

KUFAKUNESU CHITORO
and
G.H PAYNE
and
THE PROVINCIAL MINING DIRECTOR: MASHONALAND WEST
and
THE MINING COMMISSIONER (2012)
and
THE CHIEF GOVERNMENT MINING SURVEYOR (2012) N.O
and
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
LAIMOS CHIMHURI
and
NOEL MUNYUKI

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 12 July 2023

Opposed Application

Adv M Ndllovu, for the applicant
Adv R Mabwe, for the respondent

CHINAMORA J:

Factual background

This is an application for a declarator in terms of s 14 of the High Court Act [*Chapter 7:06*]. The applicant seeks a declaratory order, which declares him to be the sole legal owner of a mining location known as Shambi (i) Mine, registration number 42618, situated in Makonde District, Chinhoyi (hereinafter referred to as “the claim”). Additionally, he seeks consequential relief in the form of a prohibitory interdict against the first, second and fifth respondents from impeaching the applicant’s title in the mining claim. The basis of the application is best explained against the brief background of facts giving rise to the dispute.

It seems to me that sometime prior to 18 May 2012, the applicant and seventh respondent registered a mining claim under registration number 19212. The proof of title is annexed to the application on p 13 of the record. The sixth respondent took title and registered

the claims in his name. For a period of up to 27 June 2019, the sixth respondent was in undisturbed possession of the claim as he conducted his mining activities. During the same period, the sixth respondent conducted his mining activities without any hindrance or interference. Later in 2019, the sixth respondent sold his mining claim to the applicant who paid for it. The same claim was then repegged to become Shambi (i) with registration number 42618 given to it. For the avoidance of doubt, Shambi (4) registration number 19212 consequent to the sale to the applicant was repegged to become Shambi (i) Mine registration number 42618. It is the applicant's case that the mining location was a repeg of a forfeited mining block. He states that he did his due diligence search and confirmed that indeed the claim was appearing on the list of forfeited claims in the forfeiture notices at the Ministry of mines and mining development.

After receiving his certificate of title, the applicant began operations at the mine. At the request of the members of the community through the district council, the applicant constructed a dam for use by the community and made other sizeable improvements at the mine. According to the applicant, it is only on 24 November 2020 that the applicant became aware that the first respondent had initiated a process to impeach the applicant's title by resuscitating Shambi (4) registration number 19212. The first respondent (as a surviving spouse to the late Basil Ashburn Payne) had executed and filed with the fourth respondent a power of attorney in favor of one Wilfred Mboma. Consequently, there was a certificate of inspection in respect of Shambi (4) that had been issued. That is when the applicant sensed danger to his rights and approached this court for the relief that he seeks. The applicant fears that the first respondent intends to use the certificate of inspection to impeach the applicant's title on the basis that the applicant pegged his claim on a claim that was already pegged in favor of the first respondent's deceased husband. Hence the relief sought in terms of s 14 of the High Court Act on the basis that he holds title to the said claim.

The first, sixth and seventh respondents filed their notices of opposition and raised preliminary points. The points *in limine* are that there was fatal nonjoinder of the Estate of the late Basil Asburn Payne. The other preliminary point raised by the respondents was that there were material disputes of fact in that there was no certainty as to which claim exactly the applicant was seeking to declare their rights between Shambi (i) and Shambi (4). It was the first respondent's argument that there was need to call a surveyor to lead evidence for the matter to be properly resolved. When this matter was heard before me, I reserved judgment on the preliminary points and it is on these that I now hand down my judgment.

The law and application to the facts

Misjoinder and/or non-joinder of interested parties

The law on nonjoinder of interested parties is in terms of Order 13 of the high court rr 1971 (old Rules) this application is defective for want of joinder of parties that have vested rights, interests and legitimate expectations in the mining claim in dispute. The Supreme Court in *Wakatama & Ors v Madamombe* SC 10-12 the court held that;

“The question whether the non-joinder of the Minister is Fatal need not detain this Court and can easily be disposed by reference to r87 of the Rules of the High Court which provides:

“No cause of action shall be defeated by reason of this misjoinder or non-joinder of any party and the court may in any cause or matter determine issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter

1. At any stage of the proceedings in any case or matter the court may on such terms as it thinks just and either of its motion or application –
 - a.
 - b. order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon to be added as a party”

In his answering affidavit after the question was raised, the applicant was candid with the court that he was not aware in what capacity the first respondent had acted when she personally issued a power of attorney to a third party. In the same vein, he asked the court to condone the non-joinder of the estate of the Late Basil Ashburn Payne. I believe the non-joinder is not fatal to the application before me. In this respect, I note that the first respondent deposed to the power of attorney in her personal capacity and not on behalf of the estate. It is the same power of attorney that is being used to challenge the applicant’s title and endangering the rights of the applicant. It is because of that power of attorney that the applicant seeks protection by way of a declarator. The nonjoinder of the estate does not preclude this court from determining the cause between the parties before it. The action of the first respondent in executing a power of attorney in her own right without reference to the estate and claiming rights as a result thereof, is what prompted the applicant to file the application *in casu*. There is also nothing that prevents a joinder of the estate. This point *in limine* has no merit.

Material Disputes of fact

The criterion for determining whether or not a material dispute of fact exists was set out in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi*: HH 92-09 by MAKARAU JP (as she then was) in the following terms:

“A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

On the above authority, it follows that the mere allegation of a possible dispute of fact is not conclusive of its existence. The pleadings must show the existence of a *bona fide* dispute of fact which is incapable of resolution on the papers without recourse to oral evidence. *In casu*, the third respondent issued the notices of forfeiture in respect of Shumbi (4), and repegged the claim to become Shumbi (i). Finally, it is the same office that facilitated the transfer into the applicant’s name and accepted mining fees from the applicant and said nothing as the applicant made improvements at the claim. In my view, there cannot be a material dispute of fact which cannot be resolved on the papers. The forfeiture was a legal act which terminated the existing rights inhering in the claim. At the time that the applicant acquired the claim, there was no competing right to the claim and, consequently, nothing stood in the way of registration in his name. In other words, there was no action or application to nullify the forfeiture of the claim. There is clearly no merit in the preliminary point raising a material dispute of fact.

Disposition

Accordingly, I make the following order:

1. The points *in limine* be and are hereby dismissed.
2. The Registrar is hereby directed to set the matter down for determination on the merits before 31 July 2023.
3. The costs of this application shall be determined at the time of the determination of the matter on the merits.

Messrs Sonono & Partners, applicant’s legal practitioners
Mushoriwa Pasi Corporate Attorneys, first respondent’s legal practitioners