ZIMBABWE PLATINUM MINES (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY
and
STANBIC BANK OF ZIMBABWE
and
THE MNISTERS OF MINES AND MINNING DEVELOPMENT
and
MINERALS MARKETING CORPORATION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 17 March 2013 and 29 January 2014

Opposed Application

F Girach, for the applicant
T Magwaliba, for the 1st respondent

MAKONI J: The applicant approached this court seeking a declaratur and consequential relief in the following terms:-

"1. The Application for a Declaratur is whereby granted.

2. The garnishee order issued on 16 November 2011 by the 1st Respondent to the 2nd Respondent against the applicant is invalid. For the avoidance of doubt, it is specifically declared that:

2.1. The definition of taxes under Income Tax Act [Chapter 21:05] does not include royalties under the Mines and Minerals Act (read with Chapter VII of the Finance Act [Chapter 23:04]).

2.2. the 1st Respondent acted *ultra vires* when it used the power granted unto it under Section 58 of the Income Tax Act [Chapter 23:06] for enforcing payment of taxes under that Act, in an attempt to enforce payment of royalties under Part XIV Section 245 of the Mines and Minerals Act [Chapter 21:05] as read with Chapter XII Section 26, Section 37 and Section 37A of the Finance Act [Chapter 23:04].

3. Owing to the operation of Part XIV Section 243 of the Mines and Minerals Act [Chapter 21:05], the Applicant's Mining Agreement with the Government of Zimbabwe takes precedence over Part XIV Section 244 and Section 245 of

the Mines and Minerals Act [Chapter 21:05] and takes precedence over Chapter VII Section 36, Section 37 Section 37A and the Schedule of the Finance Act [Chapter 23:04]. For the avoidance of doubt, it is specially declared that:

3.1. the applicant is liable to pay royalty rates at 2.5% of the fair market value of all products produced from the mining area, and not 5% or any other rate appearing [in the Schedule under Chapter VII of the Finance Act [Chapter 23:04] enacted by the Mines and Minerals Act [Chapter 21:05];

3.2. The applicant overpaid royalty rates to the 1st respondent for the period of 1 January 2004 to 30 September 2010 when kit paid at the legislative rate of 3% and 3.5% instead 2.5%. The Applicant is entitled to recover the amount overpaid in the sum of US$6,057,146.00 (six million fifty seven thousand one hundred and forty six United States Dollars) by way of set off royalties which were due and payable for the period of 1 October 2010 to 31 March 2011.

5. Each party shall bear its own costs."

The background to the matter is that applicant is the holder of a Special Mining lease issued by the Minister of Mines to the applicant, in terms of Mines and Minerals Act [*Cap 21:05*] (the Act). It is also a holder of a Mining Agreement (M.A) signed between it and the Government of Zimbabwe (the Government). Both documents were executed on 24 August 1994. Up until December 2003, the applicant paid a flat royalty rate of 2.5% across the board for all products as per the royalty rate contained in the Mining Agreement. The payments were made quarterly. From January 2004 to 30 September 2010, the applicant paid royalties according to rates stipulated in the Act but according to dates as provided for in the Mining Agreement. The reason given by the applicant for such payments is it anticipated a substantive agreement and performance by the government on the change of the tax regime by it. The parties had at one point contemplated revisiting the tax regime applicable to the applicant. A framework for the agreement contemplated was signed and executed by the parties. The actual agreement to vary the Mining Agreement never saw the light of day. When the government failed to implement the new tax regime, the applicant reverted to the original royalty provisions as provided by the Mining Agreement. The first respondent claimed royalties from the applicant using the legislature rates. When the applicant did not pay the amounts claimed by the first respondent, the first respondent issued a garnishee to the second respondent against the applicant. The applicant then instituted the present proceedings.

It is the applicant's case that there is no legal basis for collection of royalties by the first respondent in terms of the Act as opposed to the Mining Agreement. The first respondent therefore collected in excess of the rates applicable to the applicant and has therefore been over compensated. The applicant overpaid the first respondent in the sum total of $6 057 146-00.

It also avers that the first respondent was not entitled, at law, to recover royalties falling due under the Act by way of the power conferred on it under the Income Tax Act [*Cap 23:06*] namely to attach debts owed to the debtor.

The first respondent opposed the application. It raised four points *in limine viz*:-

i) The court application is invalid and constitute a legal nullity for want of compliance with the mandatory provisions of the State Liabilities Act [*Cap 8:14*].
ii) The applicant approached the court with dirty hands by approaching the court without complying with the requirements of the law.
iii) The first respondent is an agent of the Government of Zimbabwe and attracts no personal liability from the transactions subject to the claim by applicant.
iv) There are material disputes of fact not capable of resolution on the papers.

On the merits, the first respondent opposes the application on the basis that the terms of the Mining Agreement do not exempt the applicant from paying legislated rates of royalties. It further avers that, in the event that the court finds that the Mining Agreement superseded legislated rates, it will be argued that the applicant waived the benefit of the Mining Agreement. As such, it cannot unilaterally revert to the rates specified in the Mining Agreement.

It further avers that the first respondent was lawfully entitled to rely upon the powers set out in the Income Tax Act to enforce the payment of royalties levied in terms of the Act as read with the Finance Act [*Chapter 23:04*].

I first of all deal with the points *in limine*.

Dirty Hands

It was the first respondent's contention that the applicant had duty to comply with the law, whether arising from a court order or a legal instrument or provide an explanation for non-compliance. The applicant must pay all the royalties that have been assessed or evince an intention to want to pay before seeking the court's protection in the form of declaratur.

As it turned out, by the time the matter was heard, the applicant had settled the outstanding royalties in full and it was paying, on a without prejudice basis, royalties at the rates set out in terms of the Act. Correspondence to that effect was produced.

The issue was therefore resolved and therefore did not require a determination.

Invalidity of Proceedings

I will deal with ground (i) and (ii), together as they are interlinked. It was submitted on behalf of the first respondent that the relief sought by the applicant is divided into two. A declaratur and consequential relief. The ultimate relief includes the recovery of am amount of ± $ 6 000 000-00. In terms of s 3 of the Revenue Authority Act [*cap 23:11*], the first respondent is a legal entity. The revenue that it collects is not of its own account. It collects as an agent and remits the revenue to the relevant ministry. The applicant must therefore pursue the first respondent and the principal ministries involved. The ministries were cited but no substantive relief is being sought against them. The notice in terms of s 6 of the State Liabilities Act [*Cap 8:14*] ought to have been given. It was submitted that in view of the fragrant violation of the State Liabilities Act there was no complete cause of action and the proceedings were therefore invalid. Mr. *Magwaliba* referred the court to the cases of *Murphy* v *Director of Customs & Excise* 1992 (1) ZLR 28 (H), *Ervines* v *Shield Instance Co. Ltd* 1980 (2) SA 841 AD on 8338D. The cases *inter alia*, deal with the proper legal meaning of the expression "Cause of action." He further submitted that in respect of claims against the State, in terms of s 6 of State Liabilities Act, while all of the other requirements at common law would have accrued, the full cause of action does not accrue until notice has been given to the defendant or the respondents as the case may be.

The first respondent further contended that it is an agent for the third respondent and ought not to have been sued. In terms of s 4 of the Revenue Authority Act [*Cap 23:11*] the functions of the respondent are to act as an agent of the state in assessing, collection and enforcing the payment of all revenues. The ordinary consequences as between a principal and an agent are applicable in the relationship between the first respondent and the State. The first respondent cannot therefore be sued with its principals the third respondent. The applicant elects who to sue. It is misleading for the first respondent to argue that the applicant's cause of action is incomplete.

The applicant contented that the sate Liabilities Act does not apply to this matter. It only applies to claims against the State as defined in s 2 of the State Liabilities Act. Further

the claim by the applicant is not for money or delivery. It is a declarant. The applicant further contends that it is not correct that the first respondent is merely an agent *ejusdem generis* or a collecting arm of the State. Section 3 of the Revenue Act [*Cap 23:11*] provides that the first respondent can be sued. The intention of the legislature was to establish an agent *sui seneris* capable of assuming liability for its wrongful conduct. It is the first respondent who made erroneous assessment and collected the revenue and not third respondent.

The answer to the above arguments is to be found in the Revenue Authority Act. Section 3 of that Act provides:-

> "There is hereby established an authority, to be known as the Zimbabwe Revenue Authority, which shall be a body corporate capable of suing and being sued in its own name and subject to this Act, of performing all acts that bodies corporate may by law perform."

Section 4 sets out its functions and powers and one of such functions is to act as an agent for the State in assessing, collecting and enforcing the payment all revenues. Paragraph 22 of the Second Schedule to the Revenue Authority Act which lays out the powers of the Authority, provides as follows:-

> "On behalf of the State, to institute and maintain proceedings in any court or tribunal for the recovery on any revenues and to take such steps as may be necessary to recover the revenues."

My view is that these provisions take the first respondent out of the purview of the State Liabilities Act. The clear intention of the legislature was to create a separate legal entity in the respondent capable of suing and being sued. The State Liabilities Act is applicable to acts of the State as defined in s 2 of that Act.

The acts complained of by the applicant were done by the first respondent who is seized with the responsibility of assessing and collecting revenue due to the State. According to applicant's averments, it has made a wrong assessment and collected the amounts due. The applicant is taking issue with the first respondent's statutory obligation to assess and collect revenue. In any event it is the first respondent who is disputing the applicant's entitlement to assessment of royalties at a particular rate stipulated in the Mining Agreement between it and the third respondent. The third respondent has not opposed the application. The first respondent is therefore rightly before the court.

I agree entirely with the submission by the applicant that it is misleading to argue that there is no complete cause of action unless and until notice is given in terms of State Liabilities Act.

Having defined cause of action correctly it should have been clear to the first respondent that the material averments to found a cause of action are premised on the substantive elements of a particular action and not on procedural requirements. The Murphy case (*supra*) was quoted out of context. What the court was saying in the matter is that the preliminary notice must state the cause of action "clearly and explicitly."

The first respondent cannot succeed on this point.

Disputes of Facts

The respondents contented that there are material disputes of fact that cannot be resolved on the papers. The applicant ought to have known of these material disputes of fact before embarking on the present proceedings. This is more particularly so as the applicant initially filed an urgent chamber application which was dismissed. The respondents, in those proceedings, pointed out to the applicant the existence of the material dispute of fact. The respondents made reference to *Zimbabwe Bonded Fibre Glass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 S at 339 C and *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR at 221 9-222 A.

The dispute of fact are contained in para 45 of the respondents' Heads of Argument and they centre on the fact that the applicant relies upon certain undertakings given to it by the Government of Zimbabwe. These were not placed before the court. If the undertakings were accepted then the applicant, as it contends, acted upon such undertakings. There was a contract between the Government of Zimbabwe and the applicant other than the contracts attached to the applicant's founding affidavit.

The applicant alleges breach of the contract by the Government. The material terms of the contract have not been placed before the court. The applicant also attempted to give a breakdown of the amounts it alleges to have overpaid and expects the court to accept its statements on its mere say so.

The applicant contends that the issue before the court is a question of law and the applicant has furnished the courts with the necessary affidavits and written documents attached thereon from which the court can ascertain the facts and apply law to establish a declaratur. The applicant referred to the *Room Hire Co. (Pvt) Ltd* v *Jeppe Street Mansions (Pvt) Ltd* 1949 (3) SA at 1155 T and *Mpumela* v *Berger Paints (Pvt) Ltd* 1999 (2) ZLR 146(S).

In *Room Hire Co* (*supra*) MURRAY JA observed pertinently that apart from those 2 matters there where the procedure is prescribed by law such as ammonal matters and illiquid claims among others in which motion proceedings are not permissible at all

> "There is an area in which according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact ------- the deciding factor is the existence of a dispute of fact, not as to law, and it is (with respect) difficult to appreciate what greater advantages are denied by a judicial officer from *viva voce* evidence, then from affidavits when he has to ascertain only the law to be applied."

I agree with the position adopted by the applicant that the issue that is before the court is a question of law. The issue is whether or not Part 14 of the Act applies in ascertaining what royalties the applicant pays of the Mining Agreement. The applicant has placed before the court facts, which are not disputed, by the first respondent. It has placed before the court the Mining Agreement. There is no dispute as to whether it was amended. It has placed on record all the correspondence between it and the fourth respondent which the fourth respondent has not challenged. The court is being merely asked to interpret the documents attached and apply the law. As was stated by MURRAY AJP in *Room Hire Co. (Pvt) Ltd* (*supra*), it is difficult to appreciate what greater advantages the court would derive from *viva voce* evidence other than from affidavits and written documents attached hereon when all the court is being asked to do is ascertain which law to apply.

In view of the above I will dismiss the point *in limine*.

Validity of the Garnishee

The Applicant had taken issue with the definition of taxes under the Income Tax Act [*Cap 21:05*] in that it does not include royalties under the Mines and Minerals Act as read with Chapter VII of the Finance Act [*Cap 23:04*]. And that the first respondent acted *ultra vires* when it used the powers granted unto it under s 58 of the Income Tax Act [*Cap 23:06*] for enforcing the payment of taxes under that Act.

By the time the matter was hard s 58 of the Income TAX Act had been amended in the definition of tax by the Finance Act 4/12 by the respect of para e and the substitution of (e) any levy or sum payable in terms of the Charging Act. Act 4/2012 came into effect on 17 September 2012. The applicant decided not to pursue the issue. There will not be necessary therefore to determine the issue.

The Royalties Regime which applies to the applicant

The issue for determination is whether it is the MA regime or the legislature regime which applies in the assessment of royalties payable by the applicant.

Mr *Girach* contended that clause 6 of MA provides for the payment and levying of royalties due by the applicant. Paragraph 6.1 thereof prescribes the rate of two and half per cent (2.5%) of the fair market value determined in accordance with Clause 11 thereof, payable on a quarterly basis. He further contended that s 244 and s245 of the Act do not apply to the applicant as he is a holder of an MA.

Mr *Magwaliba* submitted that s 167 of the act provides that you cannot enter into an agreement which is inconsistent with the Act. The Act in s 244 and 245, provides for royalties which flactuate and are payable monthly. The MA provides for 2.5 per cent. If s 244 and 245 are read together with s 167, the MA falls foul of the law.

Section 167 provides:

"The Minister, with the approval of the president, may enter into an agreement, not inconsistent with the Act, with any person regarding

a) ----------
b) ----------
c) The liabilities and obligations of the person in terms of any special mining lease that may be issued to him, including payments by way of royalties, rents and fees; and
d) ----------"

Section 243 of the Act provides:

"This part shall apply to the holder of a special mining lease only to the extent that the terms and conditions of his special mining lease or of any agreement entered into with him in terms of section one hundred and sixty seven and consistent with this part."

It is common cause that the MA was entered into in terms of s w167 of the Act. It has a royalty clause as provided for in the section. The parties differ on the interpretation of s 167 as read with s 243, s 244 and s 245. Mr *Girach* contends that in terms of s243 the rates as promulgated in terms of s 245 do not apply to it as it is a holder of a MA. He submitted that if the words of s 243 are given their ordinary grammatical meaning, they clearly exclude the application of s 245 to anyone who holds a mining lease. Section 243 gives precedence to the MA.

Mr *Magwaliba* contends that s 243 only gives precedence to a Mining Agreement if it is properly entered into in terms of s 167. According to his interpretation, an agreement is properly entered into in terms of s 167 if the rates payable are made in terms of the Act. He

argued that s 167 allows parties to enter into an agreement and agree on rate as set in terms of the Act or above it.

What is clear from the above is that there is an obvious and glaring discrepancy in clause 6 of the MA and the provisions of s 244 and 245 of the Act. The MA provides for a fixed rate of 2.5 per cent payable quarterly. The Act provides for various rates based on the mineral produced which are generally higher than those provided for in the MA and which are payable monthly.

In terms of Part IX of the Act, Special Mining Agreements were set up, inter-alia, in order to encourage investment in the mining sector. The lease holders would exploit to the resources while at the same time creating employment. Section 243 was put in place to specifically deal with situations such as the present one, where there are inconsistencies between a special mining agreement and Part XIV of the Act, which regulate royalties. The provision gives precedence to the mining agreements. To interpret it in the manner suggested by the respondent would be to defeat the intention of the legislature in setting up the special mining leases. The question would be why enter into the special mining lease, which must contain a royalty clause in terms of s 167, and at the same time have royalties regulated in terms of Part XIV which invariably, will be higher than the rates in the MA. Such an interpretation will lead to an absurdity.

I agree with Mr *Girach* that s 243 specifically confers precedence to the MA and the respondent had no legal basis to levy royalties against the applicant in terms of the legislature regime.

Waive and Estopped

Mr *Magwaliba* submitted that in the event of the court finding in favour of the applicant in respect of the rate of the royalty, the court must find that the applicant abandoned any reliance on the MA to the extent that it set the rates of the royalties payable. For a period of over 6 years the applicant paid the higher and legislated rates. During the entire period it was aware of its rights in terms of the MA. It did not insist on the enforcement of such rights. The first respondent is therefore entitled to regard the conduct of the applicant as a clear and unequivocal abandonment of any perceived rights to pay reduced rates of royalties in terms of the MA. The non variation clause and the waiver clause will not assist the applicant.

Mr *Girach* submitted that as a result of an error on the part of the applicant it paid royalties in terms of the legislated rates. This did not amount to estopped in view of Clause 29.2 of the MA.

The MA contains a non-variation clause and a non-waiver clause in Clauses 29.1 and 29.2 respectively. The clauses are carefully and extensively worded. What is the combined effect of such clauses in a contract. The head note in *Agricultural Finance Corporation* v *Pocock* 1986 (2) ZLR 229 SC sums it all.

> "A non-variation clause in a contract entrenches the requirement that any variation has to be in writing but does not prevent a party for whose benefit it s inserted from waiving the requirement.
>
> A non waiver clause negatives any rising of a waiver or any estopped in that it amounts to notice given in advance, acknowledged by the other party, that conduct which might otherwise be a waiver or give rise to an estopped, may not be taken to be such conduct.
>
> The combined effect of the two clauses is that two parties to a written agreement containing carefully and extensively worded non-variation and non-waiver clauses cannot enter an enforceable oral agreement departing from the written terms since to the extent it is a variation of the contract it is precluded by non-variation clause whereas if it be said to be a waiver or conduct giving rise to an estopped then the non-waiver clause provides the complete answer to the point.

Clause 29.2 provides a complete answer to the issue raised by the first respondent. It cannot place reliance on the unilateral conduct of the applicant of departing from the written MA as such conduct will not preclude the applicant from thereafter enforcing the right or provision of the agreement being indulged. There is nothing on the papers to show that the MA has been varied. The first respondent cannot therefore successfully rely on either waiver or estoppel. The effect of Clause 29.2 is to negate both defences.

Over-payment of Royalties

This issue was not persisted by the applicant in its submissions. I will take it that the applicant abandoned the claim and rightly so in my view. The applicant had not, in its founding papers, illustrated to the court how the alleged overpayment was made in respect of each year.

Accordingly, I will make the following order:

IT IS ORDERED THAT:-

1. Owing to the operation of Part XIV Section 243 of the Mines and Minerals Act [*Cap 21:05*], the applicant's Mining Agreement with the Government takes precedence over Par XIV s 244 and s 245 of the Mines and Minerals Act [*Cap 21:05*] and takes

precedence over Chapter VII s 36, s 37, s 37 A and the Schedule of the Finance Act [*Cap 23:04*]. For the avoidance of doubt, it is specifically declared that:

1.1. The applicant is liable to pay royalty rates at 2.5% of the fair market value of all products produced from the mining area, and not 5% or any other rate appearing in the Schedule under Chapter VII of the Finance Act [*Cap 23:04*] enacted by the Mines and Minerals Act [*Cap 21:05*];

2. Each party shall bear its own costs.

Scanlen & Holderness, applicant's legal practitioners
The Civil Division of the Attorney General's Office, 3rd respondent's legal practitioners