

MABWE MINERALS (PRIVATE) LIMITED
and
TAPIWA GURUPIRA
and
TAG MINERALS ZIMBABWE (PVT) LTD
and
JOHN RICHARD NEEDHAM GROVES
versus
PETER VALENTINE
and
BASE MINERAL ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 10 October AND 8 December 2016

Opposed Matter

R. F Mushoriwa, for the applicants
S. T Mutema, for the respondents

MANGOTA J: The applicants applied for a decree of perpetual silence against the respondents. They submitted that these constituted a nuisance to them. The respondents, they said, took them to the magistrates' courts, this court and the Supreme Court with no end in sight. They stated that the respondents took them to court on not less than forty (40) occasions. They averred that they have been subjected to a series of abusive criminal and civil proceedings. They said, despite repeated dismissal of their claims by the courts, the respondents maintained the position that the judgments which were entered against them were ineffectual. They complained that the respondents were harassing and vexing them. They insisted that the court should protect them as well as itself from the abusive conduct of the respondents. They moved the court to grant them the decree.

The respondents opposed the application. They moved the court to examine the cases which formed the basis of the application in relation to their cause. They denied that they were

always in the driving seat when the cases which the applicants made reference to found their way to the court(s). They stated that the applicants filed some of the cases with the court(s). They said all the cases upon which the current application rests had a bearing on a mine tribute agreement which the fourth applicant concluded with the second respondent. The fourth applicant, they said, concluded the tribute agreement with them through his Chiroswa Minerals (Pvt) Ltd [“the company”]. They submitted that they should not be silenced for their effort to assert their right in the tribute agreement. They moved the court to dismiss the application with costs.

At the centre of the parties’ dispute is Dodge Mine [“the mine”]. It lies in Shamva District under Mashonaland Central Province. It has six claims. These are lucrative, according to the evidence filed of record.

The fourth applicant and his partner used to own and work the mine. They worked it under the name Chiroswa Syndicate. The fourth applicant later sold the mine to the first applicant. This was after his partner had left the syndicate. The first applicant is currently the owner of the mine.

The issue of the mine has seen the parties take each other to court on thirty (30), and not forty (40), occasions. The applicants filed actions and/or applications against the respondents on nine (9) occasions. The respondents filed actions and/or applications on sixteen (16) occasions. The following five (5) cases were not accounted for: HC 233/13, HC 5669/13, HC 5460/13, HC 6842/14 and HC 308/12. The court could not tell which party filed what action or application in respect of the mentioned five (5) cases. What it could tell, however, was that the parties have been in and out of courts on thirty (30) occasions.

The relief which the applicants moved the court to grant to them is not new to the jurisdiction of this court. In *Mhini v Mupedzamombe*, 1999 (1) ZLR 561, 566 E GARWE J (as he then was) had the occasion to deal with an issue which was similar to the present one. The learned judge quoted with approval what CURLEWIS J said in *Brown v Simon*, 1905 TS 311, 322 wherein he remarked that the procedure:

“... affords a useful means of bringing to a conclusion all threatened actions, and in our opinion, it is applicable under due safeguards not only to cases where a claim has been made or an action threatened publicly, but to every case where by demand or threatened action there has been a disturbance of, or interference with, the quiet enjoyment of another’s rights. [emphasis added].

In *Corderoy v Union Government [Minister of Finance]* 1918 AD 512 which GARWE J was pleased to make reference to in *Mhini v Mupedzamombe (supra)* the South African

Appellate Division held that when there has been repeated and persistent litigation between the same parties, in the same cause of action and in respect of the same subject – matter, the court can make a general order prohibiting the institution of such litigation without the leave of the court but that power extended only to prevent abuse of its own process without being concerned with the process of other courts.

The paucity of case authorities on the current subject is ample evidence of the fact that the relief, whilst recognised at law, is seldom resorted to. It is only granted where a party succeeds in showing the court that the defendant or respondent is a serial litigator who has the tendency to abuse not only the court but also its process and his adversary.

It is important for the court to examine and establish the fact of whether or not the respondents fall into the category of serial litigators who abuse the applicants, the court(s) and their processes.

The dispute of the parties has its origin in the Judgment of PATEL J (as he then was). The learned judge had the occasion to hear and determine the matter in which Chiroswa Minerals (Pvt) Ltd [“the company”] and the second respondent brought before him under case number HH 2612/11. The company and the second respondent had sued the following three parties – the Minister of Mines, one Morris Tendayi Nyakudya and the latter’s company, Vambo Mills (Pvt) Ltd. They succeeded in having Mr Nyakudya and Vambo Mills (Pvt) Ltd evicted from the mine where they were operating in terms of an expired tribute agreement. They successfully moved the court to order the Minister of Mines to refer the tribute agreement which they had concluded between them to the commissioner of mines for approval and registration.

A reading of PATEL J’s judgment under HH 261/11 tends to suggest that it was Chiroswa Minerals (Pvt) Ltd which entered into the tribute agreement with Morris Tendayi Nyakudya and his Vambo Mills (Pvt) Ltd. It is also not a far-fetched suggestion that Chiroswa Mills (Pvt) Ltd moved to enter into the second tribute agreement of the mine with the second respondent.

The abovementioned observations find support from the fact that it is Chiroswa Minerals (Pvt) Ltd, and not Chiroswa Syndicate, which moved for the eviction of Mr. Nyakudya and his Vambo Mills (Pvt) Ltd from the mine. The company worked hand-in-glove with the second respondent to achieve its desired end-in-view.

The impression which the company created in the mind of the respondents, at the time, was that it owned the mine. It could not successfully evict those from the same if it was not the owner of the mine. It would have had no *locus standi* to do so.

It is common cause that the fourth applicant owned Chiroswa Minerals (Pvt) Ltd. He, in appreciation of his good working relationship with the first respondent, donated 50% of his shares in the company to the first respondent. The first respondent, it is not in dispute, was or is the managing director of the second respondent.

The above observed matters do, in the court's view, account for the misunderstanding which later ensued between the fourth applicant and the respondents. These, the first respondent in particular, must have laboured under the genuine but mistaken belief that they, or he, as a 50% holder of shares in Chiroswa Minerals (Pvt) Ltd, had a substantial interest not only in the company but also in the mine which the company owned.

The first respondent's belief in the mentioned regard finds support from a reading of MATANDA-MOYO J'S judgment under case number HH 557/14. The first respondent had, in the case, sued the first, second and fourth applicants. He moved the court to set aside the agreement of sale of the mine which the fourth applicant had concluded with the first and the second applicants. He claimed that he owned 50% of the mine. He challenged his omission from participating in the sale of the mine. He insisted that the sale was, on the mentioned basis, null and void and had, therefore, to be set aside.

It is such belief as has been stated in the foregoing paragraphs which caused the respondents to file one suit after another with the courts. They worked on the impression which had been created. They believed that they, or one of them, owned 50% of the shares in the company which owned the mine. They, therefore, made every effort to assert what they believed belonged to them.

The respondents' belief was shattered when MATANDA-MOYO J ruled, to their disappointment, that Chiroswa Syndicate, and not Chiroswa Minerals (Pvt) Ltd, owned the mine. The respondents could not, under the stated circumstances, be said to have engaged themselves in a wild goose chase, as it were. They honestly believed, in the court's view, that they were pursuing a genuine cause. They believed, further, that the fourth applicant and the company were treating them unfairly. They, therefore, made effort to have their case determined by the courts.

The respondents' unrelenting effort to assert their right in what they believed belonged to them took their case to a higher level in 2013. In a matter which Chiroswa Minerals (Pvt) Ltd and the second respondent filed under case number HC 5208/13, TAKUVA J remained alive to the judgment which PATEL J delivered under HH 261/11. The learned judge ordered the Minister of Mines, one Obert Mporu, and the Commissioner of Mines, a Mrs E Kahonde, to process the tribute agreement which Chiroswa Minerals (Pvt) Ltd and the second respondent concluded as at the time of PATEL J's judgment and to have the same registered at the offices of the mining commissioner. The order contained a stiff sanction which the minister and the commissioner would suffer if they did not comply with it. They would each be held to have been in contempt of court and be committed to thirty (30) days imprisonment.

It was as a result of TAKUVA J's order that the mining commissioner did, on 13 February 2014, register a tribute agreement in favour of the second respondent. The fourth applicant represented the company and Chiroswa Syndicate in the tribute agreement which the parties registered with the mining commissioner. The first respondent represented the second in the same. The tribute was or is to endure for a period of three years. It would, therefore, expire on 13 February, 2017.

Given the above described set of circumstances, it would be difficult, if not impossible, for one to suggest, as the applicants did, that the respondents were or are a nuisance to them. The applicants, the fourth applicant in particular, conveyed an impression to the respondents. These believed him only to discover, at a later stage, that he was hunting with the hounds and running with the hares, so to speak. He dined and wined with them, as it were. He later switched his allegiance from them and proceeded to work with the applicants against them.

The fourth applicant was undoubtedly the main cause of the parties' misunderstanding. He, through his Chiroswa Minerals (Pvt) Ltd, worked with the second respondent to evict persons who were at the mine from the same. He agreed to enter into a tribute agreement of the mine with the second respondent. He sold the mine to the first applicant. He sold his 50% shareholding in Chiroswa Minerals (Pvt) Ltd to the third applicant. He consulted no one in this complicated matrix which he created not for himself but for the respondents.

The court was not amused by the fourth applicant's manner of dealing with his business partners. It viewed the applicants' effort to conceal certain matters from it with serious disquiet.

They attached to the application a wrong tribute agreement. The agreement showed its life span as commencing on 14 December 2011 and expiring on 14 December, 2014. They did not make any reference to the correct tribute agreement which was registered at the mining commissioner's offices on 13 February, 2014. They plucked off the last page of PATEL J's judgment i.e. the page on which the learned judge's order was recorded. They made an effort not to disclose the existence of TAKUVA J's order under HC 5208/13.

In acting as they did, the applicants' aim and object were to paint the picture which showed that the respondents were a rogue element which must be placed under leash all the time, so to speak. They, unfortunately for themselves, over-did their trick to a point where their story remained difficult, if not impossible, to believe. They were ably legally represented in this and other actions or applications. Their legal practitioner should have been more candid with the court than he did. The court, therefore, viewed the conduct of the applicants and their legal practitioner with displeasure.

The respondents could not be faulted for having made an effort to assert their right in what they believed belonged to them. They cannot be blamed for asserting their right in the tribute agreement which was registered in the second respondent's favour on 13 February 2014. That agreement is still extant. It will only expire on 13 February, 2017.

The application cannot, on the basis of the foregoing, be allowed to stand. A decree of perpetual silence, as I understand it from the papers which were placed before me, is a very extra-ordinary remedy. It seeks to make a person not deaf but dumb before the court which perpetually silenced him. Its aim and object are to bar him from instituting any criminal or civil proceedings against the party in whose favour the bar operates. It bars him from litigating or prosecuting except with the leave of a judge or the court and for good cause shown as well as on notice to his adversary. It sees him as a serial litigator who abuses the court, its process and his adversary with no end which is of any benefit to him being ever in sight. Its extra-ordinary character lies in that, once it is granted, it deprives a person of his constitutional right to litigate or to prosecute. It can, for the mentioned reasons, be granted only in exceptional circumstances.

The respondents *in casu* were not shown to be a set of serial litigators. They were not shown to have been suing or prosecuting the applicants with no end in sight which was not of benefit to them. They had, and still have, a clearly defined cause which they were, and are,

enforcing. They took the long road to realise their intended benefit because of unsound advice which their erstwhile legal practitioner continued to dish out to them. He made them use the wrong method to achieve their lawfully acquired right. They should not, therefore, be made to suffer for the sins of their legal practitioner. Indeed, the courts expressed their displeasure against the legal practitioner when they ordered him to pay costs on two separate occasions. Such was the height of the courts' lack of amusement on the work of the respondents' legal practitioner. If he had sat down to reflect as he should have, he would have realised that something was not sticking in the manner that he approached the case of his clients.

The court has considered all the circumstances of this case. It is satisfied that the applicants were not able to discharge the *onus* which rested upon them. Their application stood on nothing. They made their case less credible by concealing vital evidence which related to the application. The application is, accordingly, dismissed with costs on a higher scale.

Mushoriwa Pasi Corporate Attorneys, 1st and 2nd applicants' legal practitioners
Stanslous & Associates, respondents' legal practitioners