the month following the month in which the proceeds from which the royalties were deducted are received.

(4) If royalties are not remitted timeously in terms of subsection (2), interest, calculated at a rate to be fixed by the Minister by statutory instrument, shall be payable on so much of the royalties as remain unpaid during the period beginning on the day next following the last day provided for its remittance and ending on the same date the royalties are remitted in full:

Provided that, in special circumstances, the Commissioner-General of the Zimbabwe Revenue Authority may extend the time for the remittance of royalties without charging interest.

(5) As soon as it comes to the notice of the Commissioner that any person responsible for remitting royalties timeously in terms of subsection (2) has failed to do so, the Commissioner shall serve upon that person notice to pay double the amount of the royalties payable (hereinafter called "the primary civil penalty."

(6) A person upon whom the Commissioner has served a notice in terms of subsection (1) and who has failed without just cause to comply with the notice

within the first seven days of the period of one hundred and eighty-one (181) days referred to in paragraph (a) below, shall-

(a) be liable for a secondary civil penalty of US$30 (or the maximum monetary figure specified from time to time for level 4, whichever is the lesser amount) for each day the person remains in default, not exceeding a period of 181 days;

(b) if the person continues to be in default after the period specified in paragraph (a), be guilty of an offence and liable on conviction to a fine not exceeding level 10 or to or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

(7) A primary and secondary civil penalty that becomes payable by the infringer shall constitute a debt due by the infringer to the Zimbabwe Revenue Authority and shall, at any time after it becomes due, be recoverable in a court of competent jurisdiction by proceedings in the name of the Authority.

(8) The primary and secondary civil penalty shall be paid into and form part of the Consolidated Revenue Fund

(9) For the avoidance of doubt it is declared that, in calculating the gross fair market value of a mineral on the basis of which royalty is deducted for the purposes of this Chapter, no deduction shall be made of beneficiation, processing or other costs whatsoever incurred in the production of the mineral concerned."

30. Notably, s 36 in either version is virtually the same with regard to the portions quoted. However, s 37 as substituted by the FA No. 8 of 2020, while corresponding with the provisions of s 37A in the repealed Chapter, also expands them by the "introduction" of a few more new provisions. Nevertheless, it appears that the difference in the governing provisions for 2019 on the one hand and 2020 - 2021 on the other, does not result in any differentiation between the said periods with regard to the end result in the determination of this matter. The setting out of the provisions pertaining to the two stated periods is thus effectively for completeness only.

ANALYSIS

Whether or not the court *a quo* erred in finding that the exclusion of freight charges on the invoice was a deduction, proscribed by law.

31. In *Zimbabwe Revenue Authority* v *Murowa Diamonds (Private) Limited* SC85/23, this Court was faced with a different issue from that in *casu*. The court was dealing with the question whether or not royalties payable under s 244 of the MMA constitute an allowable deduction under the general deduction formula of the Income Tax Act [*Chapter 23:06*]. Although this case was different, however, the following excerpt from the Court's judgment at paras [25] and [26] sheds some light on the issue of mining royalties. KUDYA JA, stated as follows:

> "[25] Mining royalties were payable to the mining commissioner in this country in terms of s 79 of the Mines and Minerals Act No. 16 of 1935 and s 139 of the Mines and Minerals Act No. 18/1951. There were no specific sections under which the royalty payable was deductible in the corresponding Income Tax Ordinance of Southern Rhodesia No. 20 of 1918 and the Income Tax Act No. 16/1954. The term was not and has never been statutorily defined in Zimbabwe.
>
> …………
>
> Again, Broadway and Keen, wrote in the *Economic Analysis* of August 2013, in an article entitled *Mining Taxation – The South African Context* at p13 that:
>
> > 'The rationale for a mineral royalty is the payment to the resource owner (typically the State) by the extractor in return for the right to mine. The Mineral and Petroleum Resources Royalty Act No. 28/2008 provides for the <u>compensation to the State (as custodian) for the permanent loss of non-renewable resources</u>.'
>
> [26] In the Zimbabwean context, a mineral royalty payable in terms of s 244 of the Mines and Minerals Act constitutes a fee paid by the holder of a mining right to the mining commissioner for the right to dispose the mineral resources from a mining location. The royalty is payable on the value (*ad valorem*) of the mineral resources extracted from the mining location.'" (The underlining is mine)

32. It has not been disputed that the appellant is a producer of ferrochrome which it sells to the Asian market. It has neither been disputed that the law requires it to pay royalties on the minerals that it sells. It is also common cause that during the period 1 January 2019 to 31 December 2021, the appellant sold minerals to XHF Hong Kong Minerals. Royalties were declared on the minerals using the ex-works price at which the appellant sold the minerals.

The said ex-works price was arrived at after deducting "10 cents ocean freight" from the benchmark. At the time of the agreement the fair market value of ferrochrome was US$0.70/lb. This much is evident as reflected in clause 3.1 of the agreement of sale between the appellant and XHF HONGKONG LIMITED to which it sold the mineral. The said clause provides as follows:

> "**3. Price Payment**
> 3.1 The purchase price shall be negotiated and approved by both party (*sic*) per monthly basis in accordance with prevailing market conditions. For the high carbon ferrochrome, the Fastmarkets Ferro-Alloys price shall be used as the benchmark. Therefore as of June, the Fastmarkets Ferro-Alloys price is $0.70/lb*Cr after factoring in 10 cents Ocean freight the Ex-Works price will be US$0.60/lb Cr, provided the parcel is delivered within 30 days of commencement of the agreement."

33. The meaning of gross fair market value is at the centre of this dispute. The court *a quo* articulated it as follows at pp 7-8 of its judgment:

> "The respondent asserts the gross fair market value of the mineral means a value based on what a hypothetical willing buyer and hypothetical willing seller dealing at arm's length on an open market would agree as a whole without deductions being made on such value.
>
> On the other hand, the applicant contends that the word market benchmark which is given as US0.70c ex Hong Kong should be accepted as US0.60c ex Selous Zimbabwe."

34. As already seen, the Schedule to Chapter VII of the FA, stipulates the rate payable on royalties as a percentage of the "gross fair market value" of the mineral produced. The question is what is the meaning of the term "gross fair market value" as used in s 37 of the FA. Section 37 (9) of the FA provides the following:

> "For the avoidance of doubt it is declared that, in calculating the gross fair market value of a mineral on the basis of which royalty is deducted for the purposes of this Chapter, no deduction shall be made of beneficiation, processing or other costs whatever incurred in the production of the mineral concerned."

35. Notably, in its letter dated 26 June 2023 to the appellant's legal practitioners, the respondent responded to the issues that they raised in theirs of 20 June 2023 on behalf of the appellant. The respondent stated that the appellant, at a meeting held at the former's offices, had acknowledged "that ocean freight is deducted from the Cost Insurance and Freight price since the customers acquire the product at factory in Selous Chegutu Zimbabwe i.e. the client sells the ferrochrome at Ex-works price to customers i.e. XHF Hongkong." (*sic*) It also stated that the term "fair market value" refers to the price the mineral is sold at in a particular marketplace and that in this case it refers to the price at which the ferrochrome was sold in the Asian market. Further, that the term "gross fair market value" clearly shows that no deductions are to be made to the fair market value. The respondent's letter went on to expound as follows:

> "2. … The price quoted by the parties were (sic) not reflective of the gross fair market value hence the adjustment which was done. In determining the "gross fair market value it is important to identify where the market of the product is, and how much the product will fetch when sold in that particular market. In this case Afrochine Smelting Pvt Ltd sells the commodity to XHF Hongkong who later sells the commodity to the final user for use. The gross fair market value is arrived at after considering the cost of production or the costs of transporting the product to the market, but how much the product fetches in that market.(*sic*)
>
> 3. Despite the sale of the ferrochrome using the ex-works price, the price, which is recognized as the gross fair market price, is the price in which the mineral will be sold in the market, in this case in Hong Kong. Despite the agreement of a sale contract, which is between Afrochine Smelting Pvt Ltd, Minerals Marketing Corporation of Zimbabwe and XHF Hong Kong Ltd is selling the ferrochrome using the ex-works price, the market value remains the price the mineral is sold in the market as shown by the ferroalloy markets such as Fastmarkets and Ferro-Alloy.com.
>
> 4. … According to section 37B to the Finance Act No. 7 of 2021, mining royalties for diamonds and all other minerals are to be calculated on the invoice value as determined by the Minerals Marketing Corporation of Zimbabwe. Please note that this is with effect from 1 January 2022. Calculation of mining royalties for prior year was not changed and was based on the gross fair market value, not the selling price."

36. After quoting s 37 (9) of the FA, the respondent further stated as follows at para 5 in the said letter:

> "5. The term "fair market value" refers to the price the mineral is sold in a particular marketplace. In this case, it refers to the price at which the ferrochrome were sold in the Hong Kong market. The use of the term "gross" clearly shows that no deductions are to be made to the fair market value.
> 6. …..
> 7. It is our position that for the period under review the client should have calculated the royalties on minerals based on the gross fair market value since section 37B of the Finance Act came in effect on 1 January 2022. Tax review findings and debt we submitted to your office we did not include the period 2022 and onwards since the invoice value was accepted as determined by the MMCZ. Prior to 1 January 2022 the basis for determination of the base upon which mining royalties are to be calculated was the gross fair market value, which is the value of the mineral in a particular market. Therefore, the ZIMRA team correctly calculated the mining royalties based on the gross fair market value of the mineral as shown on the Fastmarkets and other markets."

37. What emerges from the above quotation is that the appellant was expected to calculate royalties on the price pegged by Fastmarkets, which can objectively be used as the gross fair market value of the product. At para 17 of the respondent's heads of argument, the submission is made that:

> "At the material time of the agreement appearing on … the fair market value of ferrochrome was US$0.70/lb*Cr. The price pegged by Fastmarkets is what can objectively be used as the gross fair market value of the product. It is on this value that appellant was supposed to calculate its royalties. It is however important to note that international prices do not take into account the cost of freight. If they did, it would result in a situation where mineral commodity exchanges would have international prices for each country in the world. The reference to Cost of Insurance and Freight (CIF) in grounds 3 and 4 therefore does not arise. International prices do not contain CIF. That charge may be added to the fair market value. It is not deducted from the fair market value of the product."

The respondent thus correctly viewed the invoice value of less than the gross fair market value as determined by the Fastmarkets Ferro Alloys price, as an under-declaration and it is this which the court *a quo* found to be proscribed by law.

38. In its judgment, the court *a quo,* after analyzing the contesting parties' contrary positions and interpretations, stated the following:

> "The court in doing this can have regard to the context or such other considerations as the court is justified in taking into account. The reason governments levy royalties on miners is to obtain a finite resource that is being taken away from the country by a miner or as a form of compensation for the loss of such finite resource. Different jurisdictions have different ways of calculating the share or compensation to be collected. Some levy royalties on the net revenues obtained whilst others levy on the gross.
>
> Clearly in this case it was the intention of the legislature to levy on a standard benchmark and not ex-works as this would result in different levels for different miners. It cannot be held that such a way of levying royalties is interference with the miner's business decision. What was within the discretion of the miner on the rate 70c ex Hong Kong was to increase the price to include the insurance and freight. The product by being sold at 60c ex Selous was sold at below the gross fair market value.
>
> It is my finding therefore that the applicant erred in declaring royalty on the face value of the invoice based as it was on the ex-works price of 10 cents less than the Fast Markets Ferro Alloys price."

39. The court's reasoning as reflected above is sound. Having agreed and stipulated in the agreement of sale that the Fastmarkets Ferro-Alloys price shall be used as the benchmark and that as of June that price was US$0.70/lb*Cr, the deduction therefrom was a deduction from the gross fair market value. The sale of the product at US$0.60 was at below the gross fair market value hence the findings of the respondent's review exercise and the adjustment, which corrected the under declarations. The calculation of royalties by MMCZ was on the basis of the face value of the invoice raised by the appellant. The almost rhetorical question by the appellant's counsel as to how a party who had not calculated the royalty due gets to be penalized misses this important premise and carries no weight. For the foregoing reasons, the first four grounds of appeal have no merit and are dismissed.

Whether or not the court *a quo* erred in upholding the respondent's revision of royalties payable by the appellant and enforcement or collection of the same without first obtaining a court order.

40. In the appellant's heads of argument, the submission is made that the respondent cannot interpret the denial of the appellant's request for a declaratory judgment as authorization to enforce collection against the appellant. It is contended that the appropriate and sole method by which the respondent may legally enforce collection from the appellant is through a court order. This position is said to be bolstered by s 366 of the MMA to the effect that before the respondent or its officials can collect any amounts, they must first prove their case in court and obtain a court order.

41. Section 366 of the MMA provides:

> "**366. Mining commissioner may sue for and have hypothec for amounts due;**
> (1) The mining commissioner, or other official duly authorized thereto by him, may ask, demand, sue for, recover and receive all amounts due and payable in respect of licences, royalties, fines, transfer duties or any other fees payable on or in connection with any mining location in his mining district."

42. This provision speaks to the powers of a mining commissioner to recover or demand amounts due in connection with any mining location in his district. It does not restrict the respondent from recovering amounts due without a court order. The respondent has powers to collect royalties due in terms of s 37A of the FA, which has already been quoted in para 27. If a party fails to comply, s 37 (5), also quoted in para 27 above, gives the commissioner, as soon as such failure comes to his notice, the power to serve upon that person notice to pay double the amount of the royalties payable, called the primary civil penalty. With this power vested in the commissioner by the FA, the respondent had the power to serve notice on the appellant. The fifth ground of appeal therefore has no merit and is also dismissed.

PENALTY

43. The appellant did not raise any ground of appeal against the penalty imposed upon it by the respondent. No error on the part of the court *a quo* in that regard was raised. In the appellant's heads of argument filed of record on 16 July, 2024, the issue was not related to and no submissions were made in that regard. The appellant meticulously set out the five issues that it perceived as arising from its grounds of appeal and none of them related to the issue of the penalty.

44. The respondent's heads of argument filed of record on 23 July, 2024 made submissions relating to the interpretation of the phrase "to pay double the amount of the royalties payable" in s 37 (4) of the FA. In doing so, it purported to be addressing the appellant's fifth ground of appeal. However, the said ground of appeal does not relate to the issue addressed by the respondent. The ground relates to an alleged error by the court *a quo* in not concluding that the respondent had no right "to *ex mero motu* revisit such determination and impose a penalty in the absence of a court order" and did not relate to the penalty *per se*.

45. There was no amendment to the appellant's grounds of appeal which related to the penalty that was imposed. In my view, in the stated circumstances, there cannot be said to have been a full and proper ventilation of the issue on the basis of which this court could endeavour to make a determination despite the lack of a ground of appeal on the issue. The issue cannot be said to have been squarely placed before the court such as to warrant a pronouncement or determination on it. As such, it will therefore not be related to.

DISPOSITION

46. All five grounds of appeal having been found to have no merit, the fate of the appeal is a dismissal. As to costs, the appellant's stance was that even though it is not the general practice of this court to award costs in a tax matter, it will do so where they are justified. It prayed for the success of its appeal with costs on the basis that the respondent had unreasonably insisted with recovery in circumstances where the facts clearly did not justify such recovery. The respondent's counsel's submission was that costs are entirely in the discretion of the court but if the appeal is patently vexatious, an award of costs may be made against the appellant.

47. In *casu*, the respondent has been made to incur costs to defend a lawful decision. The court finds that this is a proper matter for the exercise of its discretion in the respondent's favour. An award of costs will be made for the respondent.

48. Accordingly, it is ordered as follows:

"The appeal be and is hereby dismissed with costs."

BHUNU JA : I agree

MWAYERA JA : I agree

Mushoriwa Moyo, appellant's legal practitioners

Sinyoro & Partners, respondent's legal practitioners