ANATOTH MINING (PVT) LTD

Versus

BRIGHTON NYAMUCHO

And

GARLOREM RESOURCES (PVT) LTD
t/a KIMS INVESTMENTS

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 8, 14 & 21 MARCH 2013

J. Nyarota for applicant
L. Mashanyare for second respondent
No appearance from first respondent

Opposed Court Application

KAMOCHA J: The background information in this matter may be surmised as follows:

The first respondent Brighton Nyamucho entered into a tribute agreement with Anatoth Mining (Pvt) Ltd – the applicant on 15 June 2012 in terms of which applicant leased respondent's mining claims in Gweru district being Panorama 191, 193, 22 and 207.

The tribute agreement was for a period of three years with applicant having the right to renew it for a further three year period until 14 June, 2018

In terms of section 13 of the tribute agreement the grantor gave the tribute the option to purchase the tribute mining claims during the tribute period.

Despite the option to buy given to the applicant in the tribute agreement the first respondent proceeded to sell the tribute mining claims to the second respondent on 24 July 2012 without the knowledge of the applicant who had, by that time, submitted the tribute agreement to the Gweru Mining Commissioner for approval in terms of section 284 of the Mines and Minerals Act [Chapter 21:05] – 'the Act" and had also paid $38 200 inspection fees.

The purported second sale was not submitted to the Mining Commissioner for his examination and approval.

Neither was it registered and transferred into the name of second respondent by the Mining Commissioner in terms of section 275 (7) of the Act.

On 30 July, 2012 first respondent wrote a letter to the applicant purportedly to cancel the tribute agreement with the applicant. The purported cancellation was, however, contrary to the provisions of clause 10 of the tribute agreement between the parties which provides:-

> "(1) should the Tributor commit any breach of the conditions of this agreement the grantor may make immediate demand upon the Tributor to rectify any such breach within 7 days from the date of demand and should the Tributor fail so to rectify that breach of agreement then and in such case the grantor shall have the right to terminate this agreement by giving one month's notice in writing to that effect to the tributor subject to such determination not in any way affecting any claim grantor (sic) in respect of such breach."

The first respondent completely ignored the above provisions for reasons only known to himself.

While conceding that there was no evidence to show that the second respondent was *mala fide* when it purchased the said claims it was submitted by the applicant's counsel that second respondent had not been diligent because if it had been, it would have found out that there was a registered tribute agreement in force which had a right of first refusal clause in it.

Mr *Mashanyare* representing the second respondent correctly conceded, in my view, that the sale between first and second respondents was not completed. He, however, suggested that it was at an advanced stage of completion. The simple fact is that it was not complete that is why transfer and delivery had not been effected. Further the second respondent had not even taken occupation. The applicant was still in occupation.

The balance of convenience favours the applicant which had thus far incurred expenses in excess of $70 000 on the claims and had filed proof of expenses. The second respondent had incurred expenses in the sum of $17 000 only.

The first respondent has filed an affidavit wherein he consented to the order sought by applicant and undertook to refund the second respondent what he had paid for the claims and compensate whatever expenses it incurred pursuant to their purported agreement.

The second respondent refused to accept that and maintained that he was the new owner of the claims. His assertion was erroneous. He was not the new owner as transfer and delivery had not been effected in his favour.

Costs

The applicant submitted that this was a proper case to award punitive costs against the losing parties. The first defendant although he has had a change of heart he is the one who caused all the trouble. He knew he had entered into a tribute agreement with applicant on 15 June 2012 and yet purported to sale the same mining claims on 24 July 2012 to the 2nd respondent. He knew the first sale had a first refusal clause. He was clearly dishonest. He deserves to pay punitive costs.

The second respondent went wrong by taking the law into his own hands and resorted to self help. That cannot be countenanced by this court which shall show its displeasure by an award of punitive costs against him.

The parties agreed at the commencement of the hearing that the decision in this particular case number HC 2818/12 will dispose of case in number HC 2817/12.

Accordingly, it is ordered that the application in case No. HC 2818/12 be and is hereby granted in terms of the draft as amended and the one in case No. HC 2817/12 automatically falls away.

Wilmot & Bennet, applicant's legal practitioners
Garikayi & Company, 2nd respondent's legal practitioners