

ZIMASCO (PVT) LTD  
versus  
ZIMSLATE MINING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 16 June 2015 and 24 June 2015

**Civil Trial**

*D. Tivadar*, for the plaintiff  
*N Chikoore*, for the defendant

MATHONSI J: The parties are mining concerns who are not so neighbourly neighbours they having accused each other of encroachment at mining claims south of Shurugwi in Midlands Province. In the commendable spirit of sustaining neighbourliness they engaged each other in December 2011 to try and resolve the dispute between them resulting in some form of compromise but no sooner had they found each other in a settlement than they were back again at each other's throats as a result of which litigation was seen as the only way out.

The plaintiff then instituted summons action against the defendant averring in its declaration that it is the lawful holder of registered mining claims number B 1144 BM and B 1145BM known as Vera Block 31 and 32 in the Bannockburn area south of Shurugwi. During the period up to May 2011 and despite such registration of the mining claims, the defendant encroached onto those claims helping itself to an area of 3117 square metres of the plaintiff's mining claim thereby exposing an *in situ* total of 4121 tonnes of chromite ore from which it would have recovered 3 296,8 tonnes as the out of pit production.

The plaintiff averred further that it would have produced a total of 1 173,78 tonnes of saleable alloy from that out of pit production. At the net price of \$1, 05 per pound that alloy would have yielded a sum of \$504 559-87 which now represents the loss that the plaintiff sustained as a result of the defendant's illegally mining its registered claims.

About December 2011 the defendant acknowledged liability in that amount and undertook to deliver to the plaintiff chrome ore of similar quality to the value of the loss. Despite such undertaking, the defendant only delivered 1 064-26 tonnes worth \$162 880-03 leaving a deficit of 2 232-54 tonnes of chromite ore worth \$341 679-84 which the plaintiff claimed together with interest at the prescribed rate from 1 June 2011 to date of payment and costs of suit.

In contesting the action the defendant averred in its plea that it never encroached onto the plaintiff's mining claims and that the plaintiff's surveyors, security staff and beacon inspectors had confirmed that the defendant's mining activities were not encroaching and given the defendant the go ahead to continue mining. Further, it denied ever acknowledging liability asserting instead that the agreement reached by the parties in December 2011 was in fact a straight sale in terms of which it sold its "very high quality stockpile ore" to the plaintiff at a give away price of \$60-00 a tonne as it was desperate to sell. The prevailing market rate was well above that.

The defendant averred further that not only did the plaintiff have a stronger bargaining power being the sole market for the ore, it also used the allegation of encroachment to arm twist the defendant to submit to "selling the ore at an uneconomical price". Although the defendant did not participate in the weighing of the ore which had been collected "pursuant to an agreement of sale," it disputed that 1 064- 26 tonnes of ore was collected and without suggesting an alternative figure, the defendant denied any liability to the plaintiff.

Although the parties had agreed to an expanded version of issues for trial at the pretrial conference, at the commencement of trial both counsel agreed to narrow the issues. It was agreed between the parties that a letter written by the defendant on 28 December 2011 following a meeting of their representatives constituted a compromise agreement between them. The sole issue for determination at the trial was therefore the quantum of chromite ore that was delivered to the plaintiff in pursuance of that agreement.

As much as is possible, given that even after that narrow agreed route to be navigated, the witnesses that testified for both sides were still led astray and away from the field of discourse, this judgment shall hence forth endeavor to address only that issue.

The letter of 28 December 2011, which the parties agree constitute a compromise agreement, was written by the defendant's director and shareholder, Tinashe Abel Chimanikire (Chimanikire) to the plaintiff's manager. It reads:

“Attention : Mr Daka

Dear Sir,

**RE:    LOADING OF ZIMSLATE CHROME ORE FROM CHOMVURI RAIL SIDING  
          ZVISHAVANE**

Whereas:

In a letter dated 9 November 2011, Zimasco has made a claim for 3 297 tonnes of ore against Zimslate and

Whereas:

Zimslate responded to the claim in a letter dated 17 November 2011 and in conclusion proposed to resolve the dispute by offering to sell its entire stock pile at a mutually agreed price. To begin with this letter serves to confirm to you that we have authorized Mr Matsika and/or Mr Jasper Maposa to negotiate and execute terms and conditions of the sale and purchase of our chrome stock pile in Zvishavane.

For the avoidance of doubt the terms and conditions as agreed at your meeting with Mr Matsika and Mr Maposa are herewith reduced to writing as follows:

1.     Buying price at \$60/tonne for lumpy ore delivered in lieu of Zimasco claim.
2.     Zimasco responsible for loading at siding in the presence of Zimslate appointed representative.
3.     Zimslate responsible for loading at mine site, while Zimasco to provide tippers for loading at mine for a fee.
4.     Zimasco to quantify fines at mine site for the purpose of off setting against Zimasco claim.
5.     Zimslate to compensate, through ore from its claims any deficit that, may arise after all fines at site and lumpy ore, have been discounted from the Zimasco claim.
6.     Zimasco to pay Zimslate \$60/tonne for this ore.
7.     Zimasco to pay Zimslate against smelter receipts in the same way and time as they pay their tributors.
8.     Any ore delivered as surplus to Zimasco's claim is to be paid for at the prevailing mechanized rate.
9.     Zimasco to confirm in writing the above terms and conditions as agreed.

In order to implement the above terms and conditions

We have in turn given loading instructions to our Mr Jasper Maposa ID No. 44 – 074574 V 13 or Mr Prestige Dzinyembe ID No. 71 – 0745964 – Y – 71. Mr Dzinyembe is to be present on loading and is to confirm on our behalf details (quantity, dates and time, packaging details, rail

wagon numbers etc) of all chrome that may be loaded from our stock pile at Chomvuri for delivery to Zimasco. The contact details of the two gentlemen are as follows:

- Jasper Maposa Mobile No. 0773 299 020
- Prestige Dzinyembe Mobile No. 0772 665 567 or 0713 485 974
- Should Mr Dzinyembe not be available you may contact Mr Cuthbert Chuchu (0771 2775 077 or 0779 282 373) or Mr Maposa for loading.  
Should you have any queries please feel free to contact us.  
Thank you.

Yours faithfully  
TINASHE A. CHIMANIKIRE.”

The plaintiff responded by letter dated 5 January 2012 which reads:

“Attention: Mr Tinashe A Chimanikire

Dear Sir

RE: LOADING OF ZIMSLATE CHROME ORE FROM CHOMVURI RAIL SIDING

I acknowledge receipt of your letter dated 28<sup>th</sup> December 2011, which served as a record of the terms and condition agreed at our meeting with Messrs Matsika and Maposa to resolve the illegal mining dispute between Zimasco (Pvt) Ltd and Zimslate Quartzite. Clauses 1 to 7 and clause 9 correctly represent what we agreed on. However, we did not discuss the issue stated on clause 8. The issue of ore surplus to our requirements was not part of the discussion. It can and shall be discussed once Zimslate Quartzite has fully compensated Zimasco (Pvt) Ltd.

Yours faithfully

P. MUSARANDEGA  
ACTING MANAGER – SURFACE MINES.”

The defendants letter of 17 November 2011 which is mentioned in correspondence has not been produced but for completeness let me mention that by letter dated 9 November 2011 addressed to the defendant and marked for the attention of Chimanikire, the plaintiff had stated that it had found the defendant mining illegally on its claims referred to in the summons. It had referred the dispute to the Mining Commissioner for Masvingo who had ruled in favour of the plaintiff and ordered the defendant to stop mining operations on the claims. It therefore claimed compensation for the 3297 tonnes of mined ore with the quality mentioned in the summons which would have yielded 1174 tonnes of saleable alloy worth \$504 559-87 which amount it claimed from the defendant.

The plaintiff called a total of 5 witnesses whose testimony was meant to establish the illegal mining on its claims and what then transpired after the discovery as well as how the amount being claimed was arrived at. Pindukayi Musarandega was the acting surface manager who was involved in the negotiations which led to the compromise reached on 21 December 2011 and captured in the defendants letter I have cited above. According to him, at that meeting which was convened at the instance of the defendant, it was common cause that the defendant had illegally mined the plaintiff's claims to the prejudice of the plaintiff in the amount claimed in the plaintiff's demand letter of 9 November 2011. All the parties sought to achieve was to find common ground on how to compensate the plaintiff.

Musarandega confirmed the contents of the letter of 28 December 2011 as representing the agreement of the parties and added that it was the understanding of the parties that in the event that the chromite stock pile at Chomvuri siding did not adequately cover the loss of 3297 tonnes illegally mined, the defendant was to make up the difference with further stocks from its mine. If that was not adequate the defendant would make up the balance in cash.

The price of \$60-00 per tonne was a compromise in the interest of good neighbourliness. A representative of the defendant was to be present at loading. The agreement was then confirmed in writing by the defendant aforesaid. As shown in the notes that the witness took during the course of the meeting the parties had estimated the stockpile at Chomvuri Siding at 1 500 tonnes and therefore not enough to compensate the plaintiff.

In pursuance of the agreement the plaintiff then moved the chromite ore gathered at the siding over a period of 4 months from January to April 2012. He referred to pro forma invoices generated at the plaintiff's smelting site in Kwekwe where the ore was delivered and weighed. The computer generated invoice shows that the first consignment was 118,20 tonnes, followed by 316,55 tonnes, then 419,94 tonnes and finally 210,30 tonnes making a total of 1064,26 tonnes delivered to the plaintiff. Nothing was moved from the defendants mining site.

Reuben Zengeni is the plaintiffs employee who received the stock of chromite ore at the plaintiff's smelting plant in Kwekwe. He described the procedure followed when rail wagons arrive. They first go through the weighbridge with their load and are weighed for that first weight to be recorded. They move to off load the ore, after which they return to the weighbridge, to be weighed empty for the second weight to be recorded. Once that is done the computer system then

generates the tonnage of the load by subtracting the second weight from the first weight to give the nett weight. The witness went through the weight tickets in exhibit 1 to illustrate how the tonnage of 1 064,26 was arrived at. He confirmed that at the place of weighing the defendant did not send a representative to witness the process.

Owen Mubhobho was appointed by the defendant to monitor the loading of the ore at Chomvuri siding. His task was to record the wagon numbers after which they would then load the ore onto them. 2 weeks after the loading he would proceed to Zimasco Shurugwi to collect the proforma invoices showing the total tonnage that would have been moved to Kwekwe and the amount of money involved. He would compare with his own record to see if the information, that is, wagon numbers, tallied. He would then telephone Chimanikire and advise him what amount he was to expect to be deposited in his bank account. Throughout the period of 4 months when the stock was moved all the information on the proforma invoices tallied with his records and the defendant happily received payment.

Mubhobho confirmed that during loading a security officer for the plaintiff and one for the defendant would at all times be in attendance. The 3 of them would record the wagon numbers. At Shurugwi his task was to ensure that the defendant received payment and it did receive it.

Farai Makwara is the mining services manager of the plaintiff. He went through the resource evaluation domain report which he prepared in June 2011 showing how the tonnage of 3297 of chromite ore extracted from Vera 32 mining claim was arrived at using best practices of the industry. Ngonidzashe Mpofu, the Group Financial Controller of the plaintiff testified on how he priced the tonnage that was lost by the plaintiff through illegal mining, again using standard practice, in order to arrive at the figure of \$341.679.84 being claimed in respect of the product that was not restored by the defendant.

The evidence led on behalf of the plaintiff went generally unchallenged and the plaintiff's witnesses were not bothered in any meaningful way under cross-examination. With that evidence not having been impeached at all and the plaintiff's witnesses having been generally impressive, I have no reason not to embrace it as truthful and representing what transpired on the ground.

That compliment is however not shared by the defendant's witnesses who, serve for Prestige Dzinyembe who was confident and had clarity in his presentation, were woefully

unreliable and patently shaken. The main man, Tinashe Abel Chimanikire, who effectively ran the defendant, tried too hard in trying to evade liability. He was unduly emotional, loud and tended to wander from the issues at hand volunteering extremely irrelevant information. In the process he contradicted himself and even that which was indisputable.

Chimanikire stated that he had assigned Messrs Matsika and Maposa to negotiate a settlement with the plaintiff over the latter's claim for compensation arising out of the alleged illegal mining. The two did not have any mandate to bind the defendant to anything as he was the sole authority that could do so. They did negotiate but could not enter into a final agreement. This sharply contradicts what he himself stated in the letter of 28 December 2011. That letter leaves no doubt that Matsika and Maposa had concluded an agreement with the plaintiff, *vide*:

- (i) "To begin with this letter serve to confirm to you that we have authorised Mr Matsika and/or Mr Jasper Maposa to negotiate and execute terms and conditions of the sale and purchase....".
- (ii) "For the avoidance of doubt the terms and conditions agreed at your meeting with Mr Matsika and Mr Maposa ...".

Chimanikire insisted, while at the same time admitting that the letter of 28 December 2011 represented the agreement between the parties, that the relationship between the parties was purely a purchase and sale of the defendant's chrome ore with nothing to do with the plaintiff's claim for compensation. The incongruence of that assertion is clear from an examination of the letter, again exhibiting a contradiction of immeasurable proportions. He wrote;

- (i) "Zimasco has made a claim for 3297 tonnes of ore from Zimslate ...."
- (ii) "Zimslate ... proposed to resolve the dispute by offering to sell its entire stock pile at a mutually agreed price".
- (iii) "1. Buying price at \$60/tonne for lumpy ore delivered in lieu of Zimasco claim".
- (iv) "4. Zimasco to quantify fines at mine site for the purpose of offsetting against Zimasco claim".
- (v) "5. Zimslate to compensate through ore from its claims, any *deficit* .... from the Zimasco claim".

It is clear that the defendant acknowledged the plaintiff's compensation claim of 3297 tonnes and that the agreement was not a straight forward sale but a compromise in respect of that claim. Chimanikire was therefore being dishonest by claiming that it was a straight forward sale.

Initially Chimanikire testified that the stock pile at Chomvuri siding was removed by the plaintiff in the absence of the defendant's representative, but that the defendant raised concerns when the stock was detained for a lengthy period at Dabuka. When asked to explain why nothing was done about what would have amounted to theft, he shifted ground to say that part of the stock was removed in the presence of the defendant's representative. He could not explain why Mubhobho was not challenged in his evidence that he was the representative of the defendant throughout and reported directly to him, content to hang on to a thread, that his letter appointed only Matsika and Maposa, an assertion not helpful at all.

He stated that the agreed pricing had 2 categories, the first relating to the initial quantity of 3297 tonnes (coinciding with the plaintiff's claim of that amount of ore) which was being sold at \$60-00 a tonne. The second category was above 3297 tonnes. If the defendant was to deliver above that threshold, the price would be at the prevailing mechanised rate consistent with the fact that the defendant acknowledge liability in respect of 3297 tonnes and compromised on its price.

Chimanikire was clearly an unreliable witness who prevaricated a lot. I reject his evidence as well as that of David Mbango who was clearly coached. A witness who was not even on the list of the defendant's witnesses in terms of its summary of evidence, Mbango was employed by the defendant between November 2010 and July 2011. So when the dispute between the parties was raging and was resolved he had long left to work at another mine 2 kilometres always from the site. Distance however could not be allowed to stand in the way of a convenient testimony, he was still able to witness Chinese vehicles being directed by the plaintiff's employees coming in to remove more chrome ore from the site. Significantly no other witness, not even Chimanikire, testified that the plaintiff used some Chinese nationals to remove more chrome ore than that at the siding.

Although he had long left the defendant's employ, he said that when this happened in 2014 he still had time to leave his employment each time the Chinese vehicles came in and was still "curious" enough to travel the 2 km distance to come and witness the removal. Clearly this witness was unreliable and as I have said, I reject his evidence.

Prestige Dzinyembe was the only impressive witness for the defendant. He was employed by the defendant as a site clerk charged with recording day to day activities. He said he witnessed the removal of the first batch of chrome ore by the plaintiff from the siding when 18 wagons were loaded. As site clerk he had to record what was happening. Unfortunately nothing said by this witness advanced the defendant's cause in any way.

What we have here is a situation where the plaintiff complained of an encroachment onto its registered mining claims by the defendant. The plaintiff's complaint was upheld by the Mining Commissioner, whose ruling is contained in a letter dated 7 September 2011, who ruled that the defendant should stop mining operations at the plaintiff's claims in question. By then the defendant had extracted chrome ore from pits and evidence led, which I have accepted, shows that the 3117 square metres illegally mined had an *in situ* tonnage of 4121 tonnes of chrome ore which would have yielded an out of pit amount of 3 296,8 tonnes.

Upon realising that it could not contest the plaintiff's claim the defendant led the way for a meeting to be held to settle the dispute. A compromise was reached at that meeting in terms of which the defendant was to deliver that amount of ore to compensate the plaintiff. I find as proven that the plaintiff shifted position in that compromise by agreeing to pay the defendant, as if it were its tributor, at a rate of \$60-00 per tonne if it succeeded to handover 3296,8 tonnes, a price which has all the hallmarks of a compromise in that the then prevailing rate was \$1,05 per pound. A simple mathematical calculation shows that for the 3296,8 tonnes meant to be delivered the plaintiff would have paid the defendant a total of \$197 808-00 at the compromise price.

The plaintiff would have paid the defendant \$133 952-40 for the 2232,54 tonnes which was not delivered. Mr *Tivador* for the plaintiff confirmed in his closing submissions that the plaintiff was suing on the compromise of 28 December 2011. If therefore has to accept that if it is enforced, it has the corresponding effect of obliging it to pay the price therein contained.

The learned author R.H Christie, put it very clearly when writing about compromise in his book, *Business Law in Zimbabwe*, 2<sup>nd</sup> ed, Juta & Co Ltd at p 108:

“Compromise is the settlement by agreement of disputed obligations, and is a form of novation, replacing the disputed obligations by the obligations created by the agreement of compromise. In *Nagar v Nagar* 1982(2) SA 263(2) McNally J observed that a compromise may be subject to a resolutive condition, subject to a suspensive condition or be a compromise pure and simple. The difference becomes significant when one party fails to fulfil his obligations under the compromise

agreement. May the other party revert to his original claim? The answer is that he may not if it is a compromise pure and simple (*Majoro v Kuririrana Bus Service (Pvt) Ltd* 1990(1) ZLR 87 (S)) but if, as visualized in *Markides v Ashe and Ashby* 1932 SR8, the compromise is subject to the resolutive condition that the parties' previous rights revive if the terms of the compromise are not fulfilled, or to the suspensive condition that the previous rights are not replaced until the terms of the compromise agreement are fulfilled, then the other party may revert to his original claim".

There is nothing in the agreement of the parties as captured in the letter of 28 December 2011 to suggest the existence of either a resolutive or suspensive condition in the compromise. It must follow therefore that the compromise agreement was pure and simple meaning that the plaintiff cannot possibly revert to his original claim of \$504 559-87 for the whole 3296,8 tonnes which would translate to \$341 679-84 for the deficit. Mr *Tivador* submitted that the \$60-00 per tonne had already been taken into account in the letter of demand as part of the cost of extraction as stated by Mpfu in his evidence. If that is so, it is not borne by the evidence and I am not satisfied that the plaintiff has proved it.

In my view, the sum which the plaintiff would have paid in terms of the compromise agreement for the outstanding 2232,54 tonnes of chromite ore, namely \$133 952-40 should be deducted from its claim of \$341 679,84 representing the loss it suffered at the rate of 1,05 per pound. The plaintiff is therefore entitled to judgment in the sum of \$207 727-44.

In the result, it is ordered that:

1. The defendant is hereby directed to deliver to the plaintiff 2232,54 tonnes of chromite ore of the quality 44,33% Cr<sub>2</sub> O<sub>3</sub> and 2,27CR: Fe within 7 days of the date of this order.
2. In the event of the defendant's failure to comply with paragraph 1 above, the defendant is directed to pay to the plaintiff the sum of \$207 727-44 being the value of that quantity of chromite ore at the compromise rate together with interest at the prescribed rate from 7 August 2012 to date of payment.
3. The defendant shall bear the costs of suit.