

MATOVU INVESTMENTS (PVT) LTD

versus

LUCKSON SITHOLE

and

MINISTER OF MINES AND MINING DEVELOPMENT

and

SECRETARY OF MINES AND MINING DEVELOPMENT

and

PROVINCIAL MINING DIRECTOR MIDLANDS

HIGH COURT OF ZIMBABWE

MANZUNZU J

HARARE, 16 May & 16 August 2023

COURT APPLICATION

*Adv. L Uriri with M Zinyakatira, for the applicant
Mr T G Kuchenga, for the 1st respondent*

MANZUNZU J: This is an opposed court application in which the applicant seeks a declaratory order in the following terms;

“IT BE AND IS HEREBY ORDERED THAT:

- 1. The certificate of registration issued to the 1st respondent on the 17th of June 2021 by the 4th respondent be and is hereby declared unlawful and illegal therefore rendering it null and void.*
- 2. The 4th respondent be and is hereby ordered to facilitate the cancellation of the certificate of registration issued to 1st respondent.*
- 3. 1st respondent pays costs of suit on a higher scale if application is opposed.”*

APPLICANT’S CASE

The applicant’s case is that it is a holder of a mining location registered as Tebekwe mine by virtue of a tribute agreement signed in February 2010 between the applicant as the tributor and Ngezi Mining Company Pvt Ltd, a subsidiary of SMM Holdings as the grantor. A copy of the tribute agreement is attached in support. There were subsequent renewals of the tribute agreement the last of which was on 24 September 2021 before the applicant then bought the mining location from Ngezi Mining Company Pvt Ltd. A copy of the agreement of sale is attached signed in October 2021.

The applicant further claims that it has been carrying out mining activities at the mine since 2010 and has been paying all statutory fees to the Ministry of Mines.

The bone of contention is that on 17 June 2021 the 1st respondent was issued with a certificate of registration by the 4th respondent in respect to the same mining location which belongs to the applicant. The certificate was issued in terms of section 48 of the Mines and Mineral Act, Chapter 21:05 (the Act) whose intended purpose is to carry out prospecting operations and pegging.

The applicant further avers that such certificate can only be issued to a location which is open and reserved for pegging and prospecting as per sections 50 (1) (a) and 31 (1) (b) of the Act. The applicant says the certificate issued to the 1st respondent violates the above sections in that it was issued at a mining location that is not reserved and open for prospecting and pegging, that is to say, was issued at the applicant's mining blocks.

There is a supporting affidavit of Joseph Phiri, a pegger, who says the coordinates on the special grant issued to 1st respondent are within Tebekwe mine and as such the 1st respondent intends to carry out prospecting and pegging within the mining location which belongs to the applicant.

1ST RESPONDENT'S CASE

The application was opposed by the 1st respondent, who, while acknowledging the existence of a tribute agreement, says it was an invalid document because the same was not endorsed as required by sections 284 to 286 of the Act. On that basis he says the applicant has no *locus standi* to sue in respect of the said mining location.

In respect to the sale of the mining location, the 1st respondent's position is that the alleged sale came after the issuance of the certificate in question and in any event the agreement fails to identify fully the mine sold.

The 1st respondent's defence revolves around the question of *locus standi*. He claims the place was open for prospecting at the time he pegged and subsequently issued with a certificate. The 1st respondent queried why applicant chose not to exhaust internal remedies through the 2nd to 4th respondents and has challenged any map or coordinates presented by the applicant not through the Ministry of Mines. He has also relied on the interim order in case

number HCN 288/21 issued by this court in Masvingo. The merx has not been properly defined, he added.

Consequently, the 1st respondent prays for the dismissal of the application with costs.

In its answering affidavit the applicant says the mining rights are not in dispute, but that is not correct because 1st respondent disputes that. However, the applicant says there was a verification survey done by the 4th respondent on 24 November 2021 in the presence of both parties. To that end, a report with the findings was attached to the answering affidavit. The survey report raises pertinent issues relevant to resolve the dispute between the parties.

ANALYSIS OF EVIDENCE

The applicant relies on the tribute agreement to draw its *locus standi* at the time the certificate of registration was issued on 17 June 2021. The sale agreement which came in September 2021, though challenged by the 1st respondent, is in my view a non-event. This is so because it came after the date on which the validity of the certificate of registration is put to question. The question is what were the rights of the applicant at the time the alleged offending act occurred.

There is no dispute in the interpretation of sections 48, 31 (1) (b) and 50 (1)(a) of the Act. The 4th respondent issued the 1st respondent with a certificate of registration for the purpose to carry out prospecting operations and pegging. Section 31 (1) (b) of the Act reads;

“Ground not open to prospecting

(1) Save as provided in Parts V and VII, no person shall be entitled to exercise any of his rights under any prospecting licence or any special grant to carry out prospecting operations or any exclusive prospecting order—

(a) ...

(b) upon any mining location, other than one in respect of which he may have acquired the exclusive right of prospecting under such licence or special grant or exclusive prospecting order;”

This section is drawn in peremptory terms by the use of the word “shall”. It prohibits prospecting upon any mining location. The applicant relies upon a tribute agreement to derive its *locus standi*. The tribute agreement is challenged by the 1st respondent on the basis that it was not approved in terms of the provisions of sections 284 to 286 of the Act. I recite sections 284 to 286 of the Act hereunder;

“284 Submission of tribute agreements for approval

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.

285 Approval of tribute agreements by mining commissioner

(1) The Board may authorize the mining commissioner to approve any tribute agreement which conforms to a standard agreement drawn up and approved by the Board.

(2) If any tribute agreement submitted to the mining commissioner conforms to such standard agreement, the mining commissioner may approve such agreement and shall report such approval to the Board and to the occupier or, if there is no occupier, the owner of the land concerned and shall furnish the Board with a copy of the agreement.

(3) If the mining commissioner does not himself approve a tribute agreement he shall submit the agreement to the Board for consideration.

286 Approval of tribute agreements by Board

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.”

A tribute agreement is given its effect by approval by either the commissioner or the Board. Section 289 of the Act criminalises any party to a tribute agreement who exercises any right on an unapproved tribute agreement.

Two issues arise for determination; whether the tribute agreement relied upon by the applicant was approved by the relevant authority and whether the 1st respondent prospected on a mining location contrary to the provisions of section 31 (1) (b) of the Act. These issues are resolved by the report by the Provincial Mining Director. The report dated 29 November 2021 was compiled after this application was commenced on 15 November 2021. The report was compiled after the verification exercise done on 23 November 2021 in the presence of

the applicant and 1st responded. The report remains extant. An application for its review under case number HC 101/22 was withdrawn.

Whether the tribute agreement was approved:

The 1st respondent says it was not, hence the applicant has no *locus standi*. The Secretary of Mines, on whose behalf the report was authored, is the custodian of mining records which include tribute agreements. Paragraph 1 of the report says, “*Mutovu Investments (Pvt) Ltd are holders of a registered standard Tribute Agreement with Ngezi Mining (Pvt) Ltd... The Tribute Agreement was registered in terms of section 285 (approval of tribute agreement by mining commissioner) of the Mines and Minerals act, Chapter 21:05 ...*”

This means there is no basis for the claim by the 1st respondent that the tribute agreement was not approved. The tribute agreement was given its effect upon registration which registration can only be upon its approval. The applicant is entitled to exercise its right upon the tribute agreement and derive from it the *locus standi*.

Whether the certificate of registration issued to the 1st respondent contravened section 31 (1) (b) of the Act.

The resolution of this issue is also found in the conclusion of the report which says;

“It is not disputable that the respondents (Mr Luckson Sithole and KTT Mining Syndicate) were pegged over Shaban and Mashava Mines’ Ngezi Mining (Pvt) Ltd’s cluster of mining claims (see diagrams). Lucky Gold registration number 31856 and KTT Mining Syndicate’s special grant 8223 both lie entirely within the confines of Ngezi Mining (Pvt) Ltd’s cluster of

This puts to rest the second issue. While the applicant has asked for costs on a higher scale, my considered view is, such is not justified. More so, because the certificate ought not to have been issued by the Mining commissioner.

DISPOSITION

1. The certificate of registration number 31856 issued to the 1st respondent on the 17th of June 2021 by the 4th respondent be and is hereby declared unlawful and illegal therefore rendering it null and void.
2. The 4th respondent be and is hereby ordered to cancel the certificate of registration issued to 1st respondent.

3. The 1st respondent shall pay costs of suit.

Makururu and Partners, applicant's legal practitioners
Nyamundanda and Mutimudye attorneys, 1st respondent's legal practitioners.