

OBERT MPOFU in his capacity as the former Minister of Mines and Mining  
Development  
and  
MRS. EUNICE KAHONDE in her capacity as the former Mining Commissioner for Harare  
versus  
CHIROSWA MINERALS (PVT) LTD  
and  
BASE MINERALS ZIMBABWE (PVT) LTD  
and  
REGISTRAR OF THE HIGH COURT  
and  
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE, 10 January 2014 and 13 January 2014 and 10 July 2014

*P. Machaya and T. Dodo*, for the applicant  
*F.M. Katsande*, for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

BHUNU J: This is an urgent chamber application by both applicants seeking the setting aside and declaration of nullity of writs of personal attachment and committal to prison issued against them by the Registrar of the High Court on 6 January 2014.

The first applicant is the former Minister of Mines and Mining Development whereas the second applicant was his Mining Commissioner for Harare. This application has its origin in the case of *Chiroswa Minerals (Pvt) Ltd And Base Minerals (Pvt) Ltd v Minister of Mines And Morris Tendayi Nyakudya and Vambo Mills (Pvt) Ltd*. HH 261/2011.

In that case PATEL J on 15 November 2011 granted Chiroswa Minerals (Pvt) Ltd and Base Minerals (Pvt) Ltd an order in the following terms:

“It is accordingly declared that:

1. The tribute agreement dated 17 May 2005 between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is invalid and of no force or effect.

2. The approved tribute agreement dated 18 May 2005, (registration No: 10/2005), which expired on 18 May 2008 is the only valid agreement in terms of which the 2<sup>nd</sup> and 3<sup>rd</sup> defendants occupied and mined the plaintiff's mining claims situated at Dodge Mine, Shamva, Mashonaland Central.

It is further ordered that:

1. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall deliver to the 1<sup>st</sup> plaintiff all the assets listed in annexure "A" to the Memorandum of Agreement entered into on 18 August 2005 between them and the 1<sup>st</sup> plaintiff, within 5 (five) days of the service of this order upon them, failing the Deputy Sheriff be and is hereby authorised and directed to attach and remove the said asserts for delivery to the 1<sup>st</sup> plaintiff.
2. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants, and all those claiming the right of occupation through them, shall vacate the 1<sup>st</sup> plaintiff's aforesaid mining claims within 10 (ten) days of the service of this order upon them, failing which the Deputy Sheriff be and is hereby authorised and directed to evict them.
3. The 1<sup>st</sup> plaintiff shall appoint a qualified mining engineer to determine the quantity of minerals mined by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from 18 July 2005 to the date they shall have vacated or been evicted from the aforesaid mining claims.
4. Within 10 (ten) days of having received the mining engineer's report, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall pay royalties due to the 1<sup>st</sup> plaintiff, calculated at the rate of 5% of the gross value of the minerals mined by them, less such royalties as they may by documentary evidence prove to have already paid to the 1<sup>st</sup> plaintiff.
5. Within 10 (ten) days of the service of this order at his offices, the 1<sup>st</sup> defendant shall refer the tribute agreement entered into between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs to the appropriate mining Commissioner for approval and registration in accordance with Part XV11 of the Mines and Minerals Act [Chapter 21:05].
6. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally, the one paying and the other to be absolved, shall pay the costs of suit.''

On 24 July 2013 both plaintiffs alleging noncompliance with PATEL J's order obtained an enforcement order from TAKUVA J in case number HC 5208/13 authorising the commitment of both applicants in this case to prison for 30 days for contempt of court.

A perusal of the documents in case number HC 5208/13 however establishes beyond

question that the first applicant complied with PATEL J's order. In the applicants' founding affidavit Peter Valentine the managing director and 50% shareholder in Chiroswa Minerals (Pvt) Ltd had this to say:

- “11. The 1<sup>st</sup> respondent (the Minister) conceded that he had not complied with paragraph 5 of the order by PATEL J and applied to have the matter postponed to enable him to comply. **His Lordship granted the postponement to 3<sup>rd</sup> May 2013.**
12. On 3 May 2013, Mr. Dodo representing the 1<sup>st</sup> respondent produced a letter (**Annexure C**) in which he advised the Registrar for Mr. Justice HLATSHWAYO that the 1<sup>st</sup> respondent had complied with the Court Order by PATEL J.
13. He produced as confirmation of the referral a minute by the 1<sup>st</sup> respondent (**Annexure D**) in which the 1<sup>st</sup> respondent directed the Permanent Secretary of the 1<sup>st</sup> respondent's Ministry to implement the referral of the tribute agreement to the 3<sup>rd</sup> respondent.
14. Mr. Dodo further produced a minute from the Permanent Secretary (**Annexure E**) directing the 3<sup>rd</sup> respondent to comply with Part XV11 of the Mines and Minerals act Chapter 21:05.
15. With this background the applicants conditionally undertook to file Notice of withdrawal with no order as to costs.
16. On 6 May 20 13, the applicant's Legal Practitioners F M Katsande & Partners delivered a letter (**Annexure F**) to the 3<sup>rd</sup> respondent the final paragraph of which requested the 3<sup>rd</sup> respondent to advise when it would be at her earliest convenience that the applicants would attend at the office of the Mining Commissioner to collect the tribute agreement.
17. The original copy of the tribute agreement in case HH 261/2011 had been referred to the Mining Commissioner Mr. Shumba a fact which the 3<sup>rd</sup> respondent is aware of as she personally had occasion to discuss it with her colleague one Mr Chihota.
18. That tribute agreement referred to on paragraph 5 of PATEL J's order was signed by the grantor Mr. John Richard Needham Groves and myself in 2008 as confirmed by the letter from the grantor (**Annexure G**).
19. While no deadline was imposed by the 1<sup>st</sup> respondent for the Permanent Secretary and the 3<sup>rd</sup> respondent to implement the terms of the referral the applicants were convinced that the 1<sup>st</sup> respondent's direction should be expeditiously implemented taking into consideration that the order of Patel J remained disobeyed since 20 11.

20. The letter (Annexure F) was written with a view to determine the appropriate time to file the notice of withdrawal.
21. The applicants are convinced that the 1<sup>st</sup> respondent has no desire nor the intention to process the registration of the tribute agreement copy of which her office has held since 2008.
22. Such conduct is consistent with scandalizing the authority of the judgment of PATEL J which the 1<sup>st</sup> respondent has attempted to comply with but for the deliberate intransigence of the 3<sup>rd</sup> respondent who must conditionally be committed to prison for contempt of Court.
23. With this background the applicants respectfully seek the leave of the Court to withdraw the commitment they made to file a Notice of withdrawal in case HC 233 with a view to apply to join the 3<sup>rd</sup> respondent as a party and amend the Draft Order and instead pray to have the 3<sup>rd</sup> respondent committed for contempt.”

From the foregoing it is abundantly clear that at all material times the applicants were keenly aware that the first respondent had complied with PATEL J's order. All what he was required to do in terms of para 5 of the learned judge's order was to do no more than refer the tribute agreement to the Mining Commissioner in terms of PART XVII of the Act. Whether or not the Mining Commissioner was going to grant the registration of the tribute agreement had nothing to do with him.

The applicants in their founding affidavit reproduced above acknowledge that the first applicant complied with the order by referring the tribute agreement for processing by the mining commissioner in terms of Part XVII of the Act. Confronted with this stuck reality at the hearing before me Mr. *Katsande* had no option but to concede the point saying;

“The 1<sup>st</sup> applicant has complied he has referred the matter. It is the 2<sup>nd</sup> applicant who is being mischievous.”

That valid concession puts paid to the validity of the writ of imprisonment in that it was issued in error in his absence without just cause.

I now turn to consider whether the second applicant by refusing to grant registration of the tribute agreement was in contempt of para 5 of PATEL J's order. The order reads:

“Within 10 (ten) days of the service of this order at his offices, the 1<sup>st</sup> defendant shall refer the tribute agreement entered into between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs to the appropriate mining Commissioner for approval and registration in accordance with Part XV11 of the Mines and Minerals Act [Chapter 21:05]”.

A perusal of the respondents’ founding affidavit referred to above establishes as a matter of fact beyond reasonable doubt that upon reference of the tribute agreement to him in terms of the learned judge’s order the second applicant, that is to say, the Mining Commissioner processed and considered the relevant documents in terms of Part XV11 of the Act as directed by PATEL J. After due consideration of the tribute agreement she determined that the tribute agreement could not be registered in terms of Part XV11 because it had expired.

It is trite and a matter of common sense that an agreement that has expired is no agreement at all and to that extent it is null and void and of no force or effect.

Section 283 of the Mines and Minerals Act [*Cap 21: 05*] defines a tribute agreement as follows:

“tribute agreement” means any agreement or arrangement entered into after the 1st July, 1947, where under any person has given a tribute, licence, concession, authority or other right to mine a mining location to a tributor; and includes any such agreement or arrangement which was entered into before the 1<sup>st</sup> July, 1947, and which is renewed after such date, and any agreement to alter the terms of a tribute agreement which has been approved by the Board and any renewal of a tribute agreement which has been approved by the Board;”

From the above definition of a tribute one of the critical characteristic of such an agreement is that it must be capable of conferring a right to mine a mining location.to a tributor. It is plain that an expired tribute agreement is incapable of conferring any rights to a tributor and therefore incapable of registration in terms of Part XV11 of the Act.

It is inconceivable that the learned judge could have intended that the Mining Commissioner must register the tribute agreement at all costs without conformity with the mandatory requirements of the Act. By ordering that the tribute be registered in terms of Part XV11 of the Act it was implicit in the learned judge’s order that the tribute agreement must

conform to the statutory requirements and the Mining commissioner retained his administrative discretion under the Act.

That being the case, the mining Commissioner was within her rights when she declined to register the tribute agreement for want of compliance with the registration requirements under Part XV11 of the Act.

In any case, the cardinal issue as to whether or not the tribute agreement in question is registerable is the subject of an appeal such that it would be premature to penalise the applicants at this stage.

TAKUVA J's order for civil imprisonment therefore appears to have been issued in error on papers in chambers in the absence of the other party. Rule 449 provides for the correction of such orders. It reads:

- “(1). The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgment or order –
- (a) That was erroneously sought or granted in the absence of any party affected thereby: or
  - (b) In which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
  - (c) That was granted as a result of a mistake common to the parties”.

For the stronger reason the order sought to be rescinded requires the imprisonment of the applicants in circumstances where I have demonstrated that it is doubtful whether the applicants were in deliberate disobedience of a valid court order. The principle against doubtful penalization requires that as a matter of legal policy a person should not be penalized under a doubtful law or order. See *Statutory Interpretation*, Francis Bennion 1984 at p 609. That legal policy articulated by Bennion despite being founded on English law finds expression in s 49 of the current Constitution which prohibits the deprivation of liberty without just cause: It reads:

**“49. Right to personal liberty.**

1. Every person has the right to personal liberty, which includes the right –
  - (a). not to be detained without trial; and
  - (b). not to be deprived of their liberty arbitrarily or without just cause.
- (2). No person may be imprisoned merely on the ground of inability to fulfil a contractual obligation”

For the foregoing reasons the application can only succeed. It is accordingly ordered:

1. That an order be and is hereby granted in terms of the draft order with costs being at the ordinary scale.
2. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ counter application be and is hereby dismissed with costs.

*The Attorney General’s Office, applicants’ legal practitioners*  
*F.M. Katsande & Partners, 1<sup>st</sup> and 2<sup>nd</sup> respondents’ legal practitioners*