

CHAMU MINING SYNDICATE  
versus  
SIBONGILE MPINDIWA N.O.  
and  
CHAMWANDOITA SYNDICATE

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
HARARE, 30 May 2017 & 21 June 2017

### **Opposed application**

*G. Dzitiro*, for the applicant  
*T. Mutomba*, for the first respondent  
*C. Ndlovu*, for the second respondent

MAFUSIRE J: The applicant was a mining syndicate. It was involved in gold mining and prospecting. In this application it sought several remedies against the first respondent in her official capacity. These were in respect of a certain gold mining block, Coronation 5, somewhere in Masvingo Province. The first respondent was the provincial mining director.

The second respondent was also a mining syndicate. The orders sought by the applicant against the first respondent would materially affect it.

Sticking nearly as close as possible to the applicant's own wording in the draft order, the several remedies sought by the applicant against the first respondent and which would materially affect the second respondent, were these:

- 1 that the first respondent should issue the applicant with a certificate of registration over Coronation 5 Gold Block;
- 2 that the second respondent, and all those claiming occupation through it, or all those people working on that site, should vacate;
- 3 that the deputy sheriff [*sic*] should give effect to paragraph 2 above;
- 4 that the police commander [*sic*] for Masvingo District [*sic*] should render assistance to the deputy sheriff as he gives effect to the order.

Coronation 5 Gold Block was at all materially times "owned" by the second respondent. The basis of the applicant's claims above, in my own words, as I understood the

argument, was that, in spite of the first respondent having forfeited it; in spite of the first respondent having allocated it to the applicant; in spite of the applicant having paid the requisite registration fee as calculated by the first respondent herself, and despite demand, the first respondent was, without just cause, refusing to issue the applicant with the necessary registration certificate, and that opportunists had converged on the mine to carry out illegal mining activities there, to the prejudice of the applicant.

The background facts were largely common cause. The second respondent was the registered holder of the mining certificate over Coronation 5 Gold Block since 1986. However, on 14 September 2016, i.e. 30 years later, the first respondent forfeited, or purported to forfeit it. This was in terms of a forfeiture notice that affected a staggering 385 other locations. Following the forfeiture, the affected sites would be open for relocation to third parties. The forfeiture notice said the relocation would start from 18 October 2016. On 27 October 2016, the applicant paid the registration fee for Coronation 5. On 2 November 2016 the first respondent invited it to send its surveyors for pegs verification on the site. However, the first respondent postponed the exercise. The applicant said the first respondent kept prevaricating until the verification exercise failed to take place altogether.

Fed up by the first respondent's conduct, the applicant's lawyers wrote a letter of demand on 9 November 2016. On the premise that it had acquired the mining rights over the block, the letter demanded that the first respondent should stop the illegal mining activity at the site and expel all the culprits thereat. It was also demanded that the first respondent should attend to the inspection of the applicant's pegs at the site and issue the applicant with a certificate of registration.

The first respondent did not respond.

On 24 November 2016 the applicant filed the present application to seek the above remedies. Its argument was basically that having paid the requisite fee at the instance of the first respondent, it was entitled to be issued with the registration certificate.

The first respondent opposed the application on the substantive basis that it could no longer proceed with the pegs verification exercise, let alone registering the block in favour of the applicant, because her purported forfeiture and relocation of the mine had been challenged by the second respondent, and that the matter was still to be considered. Although in the heads of argument and oral submissions the first respondent raised several other technical objections, this remained her dominant ground of opposition.

The second respondent also opposed the application, also on the same substantive basis as that by the first respondent. It went on to provide more details on the respects in which it considered the forfeiture notice and purported relocation of the mine to the applicant to be null and void. Basically, it was said the purported forfeiture notice had been issued in terms of the wrong section of the Mines and Minerals Act, *Cap 21:05* [*“the Act”*]; that the mandatory time limits prescribed by the Act in terms of which a mining location can be relocated after forfeiture, and the period allowed for objections thereto, had not been observed.

The second respondent filed its objection with the first respondent on 28 October 2016, that is, some 10 days after the expiry of the date given in the forfeiture notice as the date after which the relocations could be made. This was less than a day after the applicant had paid for the registration certificate. The reason for this detail shall soon become apparent, especially given that during argument, the applicant sought to amend its draft order in midstream.

Originally, the second respondent was a syndicate of six individuals. Four had died, including one Lawrence Nyakutsikwa [*“Lawrence”*]. He had died more than twenty years before. In this application, the opposing affidavit for the second respondent was by Lawrence’s son and heir to the estate, one Lovemore Nyakutsikwa [*“Lovemore”*].

At the hearing, Mrs *Dzitiro*, for the applicant, took a point *in limine*. She argued that Lovemore was not qualified to speak on behalf of the syndicate, especially given that there were still two other members surviving. She said these had been served with the application but that they had chosen not to file any opposing papers. As such, there was no proper opposition before the court by the second respondent.

In counter, Mr *Ndlovu*, for the second respondent, first complained about being ambushed on this point as the applicant had neither raised it in its answering affidavit, nor referred to it in its main heads of argument. He said the applicant had only raised it for the first time in its supplementary heads of argument. These were filed a mere two court days before the hearing.

Mrs *Dzitiro* said since it was a legal point, the applicant could raise it at any time.

Mr *Ndlovu* referred to s 61 of the Act, particularly subsection [2] thereof. It provides that when two or more persons are registered as joint holders of a mining location, each and

every such person shall be jointly and severally responsible for every obligation and liability attaching to the registered holder of such location.

Mr *Ndlovu's* point was that in as much as the obligations and liabilities attach jointly and severally to joint holders of a mining location, profits and benefits accrue to them in the same way. He argued that Lovemore, as heir, could legitimately stand in his late father's shoes and claim, or protect, what was due to the estate.

Mrs *Dzitiro* rejected the notion that where responsibilities and liabilities are said to attach to members of an entity jointly and severally, it is the same with regards to the benefits or accruals due to that entity. She maintained that Lovemore could well represent and protect the interests of his late father's estate as heir, but that in no way could he represent the syndicate, especially given that its two original members were still alive.

With respect, the parties' arguments on this point were more heat than light. Neither side cited any authorities for their diametrically opposed views, or referred me to any other principle or philosophy that would show that where an enactment provides, as s 61 of the Act does, that if joint members of an entity are jointly and severally liable for the debts or liabilities of that entity, their right to the accruals or profits of the entity is [or is not] joint and several, in the sense that a payment to one is [or is not] a payment to all. Mrs *Dzitiro* submitted that the right cannot be joint and several, as Mr *Ndlovu* said it was, because if, for example, the applicant won the case with costs, it could not recover against Lovemore.

But I failed to understand why Mrs *Dzitiro* was saying that. The concept of liability that is joint and several is such that the creditor is not obliged to split the debt equitably, or pro rata, between the debtors. Each is liable to the creditor to the full extent of the debt. It is up to the one that pays to seek reimbursement from the others to the extent of their respective portions. So, to Mrs *Dzitiro's* example, if the applicant won the case with costs, and if Lovemore was deemed a member of the second respondent's syndicate through his being the heir of his late father's estate, then he would be liable for those costs jointly and severally with the other members.

None of the parties answered satisfactorily the query that I repeatedly raised during argument, namely, whether these so-called syndicates are corporate bodies whose corporate status would ordinarily remain unaffected by changes in their membership. None of them shed any light on how, as syndicates, they were constituted. Mrs *Dzitiro* said they were not corporate bodies and that, at any rate, the wording of s 61 aforesaid militated against such a

construction. However, this was despite the fact that in its own founding affidavit, the applicant described itself as "... *a body corporate / universitas* ..."

I reserved judgment on the point *in limine* and opted to hear the merits.

Mr *Mutomba*, for the first respondent also raised numerous inter-related preliminary objections. He argued that, in my own words as I understood him, the remedies sought by the applicant were incompetent because this court was being asked to usurp the functions of the first respondent, an administrative functionary as envisaged by the Administrative Justice Act, *Cap 10:28*. The first respondent also argued that the applicant could not seek an order of eviction because it had not yet acquired any rights over the location in question. Finally, it argued that the police could not competently be ordered to execute civil orders as that is a function reposed in the Sheriff in terms of the High Court Act, *Cap 7:06*.

As the first respondent's so-called points *in limine* were effectively, or substantially, the very same issues for determination on the merits, I directed the parties to argue the merits. Afterwards I also reserved judgment. This now is my judgment, starting with the point *in limine* on Lovemore's capacity to represent the second respondent.

The law says he who alleges must prove. It was the applicant that said, in spite of his being the heir to the estate of his late father, who himself had been a member of the syndicate, Lovemore was not qualified to stand for, and or speak on behalf of the second respondent's syndicate. The onus was on it. It has not discharged it.

The applicant described itself as a body corporate / *universitas*. But no incorporation document was produced. The mere coming together of a group of people, or gang, for some commercial purpose such as mining, does not automatically transform it into a body corporate. *In casu*, there was nothing placed before me, either by way of documents or cogent argument, to show why Lovemore was disbarred from representing Lawrence's interest in the syndicate that had devolved to him by intestate succession.

At any rate, in the opposing affidavit, Lovemore did not say he was representing the second respondent. He said he was the heir to Lawrence's estate and that he had the authority to respond to the application.

In the circumstances, the applicant's point *in limine* is hereby dismissed.

On the merits, the entire application was a huge misconception. It was a gloss. The applicant sued over non-existent rights.

From the cover, the application was allegedly a complaint in terms of s 345 of the Act. But this was neither here nor there. Section 345[1] gives this court the original jurisdiction in every civil matter, complaint or dispute arising under the Act, unless the parties have agreed, or this court has decided, to refer the matter to the mining commissioner in the first instance.

Part IV of the Act provides for the acquisition and registration of mining rights. Among other things, if certain procedures have been complied with, s 45 provides for the registration of a mining location. In terms of it, one applies to the mining commissioner. One must pay the prescribed fee. One must also submit a litany of documents. The application may be granted or rejected. There is nowhere in that provision, or any other, that says that the mere payment of an application fee for registration automatically confers rights of ownership or leasehold, or any other entitlement on the applicant.

The applicant argued that by being invited for pegs verification after it had already been invoiced for the registration fee, which it had paid, it shows that the first respondent had already made a decision to grant its application. But this is a gloss and a misconception. The payment is one prescribed by the Act. It does not in the least preclude the mining commissioner from afterwards rejecting an application. No enforceable rights were created by such payment, except perhaps, to sue for a refund.

Furthermore, the first respondent explained why it did not proceed with the applicant's registration. Within a period of one month of the date set in the first respondent's forfeiture notice for any possible revocation of the forfeiture, namely 27 September 2016, the second respondent had filed its objection, namely on 28 October 2016 as aforesaid. That date was within ten days of the date when the forfeited locations could properly be relocated, namely 18 October 2016. A further nine days later, namely 9 November 2016, the applicant's lawyers wrote the letter of demand. Before the month was out, the applicant sued, namely on 24 November 2016.

So, in all the circumstances, quiet apart from the fact that the applicant had not yet acquired any sort of right to enforce, the first respondent's reason for not having proceeded with issuing a registration certificate was quite reasonable under the circumstances.

Virtually all the parties urged me to peek into the second respondent's objection to the purported forfeiture of its mine and make a decision on it. The applicant urged me to disregard the objection as being invalid, allegedly because the purported forfeiture had

properly been carried out in accordance with the provisions of the Act. I was also asked to rule that the purported objection had been launched outside the prescribed time limits.

On her part, the first respondent urged me to take note of the fact that an objection had indeed been launched, and that therefore she was now enjoined to adjudicate upon it. It was argued that the applicant's reference to s 266 of the Act as being the provision dealing with the power of the mining commissioner to relocate the mining locations belonging to estates of deceased persons was misplaced because that was not the issue before the court.

On its part, the second respondent urged me to consider that the reasons proffered by it in its notice of objection were valid. It was argued that the first respondent had cited non-existent provisions in its purported forfeiture notice. Furthermore, she had given an insufficient period for objections.

With all due respect, the issue whether the first respondent's purported forfeiture of the second respondent's mining location was, or was not valid, was not before me. It could not have been before me before the first respondent herself had adjudicated upon it. For the parties to urge me to consider it was to jump the gun.

From s 345 of the Act onwards, the mining commissioner is given wide powers to resolve all kinds of mining disputes. The issue whether or not the second respondent's objection was valid fell squarely within the scope of disputes the mining commissioner is clothed with the necessary jurisdiction.

Mrs *Dzitiro* did not agree. She said because in s 345[1] this court is reposed with the original jurisdiction over any dispute arising under the Act, and that because as a court of justice it does not have to wait for an irregularity to play out before it can intervene, it meant there was no need for waiting for the first respondent to consider the second respondent's objection to the purported forfeiture when I could examine for myself the nature and manner of the objection and easily see that it was a nullity.

Mrs *Dzitiro*'s argument was ill-conceived. Section 345[1] of the Act reads:

“Except where otherwise provided in this Act, or except where both the complainant and defendant have agreed in writing that the complaint or dispute shall be investigated and decided by the mining commissioner in the first instance, the High Court shall have and exercise original jurisdiction in every civil matter, complaint or dispute arising under this Act and if in the course of any proceeding and if it appears expedient and necessary to the Court to refer any matter to a mining commissioner for investigation and report, the Court may make an order to that effect.”

Even accepting that this court has the original jurisdiction as urged upon me by the applicant, this section does not say this court can commandeer proceedings that are already under way within the mining commissioner's structures and finish them off itself. The dispute as to whether the first respondent's forfeiture of the second respondent's location, or whether the second respondent's subsequent objection thereto were valid or not are matters properly pending before the first respondent. No case has been made out why this court should intervene and interfere with them before they have been determined.

In the course of argument, Mrs *Dzitiro* evidently realised the futility of the applicant's case. She changed tack. At first she sought an alternative order, without abandoning the original one. The new order would be that, within sixty [60] days, the first respondent should be ordered and directed to attend to the verification and inspection of the applicant's pegs at the location, as well as consider the applicant's application for mining rights. When I intimated that the original remedies and the alternative ones seemed mutually exclusive, Mrs *Dzitiro* was initially adamant that she wanted it that way. Eventually, she completely abandoned the original orders and threw all her weight on the new ones.

Plainly, the applicant's case had not been thought through properly right from the beginning.

In order for me to determine the applicant's new claim, it was necessary, at the very least, to prove that there had been an inordinate delay by the first respondent in resolving the matter. No such averment existed in the body of the application. That simply had not been the focus of the original complaint. Thus, no basis for such a relief had been laid out anywhere. The period of sixty days was just a thumb-suck.

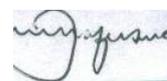
Furthermore, and at any rate, Mrs *Dzitiro* was constrained to argue convincingly that the paltry fifteen days between her letter of demand, on 9 November 2016, to when she launched the application, 24 November 2016, could, in all seriousness, be described as an unreasonable or inordinate delay. It was also not possible to argue convincingly that the less than one month period from the date when the second respondent launched its objection, on 28 October 2016, to the date of filing of the application, 24 November 2016, was an unreasonable delay. The applicant had just been rash in all its dealings.

Mrs *Dzitiro* changed tack further. She insisted that the period to consider should be from when the objection was launched with the first respondent, 28 October 2016, to when I heard the application, 30 May 2017, i.e. about five months. With due respect, that was just

being garrulous. There could be no substance in that argument. No such case had been laid out in the application. None of the parties had dealt with the fate of the second respondent's objection after the launch of this application. Nothing was laid out before me to enable a decision to be made on the point. There was no indication how much time would ordinarily be required for such objections to be dealt with. Even if the period beyond the filing of the application could properly be considered, still there was nothing to suggest that five months was a reasonable, or an unreasonable delay. There was no yardstick given or suggested by which to measure the reasonableness, or unreasonableness. It was all a dog's breakfast.

The application lacks merit. It is hereby dismissed with costs.

21 June 2017



*Mutumbwa Mugabe & Partners*, applicant's legal practitioners  
*Civil Division of the Attorney-General's Office*, first respondent's legal practitioners  
*Ndlovu & Hwacha*, second respondent's legal practitioners