

REPORTABLE (40)

MIDKWE MINERALS (PRIVATE) LIMITED
vs
(1) KWEKWE CONSOLIDATED GOLD MINES (PRIVATE)
LIMITED (2) CARSLONE ENTERPRISES (PRIVATE) LIMITED (3)
DEPUTY SHERIFF, KWEKWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MUTEMA AJA
BULAWAYO, SEPTEMBER 2, 2013

C Rungwanda, for the appellant

S Mazibisa with Mr V Matatu, for the respondents

ZIYAMBI JA: After hearing submissions by counsel, the Court dismissed the appeal with costs on the higher scale of legal practitioner and client and indicated that the reasons for its judgment would follow. The following are the reasons.

On 1 February 2006 and in terms of the Mines and Minerals Act [*Cap 21:05*] the first respondent (“KCGM”) as grantor and the Reserve Bank of Zimbabwe as tributor entered into a standard tribute agreement as well as a rental agreement in respect of Chaka Gold Plant. The life span of the agreement was three (3) years ending 2009 and renewable for another three (3) years to expire on 2 February 2012. The agreement was registered with the Mining Commissioner. The Reserve Bank during the initial term of the agreement mined the tributed claims and operated the Chaka Gold Plant through its subsidiary company Carlone Enterprises (Pvt) Ltd, (“Carlone”) the second respondent herein. However,

following a shift in policy, the Reserve Bank decided to shed all *quasi – fiscal* operations and the renewal of the tribute agreement was concluded between KCGM and Carslone.

On 15 December 2011 shortly before the expiry of the agreement Carslone wrote to the KCGM as follows:

“Dear Sir

RE: CARSLONE TRIBUTES, CHAKA PLANT

- 1.0 I refer to our telephone conversation and advise as follows:-
- 1.1 The Carslone tributes from KCGM will expire in February, 2012.
- 1.2 The Chaka Plant rental agreement will also automatically expire at the same time.
- 1.3 There are outstanding amounts for the tribute royalties and plant rental which you may discuss with Mr W. Kapofu and Mr E. Shuro for their correctness.
- 1.4 As we can no longer continue with quasi-fiscal operations, we recommend Midkwe Mining Services to be considered by KCGM to take over from Carslone. Your contact person is Honourable Mutomba.
- 1.5 Carslone will continue to rent out the excavator and two dumpers to Midkwe to ensure payment to the creditors outstanding as at today.
- 1.6 Your company may, as per recommendation, negotiate new tribute and rental agreements to replace our current arrangements at their expiration.

I would like to thank your company for the professional manner in which you handled business with Carslone Enterprises.

We undertake to do our best to pay the outstanding debts due to KCGM.

Our contact person remains Mr Wonder Kapofu, whom you are very familiar with.

Yours faithfully,

M.E. Chiremba
Chairman”

This letter was followed by a memorandum addressed to Carslone's Plant Engineer at Chaka Gold Plant which read as follows.:

MEMO

“TO: Mr C. Knight Plant Engineer, Chaka Gold Plant
FROM: Mr W. Kapofu
CC Mr A. Adolfo Technical Services Manager
CC Mr ET Nhamo GM Homestake Mining Group
DATE 30 January 2012

**RE: EXPIRY OF TRIBUTE FOR CASLONE ENTERPRISES AND
HANDOVER OF ASSETS**

1. The above issue refers.
2. Attached are letters from Homestake/KCGM as well as from their lawyers, Matatu and Partners, as you aware and can deduce from the letters the tribute agreement has expired for Carslone Enterprises. Please, therefore render their officials all the necessary assistance, in the most utmost professional manner, to facilitate a smooth hand over take over of all the assets from that were handed over to Carslone Enterprises in 2006.
3. Thanking you for your usual co-operation”.

Despite this memorandum, on the expiry of the lease Carslone continued to mine at Chaka Plant and refused to hand the plant over to KCGM. Thus it was that KCGM sought and was granted by the High Court on 29 February 2012, an interim interdict in the following terms:

“Pending the confirmation or discharge of the order, Applicant is granted the following interim relief:-

- (a) The Respondent be and is hereby interdicted from carrying out any mining operations on any of Applicant's Mining Claims or any operations at Chaka Gold Plant in whatever nature whatsoever.

- (b) The Respondent be and is hereby interdicted to ensure that any business partners, associates, previous employees or current employees refrain from carrying out any mining operations on mining claims previously tribute by the Respondent or the Reserve Bank of Zimbabwe and from any operations at Chaka Gold Plant, 4.5km peg, Kwekwe – Gokwe Road, Kwekwe”.

On 5 March 2012, the order was executed and the Deputy Sheriff closed down Chaka Gold Plant. The appellant immediately, on the 9 March 2012, filed an urgent application to the High Court in which it sought and obtained the following order:

“PROVISIONAL ORDER SOUGHT

- a) The 1st and 2nd Respondent be and are hereby interdicted from disturbing Applicant’s operations at Chaka Gold Plant and it’s mining claims especially using court order under Case No. HC 683/12 against Applicant.
- b) In the event that the Applicant’s custody possession and control had been disturbed by the Respondents the Respondents are hereby ordered to restore Applicant’s peaceful possession and control of Chaka Gold Plant and its mining claims”.

The Order lacked the characteristics of a provisional order. By all accounts it was a final order. Nevertheless the two matters came before the High Court for confirmation of the provisional orders and were consolidated. KAMOCHA J in his judgment dated 8 November 2012 confirmed the first order and discharged the second. This appeal is against the judgment of KAMOCHA J.

Much has been made by the appellant of the fact that the order of 29 February 2012 did not apply to it as it was not one of the parties to the application. However the order includes the business associates of Carslone and it is clear from an affidavit filed by William Mutomba who described himself as a director of the appellant, that the latter entered into a joint venture with Carslone for mining at Chaka plant. That affidavit was filed in the High

Court on 1 February 2012 in a matter in which the appellant was the first applicant and Carslone the second respondent. Paragraph 5 of the affidavit reads as follows:

“5. On or about 31st March 2011, the 1st Applicant and the 2nd Respondent entered into an agreement whereby the 1st Applicant took over the 2nd Respondent’s business as a going concern at Chaka Gold Plant, No. 1 Gokwe Road, Kwekwe. I attach hereto the agreement as Annexure ‘A’. Further to that agreement (Annexure ‘A’) the parties entered into a joint venture agreement on the 1st day of April 2011, wherein the 2nd Respondent indicated that it is *‘the holder of mining rights in terms of a tribute agreement with respect to certain gold claims situated in Kwekwe, namely Kwekwe Consolidated Gold Mines Claims’*. I attach hereto the joint venture agreement as Annexure ‘B’. As this Honourable Court will note from Annexure ‘B’, Mr Mirirai E. Chiremba, as the chairman of the Board for the 2nd Respondent signed the agreement as a representative for the 2nd Respondent”.

The appellant has not established any right whatsoever to occupy and mine on the premises which belong to the respondent. The tribute agreement with Carslone expired on 2 February 2012 as did the rental agreement which automatically expired at the same time. No tribute and rental agreements were concluded between the appellant and KCGM. The Mining Commissioner in his letter to KCGM dated 29 February 2012 advised as follows:

“Dear Sir

**REF: Current status of Tribute Agreement No. U/R05/06
KCGM in favour of RBZ**

Please be advised that according to records in this office, the above tribute lapsed on 3 February 2012 after six years to 2 February 2012.

Any person who is mining under the former agreement is doing so in contravention of Mining Law and should be reported to the police and section 289 of the Mines and Minerals Act (Chapter 21:05) should be invoked”.

The court *a quo* correctly found in my view that the appellant was mining in contravention of the law when he approached the court for the second provisional order on 9 March 2012. On p 4 of the cyclostyled judgment the court said:

“The applicant of the provisional order granted on 9 March 2012 under case number HC 800/12 was clearly mining in contravention of the mining law. This ought to have been clear to the applicant yet it still sought to have the provisional order confirmed when in fact it does not even have a *prima facie* right or real right to permanently interdict the owners from retaking their mining claims. There is no document filed of record from which the applicant in that case could derive a right.

In the result the provisional order granted in that case must be discharged while the provisional order granted under case HC 683/12 is confirmed”.

In the absence of a tribute agreement between it and KCGM the appellant has failed to establish a right to mine on the mining claims in question.

The judgment of the court *a quo* is unassailable. The appeal is devoid of merit.

As to the question of costs, an order for punitive costs was sought by the respondent. The request is in our view appropriate. The appellant has persisted in this appeal notwithstanding that it ought to have been quite clear to it that there was no legal justification for remaining in occupation of Chaka Gold Plant and mining the claims in question. Indeed the Mining commissioner on 17 August 2012 obtained a provisional order requiring the appellant to cease its mining activities on the said premises and to remove its machinery and workforce from the site yet the appellant has persisted in this appeal. There is no doubt that this is a proper case for a punitive order of costs.

Before concluding this judgment, I wish to express the disapproval of this Court of the manner in which this appeal was conducted by the appellant.

At the onset of the hearing, Mr *Rungwanda* made an application to have the matter struck off the roll. The reason tendered for this application was that Advocate *Uriri* whom he had briefed to argue the matter was ‘attending to family matters’. He could give no further details. The application was opposed by Mr *Mazibisa* on 3 grounds. Firstly, that the appellant was unwilling to prosecute the appeal and was employing delaying tactics. It had not paid the costs of preparation of the record nor had it paid security for costs as required by the Rules of this Court. It was KCGM who had applied to the Registrar to have the matter set down for hearing. Secondly, he was only notified, in court, of the intention to make this application and was unable to forewarn his colleague who appeared with him for KCGM and who had travelled from Kwekwe to attend the hearing. Thirdly, he alleged that the application lacks *bona fides* because the appellant is in control of the gold processing plant and has nothing to lose and everything to gain by the delay in finalizing the matter.

Mr *Rungwanda* in reply advised the Court that although he had instructed Mr *Uriri* to argue the appeal, he had no idea as to why Mr *Uriri* was unable to attend Court. He equally had no personal knowledge of the case and was not in a position to argue the matter, but stood by the Heads of Argument prepared by Mr *Uriri*. The Court took into account the submissions made in the Heads of Argument prepared by Mr *Uriri* in the determination of the appeal.

The conduct of the appellant’s legal practitioners exhibit disdain and disrespect for the Court which had travelled to Bulawayo from Harare to hear the appeal, only to be told at the hearing that the appellant wanted the appeal to be postponed *sine die*.

The grant or otherwise of a postponement is in the discretion of the court. A party seeking the grant of a postponement or other indulgence at the hearing must come prepared for a grant or refusal of its request. A legal practitioner must be prepared, in the event of a refusal by the court to grant a postponement, to proceed with the hearing if so ordered. In this case the legal practitioners for the appellant had filed heads of argument as far back as 10 July 2013. To appear before the Court totally unprepared and totally ignorant of the merits of the case in my view smacks of negligence on the part of the legal practitioner. Mr *Rungwanda* ought to have come prepared to argue the matter in the event that his application for deferment was refused.

CHIDYAUSIKU CJ: I agree

MUTEMA AJA: I agree

Garikayi & Company, appellant's legal practitioners

Mutatu & Partners, respondents' legal practitioners