

Judgment No. HB 224/12
Case No. HC 683/12
X REF HC 800/12; 118/12;
1005/12; 2776/11; 3514/11;
Hre 2497/12; K 54/12

MIDKWE MINERALS (PVT) LTD

Versus

KWEKWE CONSOLIDATED GOLDMINES (PVT) LTD

And

THE DEPUTY SHERIFF – KWEKWE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 27 JUNE; 5 JULY & 8 NOVEMBER 2012

Chamunorwa for the applicant
S. Mazibisa with Mutatu for respondent

Opposed Court Application

KAMOCHA J: In this case two matters were consolidated and heard at the same time. In the first matter which was Kwekwe Consolidated Gold Mines (Pvt) Ltd - KCGM vs Carlone Enterprises (Pvt) Ltd a provisional order was granted in these terms on 29 February 2012:-

“Interim relief granted

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.”

The final order sought was in the following terms:-

- “(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, pending the handover – takeover of the plant between applicant and respondent.
- (b) The respondent is ordered to pay costs of suit on a higher scale.”

Then on 9 march 2012 the applicant Midkwe Minerals (Pvt) Ltd sought and was granted a provisional order whose terms were these:-

- “(a) The 1st and 2nd respondents be and are hereby interdicted from disturbing applicant’s operations at Chaka Gold Plant and its mining claims especially using court order under case number 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 final order sought was to the following effect:-

- “(a) The 1st and 2nd respondents be and are hereby permanently interdicted from disturbing applicant’s operations at Chaka Plant and its running claims;
- (b) Costs of suit shall be borne by the respondents jointly and severally.”

The germane facts giving rise to these cases may be summarized as follows. On 1 February 2006 Kwekwe Consolidated Gold Mines (Pvt) Ltd and the Reserve bank of Zimbabwe entered into a standard tribute agreement and a rental agreement for Chaka Gold Plant in terms of the Mines and Minerals Act. The tribute agreement was registered with the regional Mining Commissioner. Kwekwe Consolidated Gold Mines (Pvt) Ltd was the grantor while the Reserve Bank of Zimbabwe was the tributor.

The initial life span of the tribute agreement was 3 years i.e. up to 2 February 2009. It was renewable for a further 3 years up to 2 February 2012.

The Reserve Bank was mining the tribute claims and operating the Chaka Plant through its subsidiary company known as Carslone Enterprises (Pvt) Ltd. When the Reserve Bank of Zimbabwe decided to have a shift in its policy and shed off quasi – fiscal operations Kwekwe

Consolidated Mines (Pvt) Ltd and Carslone Enterprises (Pvt) Ltd agreed to continue with the tribute agreement until its expiration on 2 February 2012.

On 15 December 2011 Carslone Enterprises (Pvt) Ltd wrote a letter to Mr E. Nhamo the managing director of Kwekwe Consolidated Gold Mines (Pvt) Ltd (KCGM)/ Hometake Mines as follows:-

“Dear Sir

Re: Carslone Tributes, Chaka Plant

1. I refer to our telephone conversation and advise as follows:
2. The Carslone tributes from KCGM will expire in February 2012.
3. The Chaka Plant rental agreement will also automatically expire at the same time.
4. 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.
5. 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.

6. Carslone will continue to rent out the excavator and two dumpers to Midkwe to ensure payment to the creditors, outstanding as at today.
7. 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”

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As is clear from the above letter the Carlone tributes from Kwekwe Consolidated Gold Mines (Pvt) Ltd expired on 2 February 2012 and so did the Chaka Plant rental agreement which automatically expired at the same time. Quite clearly there is no new tribute and rental agreement between the respondent and applicant. The Mining Commissioner puts that beyond any doubt in his letter of 29 February 2012 addressed to Kwekwe Consolidated Gold Mines (Pvt) Ltd marked for the attention of Mr E.T. Nhamo as follows:-

“Dear Sir

REF: Current status of Tribute Agreement No. U/R 05/06 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.

Yours faithfully

W. M. Dube

Mining Commissioner

c.c. Att M. Chiremba
R B Z
Box 1283
Harare”

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. I accede to the proposed

amendment to the provisional order granted exercising my powers under Order 32 Rule 240 of the rules of this court.

This is a proper case where punitive costs should be awarded. It is clear that the tribute agreement lapsed on 2 February 2012 and so did the Chaka Plant rental agreement but Midkwe Minerals (Pvt) Ltd continued to conduct mining operations unlawfully and had the audacity to seek to interdict the legitimate owners permanently. This type of conduct cannot be countenanced by this court which must show its displeasure by making an award of costs on an attorney and client scale.

In the result the order of this court is as follows:

- (1) The respondent Carslone Enterprises (Pvt) Ltd under case number HC 683/12 and applicant Midkwe Mining Minerals (Pvt) Ltd under case number HC 800/12 be and are hereby interdicted from carrying out any mining operations on any of the Kwekwe Consolidated Gold Mines (Pvt) Ltd mining claims or conducting any operations at Chaka Gold Plant located at 4.5km peg along the Kwekwe – Gokwe Road.
- (2) The Deputy Sheriff Kwekwe with the assistance of the Zimbabwe Republic Police if need be, be and are hereby ordered to ensure compliance with 1 above.
- (3) The provisional order granted under case number HC 800/12 be and is hereby discharged.
- (4) The applicant be and is hereby ordered to pay costs of suit on an attorney and client scale for cases number HC 683/12 and HC 800/12.

Garikayi & Company, applicant's legal practitioners
Mutatu & Partners respondent's legal practitioners