CHIROSWA MINERALS (PRIVATE) LIMITED
and
BASE MINERALS (PRIVATE) LIMITED
versus
MINISTER OF MINES
and
MORRIS TENDAYI NYAKUDYA
and
VAMBO MILLS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 16 June 2011 and 15 November 2011

F.M. Katsande, for the plaintiffs
S.V. Hwacha, for the 2nd and 3rd defendants

PATEL J: The parties herein concluded three separate tribute agreements relating to the mining location at Dodge Mine in Shamva. The issues for determination arise from the subsistence of the first 10 year agreement between the 1st plaintiff and the 2nd defendant, following the conclusion of a second 3 year agreement between the same parties. The plaintiffs seek the nullification of the first agreement and the registration by the 1st defendant of a subsequent tribute agreement entered into between the plaintiffs. The 1st plaintiff also seeks an order for the ejectment of the 2nd and 3rd defendants from Dodge Mine and for the payment of royalties in respect of their use and occupation of the mining location. The 2nd and 3rd defendants contend that they are entitled to remain in occupation by virtue of the first agreement. The 1st defendant has indicated that it will abide by the judgment of the Court.

At the conclusion of the trial, both counsel were directed to file their closing submissions in writing. They were specifically tasked to consider, as a preliminary matter, the legality and enforceability of the first 10 year agreement. Mr. *Katsande* duly filed

his submissions, while Mr. *Hwacha's* submissions have yet to be filed, four months after the trial.

The Evidence

John Richard Needham Groves is the Managing Director and sole shareholder of the 1st plaintiff. He testified as follows. The first 10 year tribute agreement between the 1st plaintiff and the 2nd defendant was concluded on 17 May 2005. It was rejected by the Mining Commissioner on the ground that a 10 year tribute agreement was not registrable. It was then superseded by the second 3 year tribute agreement entered into on 18 May 2005. There was a further agreement on 18 August 2005 for the purchase of the 1st plaintiff's mining equipment by the 2nd defendant. Following various breaches of both agreements, an addendum was signed on 8 August 2006 extending the deadlines for payment of the capital sum and 5% royalties. The 2nd defendant did not comply with his obligations under these agreements, despite several written warnings and a notice of cancellation dated 9 October 2006. According to the purchase agreement of 18 August 2005, the capital assets were valued at US$75,000. The 2nd defendant made payments totalling ZW$671 million, which were treated as interest. After the expiry of the second 3 year agreement, on 22 May 2008, the 1st plaintiff did not receive any further payments for the capital assets or royalties, nor did the 2nd defendant submit any production returns. A registered letter was sent to the 2nd defendant at his address for service on 7 May 2008, asking him to rectify these breaches. However, it was returned as having been unclaimed. The 2nd and 3rd defendants remain in productive occupation of the six claims at Dodge Mine. The claims are registered in the name of Chirozwa Syndicate which also concluded the tribute agreements with the 2nd defendant. The syndicate was a partnership between the witness and one Cargill. The latter withdrew from the

partnership and the witness then became the sole owner of the claims.

Lovemore Kakuvi has been the Finance Manager of the 1st plaintiff since 1985. He confirmed that since 2008 no production returns for the Dodge Mine claims were filed with the Mining Commissioner's offices in Harare and that no copies of any such returns were received by him. He wrote to the 2nd defendant asking for copies and delivered his letter by hand, but there was no response.

Peter Valentine is the Managing Director of the 2nd plaintiff. In May 2008 the 1st and 2nd plaintiffs concluded a tribute agreement in respect of the Dodge Mine claims. The 1st defendant has not registered this agreement because of the present dispute. In 2008, the witness was appointed by Groves to manage Dodge Mine. He ascertained from the offices of the Ministry of Mines and the Mining Commissioner that no production returns were submitted. However, as was confirmed by the Minerals Marketing Corporation of Zimbabwe, the 2nd and 3rd defendants were exporting minerals to two companies in South Africa. He compiled and produced records of the monies received by the 3rd defendant from January 2007 to November 2010 in respect of these exports. He queried the exports with the Ministry of Mines but received no response. He visited Dodge Mine in January 2011 and found that mining operations were continuing but, as at the present time, there are still no production returns for the mine.

Morris Tendayi Nyakudya is the 2nd defendant and Managing Director of the 3rd defendant. His evidence was that the first 10 year agreement was never cancelled. It was not registered by the Ministry of Mines because it was not a standard tribute agreement. However, it was agreed by the parties that it would govern what was intended to be a long term relationship between them. The second 3 year agreement was concluded as a device to enable the parties to begin mining operations immediately. The 3rd defendant

was then formed to take over the operations at Dodge Mine. The notice of cancellation referred to by Groves was merely a notice to rectify various breaches, and there was no formal cancellation thereafter. Various payments were made by the 3rd defendant and accepted by the 1st plaintiff in respect of royalties and assets from June 2006 to September 2008. The amount of royalties paid was 10% of export proceeds, and not 10% of production as was required by the tribute agreements. The total amount paid was $671 million, being $91 million for royalties and $580 million for assets. At the exchange rate of ZW$100,000 to US$1 prevailing on 31 July 2006, this amount equated to a sum of US$5,800. Apart from what was contained in the record, the 3rd defendant made certain payments in foreign currency and fuel coupons equating to about US$10,000. The 1st plaintiff also withdrew US$4,000 from export receipts, and it benefited from a sum of US$3,000 garnished by the National Social Security Authority. The 2nd defendant kept a production record at Dodge Mine. Although both agreements required him to file production returns with the Ministry of Mines, it was verbally agreed that the 1st plaintiff would do so. The production record was removed from Dodge Mine by Valentine. Thereafter, the 3rd defendant obtained quarterly export licences without the submission of production returns. Under cross-examination, the 2nd defendant could not explain why his assertions relating to the production record and returns were not put to the three previous witnesses. He also stated that after the expiry of the registered 3 year agreement on 22 May 2008, he and the 3rd defendant continued mining in terms of the unregistered 10 year agreement. This clearly contradicted the averments in his opposing affidavit, in Case No. HC5009/2008, to the effect that the 3 year agreement was renewed and was currently registered.

Subsistence of 10 Year Agreement

It is common cause that the first 10 year agreement was entered into on 17 May 2005 but was never registered at any stage thereafter. It was immediately replaced, the following day, by the second 3 year agreement, which eventually expired on 18 May 2008. The intention of the parties in concluding two tribute agreements is not entirely clear. According to the 2nd defendant, they were meant to operate concurrently. The letter of 9 October 2006 from the 1st plaintiff, giving the 2nd defendant 30 days notice to rectify certain breaches, would appear to support that contention, though the evidence of Groves was that the letter was written as a mere formality. In any event, the letter states that the 2nd defendant's failure to rectify his breaches would entitle the 1st plaintiff to cancel the 10 year agreement without further notice. It is not in dispute that there was no further notice of cancellation thereafter. Nevertheless, it is arguable that cancellation automatically ensued upon expiry of the 30 day deadline without any remedial action having been taken by the 2nd defendant.

There is also the clear and unchallenged determination of Bhunu J in HH 107-2010, handed down on 16 June 2010, that "the first agreement was superseded, novated or amended by this second agreement … for the simple but good reason that it was never registered [and] having been novated, abrogated, superseded or amended by the second agreement it became a nullity and of no force or effect". While I am in broad agreement with these findings, it seems to me that there is a further and stronger ground for invalidating and disregarding the first agreement, arising from the statutory requirement of registration.

Non-compliance with Statute

The general principle governing non-compliance with statutory provisions was concisely spelt out by Innes CJ in *Schierhout* v *Minister of Justice* 1926 AD 99 at 109:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. …And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected."

The nature and effect of statutory injunctions was fully considered by this Court in *(1) State* v *Gatsi (2) State* v *Rufaro Hotel (Private) Limited T/A Rufaro Buses* 1994 (1) ZLR 7 (H). The principal issue for determination was the validity of the Presidential Powers (Temporary Measures) (Control of Omnibuses and Heavy Vehicles) Regulations 1991, consequent upon the failure to lay them before Parliament within the time specified in the enabling statute, the Presidential Powers (Temporary Measures) Act 1988. The Court (comprising Sandura JP, Smith J and Adam J) cited several South African and English cases dealing with the distinction between peremptory and directory statutory requirements and the effect of non-compliance with such requirements. In *Sutter* v *Scheepers* 1932 AD 165 at 173-174, Wessels JA observed as follows:

> "Now it is admittedly a difficult matter to lay down any conclusive test as to when a provision is directory and when it is peremptory. A long series of cases both here and in England have evolved certain guiding principles. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive, but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction: *Standard Bank Ltd* v *van Rhyn* (1925 AD 266).
>
> (1) If a provision is couched in a negative form it is to be regarded as a peremptory rather than as a directory mandate. To say that no power of attorney shall be accepted by the Deeds Office unless it complies with certain conditions rather discloses an intention to make the conditions peremptory than directory: though even such language is not conclusive.
>
> (2) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.
>
> (3) If, when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not

complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(4) The history of the legislation will also afford a clue in some cases."

Similarly, in *Leibbrandt* v *South African Railways* 1941 AD 9 at 12-13, de Wet CJ stated that:

> "The cases on the subject show that it is impossible to lay down any conclusive test as to when a legislative provision is directory and when it is peremptory. In the case of *Liverpool Bank* v *Turner* 30 LJ Ch 379, Lord Campbell summed up his conclusion as follows:
>
> > 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of Legislature by attending to the whole scope of the statute to be construed.'
>
> In the case of *Howard* v *Bodington* 2 PD 203, Lord Penzance, after stating that he had considered the principal cases on the subject and as a result agreed with the conclusion expressed by Lord Campbell, went on to say:
>
> > 'I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon review of the case in these aspects decide whether the matter is what is called imperative or only directory.' "

Again, in *Messenger of the Magistrate's Court, Durban* v *Pillay* 1952 (3) SA 678 (A) at 682-683, van den Heever JA noted that:

> "In *Sutter* v *Scheepers* 1932 AD 165 at p 173, Wessels JA stated certain rules as guidance in determining whether a statute is peremptory or directory but, as he himself observed, his rules were not intended to be an exhaustive list or a comprehensive guide. The cardinal rule is that stated in *Standard Bank* v *Estate van Rhyn* 1925 AD 266 at p 274: 'After all what we have to get at is the intention of the Legislature' or as Viscount Cave LC observed in *Salford Guardians* v *Dewhurst* [1926] AC 619 at p 626: 'I base my decision upon the whole scope and purpose of the statute, and upon the language of the sections to which I have specifically referred.' "

Turning to the consequences of non-compliance, van der Heever JA stated as follows:

> "In the first place the sub-rule with which we are concerned is couched in peremptory terms: the messenger 'shall cause the sale to be advertised…' The Afrikaans has the categorical imperative 'moet'. If a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that issuers of the command intended disobedience to be visited with nullity."

As is pointed out in Maxwell: *Interpretation of Statutes* (7th ed.) at p. 316, the failure to comply with a peremptory requirement is usually presumed to entail nullity:

> "Where powers are … granted with a direction that certain regulations or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a vigorous observance of them as essential to the acquisition of the … authority conferred, and it is therefore probable that such was the intention of the legislature."

To similar effect, in *Nkisimane & Others* v *Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434, Trollip JA stated that:

> "…a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity."

In the *Gatsi & Rufaro Hotel* case, *supra*, at 28-29, Smith J correctly observed that the proper inquiry as to the consequences of non-compliance is to ascertain the true intention of Parliament:

> "Where a statute requires that something be done without stating the consequence of non-compliance with the provision, the normal course followed in order to determine the consequence is to ascertain whether the provision concerned is peremptory or merely directory. If it is peremptory, then the act is a nullity; if it is directory, then the act has legal effect despite the non-observance of the provisions of the statute. In *Lion Match Co* v *Wessels* 1946 OPD 376 van den Heever J (as he then was) pointed out that the expressions "peremptory" and "directory", as applied to statutory provisions, are unfortunate ones, as the court is concerned not with the quality of the command but with

> unexpressed consequences following from it, as presumed to have been intended by the Legislature.
>
> …Whatever terminology is used, however, and whatever label is given to the test, it does not affect the nature of the inquiry which the court is called on to make in order to attempt to ascertain the intention of the Legislature."

A case that is highly instructive in the present context is that of *X- Trend-A-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (S), relating to compliance with section 39 of the Regional Town and Country Planning Act [*Chapter 29:12*]. The question to be decided was whether, when an agreement for the sale of a portion of property was made conditional on the obtaining of a permit for subdivision, the agreement was valid. In the earlier case of *NCR Zimbabwe (Pvt) Ltd* v *Gulliver Consol Ltd & Anor* 1993 (1) ZLR 205 (H), it was held that section 39 did not prohibit a sale agreement if it was made conditional on the grant of a permit for subdivision. In the instant case, the Supreme Court overruled that decision. It was held that, assuming this was an agreement of sale subject to a suspensive condition, such an agreement constituted a contract which could be enforced, but subject to any legislation to the contrary. Section 39 forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under section 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for the change of ownership of an unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing, or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited and therefore unenforceable.

Governing Statutory Provisions

Part XVIII of the Mines and Minerals Act [*Chapter 21:05*] regulates the approval of tribute agreements. In terms of section 284:

> "The terms of every tribute agreement shall be reduced to writing and such agreement, together with the prescribed number of copies thereof, shall be submitted to the mining commissioner for examination and approval by the Board or the mining commissioner."

Section 285 enables the mining commissioner to approve a tribute agreement which conforms to a standard agreement drawn up and approved by the Mining Affairs Board. In every other case, the agreement must be submitted to the Board for examination and approval. Section 286 prescribes the criteria for approval of tribute agreements by the Board and provides as follows:

> "If upon examination of any tribute agreement which has been submitted to it by a mining commissioner the Board is satisfied –
>
> (*a*) that the method of fixing the tribute royalty payable to the grantor and the rate of such royalty are satisfactory and are not likely to retard the progress or expansion of the mine or bring about the early cessation of mining operations; and
>
> (*b*) that the interests of both the grantor and the tributor are adequately safeguarded thereunder; and
>
> (*c*) that the period of such agreement is clearly defined and, if termination of the agreement by notice is provided for, that the interests of the parties to the agreement are adequately protected; and
>
> (*d*) that the development work required by the agreement is reasonable in the circumstances and is not unduly burdensome or likely to cause the premature cessation of mining operations on the mine; and
>
> (*e*) that the tributor is required to carry out sufficient development work to ensure the continuity of mining operations on the mine; and
>
> (*f*) that the grantor is entitled periodically and at reasonable times to inspect the mine and satisfy himself that the terms of the agreement are being observed; and
>
> (*g*) that in all respects the agreement is satisfactory and likely to result in the mine being mined to the best advantage;
>
> the Board may approve the agreement and shall endorse such approval thereon and shall inform the owner or occupier of the land concerned of such approval."

Section 287 empowers the Board to decline its approval or to approve an agreement subject to such amendments as it may deem fit. Section 288 mandates the Board and the mining commissioner to keep a copy of every tribute agreement submitted for approval.

Section 289 stipulates the penalty for acting under any unapproved agreement as follows:

> "(1) No party to a tribute agreement shall exercise any right under such agreement unless and until such agreement has been examined and approved by the Board or a mining commissioner.
>
> (2) Any party who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six."

Section 290 prohibits and penalises the disposal of minerals under an unapproved agreement:

> "(1) If a tributor is mining a mining location under an unapproved agreement or in conflict with the terms of an approved agreement the mining commissioner shall issue an order prohibiting the disposal of minerals from such mining location until he is satisfied that the agreement has been approved under this Part or until the terms of the approved agreement are complied with.
>
> (2) Any miner of such mining location who fails to observe such an order and any person knowing of such an order who contrary thereto receives any minerals from such mining location shall be guilty of an offence."

Validity of 10 Year Agreement

Section 284 of the Mines and Minerals Act requires that every tribute agreement must be submitted for examination and approval by the Board or the mining commissioner. More significantly, section 289(1) declares, in unequivocally clear language, that no party to a tribute agreement shall exercise any right under such agreement unless and until such agreement has been examined and duly approved. Section 289(2) makes it a punishable offence for any person to contravene this prohibition. Equally significantly, section 290(1) enjoins the mining commissioner to prohibit the disposal of any minerals extracted from any mining location under an unapproved agreement. In terms of section 290(2), any miner who fails to observe such prohibition is guilty of an offence.

Applying the interpretive guidelines enunciated in *Sutter's* case, *supra*, we find that the provisions of sections 289 and 290 are couched in negative form. We also find that any contravention of

their proscriptive injunctions is to be visited with penal sanctions. Having regard to these features, I have no doubt whatsoever that these provisions are intended to be peremptory rather than merely directory. In other words, no person may exercise any right under a tribute agreement or exploit any minerals thereunder unless and until the agreement is approved by the mining commissioner or the Board.

What then are the consequences of disobedience? In particular, does it entail the nullification of an unapproved tribute agreement? Taking into account the criteria for approval enumerated in section 286, it seems to me that the object of these provisions is to ensure, *inter alia*, that the interests of both grantor and tributor are adequately safeguarded and, more importantly, that the mine in question is mined to best advantage so as to avoid the premature cessation of mining operations. To allow the parties to operate a mine under an unapproved tribute agreement would be to totally disregard the critical factors that Parliament has prescribed as being essential to the orderly and beneficial exploitation of mining locations generally. Taking all the provisions of Part XVIII within the context of the Act as a whole, I take the view that Parliament intended to render invalid any tribute agreement which has not been approved by the Board or the mining commissioner. Any other conclusion would simply serve to negative the very purpose of Part XVIII of the Act.

It follows from all of this that the first 10 year tribute agreement *in casu*, having never been approved in terms of Part XVIII, is invalid and unenforceable. Consequently, it cannot be invoked or relied upon to confer any right or interest on any of the parties thereto.

<u>Royalties and Capital Assets</u>

The 2nd defendant was unable to furnish any production returns for the period in question in order to determine what royalties should have been paid in respect of the productive use of Dodge Mine since May 2005. His assertion that the production record was seized by Valentine is nothing more than fanciful creativity, neither having been mentioned in the defendants' pleadings nor having been put to the plaintiffs' witnesses in cross-examination. In any event, the paltry sums that were paid were entirely deficient and were delivered later than was stipulated.

In terms of the Memorandum of August 2005 and the Addendum of August 2006, the purchase price for the capital assets sold by the 1st plaintiff was US$75,000. According to the 2nd defendant, the total amount paid by the defendants towards royalties and the purchase of assets was $671 million, being $91 million for royalties and $580 million for assets, which sums at the prevailing exchange rate equated to US$910 and US$5,800 respectively. Apart from this, the 2nd defendant claims that the 1st plaintiff received about US$10,000 in cash and fuel coupons and a further US$7,000 from other sources. The papers filed of record contain no mention of such payments and no documentation was produced at the trial to support them. The 2nd defendant's evidence in this regard cannot be accepted.

In short, the 2nd and 3rd defendants have defaulted continually and massively in their payment obligations relating to capital assets and royalties. The 1st plaintiff is therefore entitled to the payment of royalties at the rate of 5% stipulated in the registered tribute agreement. Moreover, by virtue of clause 9 of the 2005 Memorandum and clause 4 of the 2006 Addendum, it is entitled to repossess the assets without compensation.

Relief Granted

First and foremost, it is necessary to declare the invalidity of the 10 year tribute agreement and the validity of the 3 year tribute

agreement as the operative contract between the parties. Secondly, the latter agreement having expired by effluxion of time, the 2nd and 3rd defendants must vacate Dodge Mine or be ejected therefrom. Thirdly, there being no legal obstacle to the registration of the tribute agreement between the 1st and 2nd plaintiffs, the 1st defendant, who was to abide by the decision of the Court, must be ordered to cause the registration of that agreement by the relevant authorities in accordance with the governing statutory provisions.

The determination of royalties can only be achieved by appointing an expert assessor to calculate the amount of production on which the 5% royalties should be assessed, having regard, *inter alia*, to the production records and returns, if any, furnished by the 2nd and 3rd defendants. As regards capital assets, the 2nd and 3rd defendants must be ordered to restore the assets listed in the annexure to the 2005 Memorandum. Insofar as concerns the amounts that they claim to have paid for the assets, *i.e.* the Zimbabwe Dollar equivalent of US$5,800, it seems just and equitable that they be forfeited and accounted for as fees for the beneficial use of the assets, valued at US$75,000, for a period of over 6 years.

As for costs, there is no reason why they should not follow the result. They must be borne by the 2nd and 3rd defendants.

It is accordingly declared that:

1. The tribute agreement dated 17 May 2005 between the 1st plaintiff and the 2nd and 3rd defendants is invalid and of no force or effect.
2. The approved tribute agreement dated 18 May 2005 (registration No. 10/2005), which expired on 18 May 2008, is the only valid agreement in terms of which the 2nd and 3rd defendants occupied and mined the 1st plaintiff's mining claims situated at Dodge Mine, Shamva, Mashonaland Central.

It is further ordered that:

1. The 2nd and 3rd defendants shall deliver to the 1st plaintiff all the assets listed in Annexure "A" to the Memorandum of Agreement entered into on 18 August 2005 between them

and the 1st plaintiff, within 5 (five) days of the service of this order upon them, failing which the Deputy Sheriff be and is hereby authorised and directed to attach and remove the said assets for delivery to the 1st plaintiff.

2. The 2nd and 3rd defendants, and all those claiming the right of occupation through them, shall vacate the 1st plaintiff's aforesaid mining claims within 10 (ten) days of the service of this order upon them, failing which the Deputy Sheriff be and is hereby authorised and directed to evict them.
3. The 1st plaintiff shall appoint a qualified mining engineer to determine the quantity of minerals mined by the 2nd and 3rd defendants from 18 July 2005 to the date they shall have vacated or been evicted from the aforesaid mining claims.
4. Within 10 (ten) days of having received the mining engineer's report, the 2nd and 3rd defendants shall pay royalties due to the 1st plaintiff, calculated at the rate of 5% of the gross value of the minerals mined by them, less such royalties as they may by documentary evidence prove to have already paid to the 1st plaintiff.
5. Within 10 (ten) days of the service of this order at his offices, the 1st defendant shall refer the tribute agreement entered into between the 1st and 2nd plaintiffs to the appropriate mining commissioner for approval and registration in accordance with the provisions of Part XVIII of the Mines and Minerals Act [*Chapter 21:05*].
6. The 2nd and 3rd defendants jointly and severally, the one paying the other to be absolved, shall pay the costs of suit.

F.M. Katsande & Partners, plaintiffs' legal practitioners
Dube, Manikai & Hwacha, 2nd and 3rd defendants' legal practitioners