SUNNY YIFENG TILES ZIMBABWE [PVT] LTD
versus
QUARRY PRODUCT DISTRIBUTION [PVT] LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 28 May 2024

Date of court order & *ex tempore* judgment: 28 May 2024
Date of written judgment: 8 November 2024

Opposed application

A. Ingwani, for the applicant
N. Chidembo, for the respondent

MAFUSIRE J

[1] At all material times the applicant and the respondent were both into mining. The litigation between them concerned granite mining at two locations in Mashonaland West Province, sitting on 40 hectares of land.

[2] In April 2024 the applicant applied to this court seeking two substantive remedies against the respondent. The one was that a certain tribute agreement between the parties be declared null and void. The other was an interdict to bar the respondent from carrying out mining operations on the two mining locations in question. Costs were sought on the higher scale.

[3] The application was forcefully opposed by the respondent. I heard it on 28 May 2024. Soon after argument, I granted the order sought but with no order as to costs. I gave my reasons *ex tempore* and considered myself *functus officio*. The reasons for my decision were quite elaborate. The order that I gave read as follows:

> "1. The purported Tribute Agreement signed by the parties on 28th of November 2022 is hereby declared invalid.
>
> 2 The respondent shall stop all mining operations and all works on the two mining locations situated at Stonehurst Farm, Mashonaland West Province, with registration certificates numbers 066987 DA and 066988 DA.

3. There shall be no order as to costs."

[4] After the order and judgment as aforesaid, the respondent wrote to the Registrar seeking the written reasons for my decision. Regrettably, there was a considerable delay in complying with that request. That accounts for the delay in issuing this judgment.

[5] A little more detail may shed some light. The Commercial Division is a paperless court. It is fully electronic. Among other things, it does not maintain physical records. Court proceedings, whether physical or virtual, are recorded electronically. Anyone wanting hard copies afterwards can have the recordings transcribed.

[6] Unfortunately, in this matter the digital recording system must have been malfunctioning at the time of the hearing. None of the digital tapes could be found afterwards, including my *ex tempore* judgment. I have now had to reproduce it largely from memory.

[7] Broadly, the facts and the issues were these. At all material times, the applicant was the registered holder of the two granite claims. In October 2022 it sold the claims, the mining equipment, machinery, vehicles, and buildings to the respondent in terms of a written sale agreement and an addendum thereto. The agreement specified the purchase price and the payment terms. The details are not important.

[8] In November 2022 the parties signed a tribute agreement in terms of which the applicant, as Grantor, granted the respondent, as Tributor, the right to work on the mines for the next three years, with rights of renewal. In return, the respondent would pay royalties.

[9] The applicant applied to the Provincial Mining Director for Mashonaland West Province ["***the PMD***"] to have the tribute agreement approved. The respondent had moved on site and taken over the mining operations.

[10] A payment dispute arose between the parties. Their relationship completely collapsed. In May 2023 the applicant purported to cancel the agreement of sale. Thereafter, it filed a court application under the case reference number HCHC 398/23 seeking

confirmation of the cancellation, the ejectment of the respondent from the mining locations, and damages. Costs were sought at the higher scale. The applicant also filed an urgent chamber application under HCHC 408/23 to bar the respondent from conducting mining operations at the locations. However the matter was deemed not urgent. It was removed from the roll.

[11] In December 2022 the applicant wrote to the PMD advising of its intention to cancel the tribute agreement, whether or not it had been approved. It cited irreconcilable differences between the parties that it said made the agreement impossible. It also advised of its intention to get back onto the mines and resume operations itself.

[12] The PMD responded in February 2023 essentially advising that a withdrawal from a tribute agreement had to be by the consent of both parties upon twenty one days' notice by the one party to the other.

[13] The applicant strenuously disagreed with the PMD's response. Through its legal practitioners, it wrote back to the PMD in June 2023, challenging the stance he had taken and pointing out how it was at variance with the legislation, particularly s 289 of the Mines and Minerals Act [*Chapter 21:05*] ["***the Act***"].

[14] Section 289 of the Act prohibits any party to a tribute agreement from exercising any rights under it unless and until such an agreement has been examined and approved by the Mining Affairs Board ["***the Board***"] or a mining commissioner. It is actually a criminal offence punishable by a fine for someone to defy this prohibition.

[15] The PMD recanted. On 3 July 2023 he addressed a single letter to both the applicant's legal practitioners and the respondent in the following terms:

> "The office is in receipt [of] a notice of cancellation of [the] tribute agreement application between Sunny Yi Feng [the Grantor] and Quarry Products Distributors by Sunny Yi Feng dated 21 December 2022 and we informed then informed [*sic*] Sunny Yifeng Tiles Zimbabwe P/L [to] direct the communication to the Tributor as the agreement is between the parties involved as in our letter dated 09 February 2023. In the face of the notice of withdrawal by the Grantor, this office cannot proceed with processing of the Tribute application unless parties are in agreement. In the event that parties later decide again to venture into a tribute agreement, a fresh application has to be submitted for consideration for approval."

[16] Not unexpectedly, the respondent did not accept the position taken by the PMD. It purported to appeal to the Minister of Mines and Mining Development ["***the Minister***"]. The grounds of appeal were multiple. In summary they were as follows:

- that the PMD had become *functus officio* in February 2023 after he had required the applicant to seek the respondent's consent before seeking to withdraw from the tribute agreement and that therefore he could not thereafter purport to withdraw approval of the tribute agreement as he had purported to do in his letter in July 2023;
- that to all intents and purposes the tribute agreement had been approved after the parties had signed it, submitted it and paid the registration fee for it, and appeared before the PMD himself but who had unlawfully held onto it in breach of the Administrative Justice Act [*Chapter 10:28*];
- that the PMD's letter of 3 July 2023 offended against the *sub judice* principle in that the matter was already the subject of litigation in court under HCHC 398-23 and the urgent chamber application;
- that the PMD's letter of 3 July 2023 offended against the *audi alteram partem* rule of natural justice in that the respondent was not heard before it was issued, and;
- that the PMD did not have the power to reject approval of a tribute agreement as such power is reposed in the Board.

[17] At the time of the hearing of this matter there was no information on the fate of the respondent's appeal to the Minister.

[18] Meanwhile, the respondent continued to be on the ground and mining. The applicant energetically took several other steps to have it barred from continuing with the mining operations and to have it ejected from the sites. In this regard, apart from HCHC 398-23 and the urgent chamber application under HCHC 408-23 aforesaid, the applicant caused the arrest of certain of the respondent's principal officers for illegal mining. The accused were released on bail.

[19] Apparently, HCHC 398-23 subsequently lapsed for want of prosecution. At the respondent's prompting, it was removed from the roll of pending matters. However, the applicant applied under HCHC 13-24 to have HCHC 398-23 reinstated. At the time of the hearing of this matter, HCHC 13-24 was still pending.

[20] Before me, the issues were simply whether or not the tribute agreement was valid and whether or not the respondent was entitled to carry on with mining operations or, conversely, whether the applicant was entitled to an interdict.

[21] The respondent raised some preliminary objections against the hearing of the matter on the merits. The one was *lis pendens*. The respondent argued that given that in HCHC 389-23 the applicant had applied for the same remedy as in this matter, that although that case had at one time lapsed, the applicant had nonetheless applied under HCHC 13-24 to have it reinstated, which application was still pending, this matter should therefore be held in abeyance until HCHC 389-23 was determined to finality.

[22] I had no difficulty in disposing the respondent's preliminary objection above. For *lis pendens* to succeed, like *res judicata*, the previous or outstanding suit must have been between the same parties over the same cause of action and for the same remedy. In the instant case, whilst the parties were the same, the causes of action were different. Even the remedies sought were different.

[23] In HCHC 398-23, the cause of action upon which the applicant sought the respondent's eviction from the mines, was the cancellation of the agreement of sale on which the respondent's right to occupation hinged. *In casu*, the cause of action was the invalidity of the tribute agreement.

[24] Furthermore, in HCHC 398-23, the remedy sought was the confirmation of the cancellation of the agreement of sale, and damages. *In casu*, what was sought was the declaration of invalidity of the tribute agreement. In the former case, the applicant sought ejectment. In the instant case it sought an interdict. Plainly, *lis pendens* did not apply.

[25] That the Minister was still to make a decision on the respondent's appeal to him did not preclude this court from hearing the matter. As can be see above, the issues raised in the appeal were quite numerous but far different from the issues before me. Before me, the single and most important issue was whether or not the tribute agreement was valid in terms of the law.

[26] Another preliminary objection taken by the respondent to prevent the hearing of the matter on the merits was that there had been a material non-joinder of a relevant party, namely the Minister himself. It was argued that it was the Minister, as the administrative authority, whose decision was the subject of the proceedings.

[27] With respect, this objection sounded rather desperate and confused. Firstly, the Minister had made no decision. Secondly, whether or not he had, the one and only dispute was solely between the parties as they appeared before the court. There was nothing that could preclude the hearing and determination of that dispute. At any rate, if the respondent felt that the Minister was a necessary party, nothing stopped it from applying to join him.

[28] The respondent's objections lacked merit. I had no hesitation in declaring the purported tribute agreement upon which the respondent based its continued occupation of the applicant's mines invalid for want of compliance with the law.

[29] Tribute agreements are tightly controlled by statute, primarily Part XVIII of the Act which governs the approval process. Among other things, and in terms of s 286, a valid tribute agreement is one which the Board has approved. After such approval, it is then mandatory for the Board to endorse the approval on the agreement and inform the owner or occupier of the land concerned. None of that had happened when the applicant decided to withdraw from the tribute agreement in question.

[30] Until approval as prescribed by law is completed, no rights or obligations derive from a tribute agreement. The respondent argued that the tribute agreement in question had been registered and approved. That was factually incorrect. All that had happened was that after the parties had signed the written document, the applicant had submitted it for approval and registration. But the process was not completed. The applicant withdrew from the process. The PMD's earlier direction to the applicant to get the consent of the respondent was manifestly incorrect. It was his second decision that was consonant with the law.

[31] It was for these reasons that I granted the order above. However, contrary to the general rule on costs that they follow the result, in this matter I denied the applicant

its costs because I was persuaded that it had been behaving like a loose cannon, running all over the show and ratcheting up the costs unnecessarily.

[32] I considered that the applicant should have decided on the course of action it wished to pursue and stick to it to completion. It had initially been to court under HCHC 398-23. The matter had lapsed and been deemed abandoned. That was its fault. It had then applied for reinstatement. At the hearing there was nothing solid that the reinstatement application was actively being pursued. On top of that, the applicant was invoking criminal sanctions against the respondent's personnel over what was manifestly a civil dispute. In the exercise of my discretion I felt that despite its success, the applicant was not entitled to its costs.

8 November 2024

Ingwani Chipetiwa Group, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners