

SARAH MUTEWA
versus
DENIES MUZUNZE
(In his capacity as Executor Dative for Estate late Ephraim Tachiona Muzunze
and
THE MASTER OF THE HIGH COURT, MASVINGO N.O.
and
THE PROVINCIAL MINING DIRECTOR, MASVINGO N.O.
and
ROBERT KANGANDI

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 9 March 2020 and 13 May 2020

Opposed application

F.R.T. Chakabuda for the applicant
R.C. Chakauya for the 1st respondent
No appearance for the 2nd and 3rd respondents
4th respondent in person

WAMAMBO J: The applicant seeks the following order:-

“IT IS ORDERED THAT

- 1. The agreement of sale between the applicant and the 4th respondent made and entered into on 30 June 2018 be and is hereby declared lawful and legally binding.*
- 2. The applicant be and is hereby declared to be the lawful holder of fifty percent (50%) shares in Enfield Syndicate the registered holder of seven (7) hectares of Gold Dump Claims in the mining location known as Coronation 2.*

3. *The 3rd respondent be and is hereby ordered to immediately transfer the fifty percent (50%) shares in Enfield Syndicate from the 4th respondent into the applicant's name.*
4. *The 1st respondent to pay costs of suit."*

The matter concerns shares in Enfield Syndicate the registered holder of Coronation 2, a mining location.

The applicant claims to have bought 50% shares in Enfield Mining Syndicate from the 4th respondent, with her husband Petros Mutema acting as her Manager. The first respondent is the executor dative in the estate of the late Ephraim Tachiona Muzunze. The 2nd respondent is the Master of the High Court cited as the responsible authority for registration and administration of deceased estates.

The 3rd respondent is the Provincial Mining Director, Masvingo cited in his capacity as having dominion in searching for mining and disposing of all minerals, mineral oils and mineral gases within the Masvingo Mining Districts.

The 4th respondent is Robert Kangandi the alleged previous holder of 50% of rights, title and interest in Enfield Syndicate.

The first and third respondents filed notices of opposition while the second respondent did not.

The fourth respondent filed a notice of consent to judgment which reads on the pertinent portion as follows:-

"AND FURTHER TAKE NOTICE THAT 4th respondent is not opposed to the relief sought by the applicant.

TAKE FURTHER NOTICE THAT 4th respondent hereby consents to the applicant's court application for a declaratory order and ancillary relief."

At the commencement of the proceedings *Mr Chakabuda* counsel for the applicant initially moved that only the applicant was properly before the court. He averred that 2nd and 3rd respondents are barred for non-filing of heads of argument. Further that 1st respondent although he filed heads of argument he filed them late if regard is had to the High Court Rules.

Mr Chakabuda further applied that judgment be entered against 2nd and 3rd respondents. The point is unmeritorious for the 2nd and 3rd respondents are cited on their official and administrative capacities to effect the proposed orders.

Upon further reflection *Mr Chakabuda* consented to the removal of the bar against 1st respondent. The matter proceeded to be heard on the merits.

The applicant averred as follows:-

Around 30 June 2017 she entered into a Memorandum of Agreement of Sale with 4th respondent for the purchase of 50% shares. The said shares were held by 4th respondent for a mining syndicate, the registered owner of mining block called Coronation 2. She attaches Annexure ‘A1’, ‘A2’ and ‘A3’.

Annexure ‘A1’ is a certificate of registration issued under the Mines and Minerals Act [Chapter 21:05] and reflects that Enfield Syndicate is the registered holder of 7 hectares of gold dump claims named Coronation 2 situated partly on Bruceham Farm and partly on Victoria Park Farm.

Annexure ‘A2’ is a duplicate certificate of registration for Coronation 2 Mine – Annexure 3 is an invoice for payment of \$150 towards the duplicate registration certificate for Coronation 2 Mine.

Applicant further avers that she paid for the 50% shares as aforementioned in full and final settlement as reflected in 4th respondent’s affidavit Annexure “B”.

It would appear that this affidavit is an important piece of the jigsaw puzzle.

To that end it is incumbent to regurgitate its contents. It reads in full as follows:-

“I Robert Kagandi I.D.residing at do hereby solemnly declare the following:

That I have sold my mine named Coronation 2 registration number 5244 on the following considerations-

- (i) *The purchaser Mrs Sarah Mutema I.D. No..... of Mayfield Farm, Box 1633, Masvingo paid me in the form of a Ford Ranger pick-up truck registration number ADL 9497, chassis number WFOLMFE40XW119787 engine number WL130535 and a tractor a case 4 X 4 Runner*
- (ii) *The purchaser has agreed to release the said vehicle upon signature of this agreement.*

- (iii) *The vehicles have been paid to me by the purchaser on a vootstoots state*
- (iv) *We have already signed transfer of mine forms to be lodged to the Mining Commissioner, Masvingo*
- (v) *I as the seller will make sure the transfer is executed and all the paper work required is lodged to the Mining Commissioner, Masvingo as soon as possible*
- (vi) *I have entered into this agreement willingly and the purchaser has acquired (sic) willingly.”*

Annexure ‘B’ above was signed before a Commissioner of Oaths on 30 June 2017.

The applicant refers to Annexure ‘C1’ and ‘C2’ which are Certificates of Transferee and Certificate of Transferor respectively.

‘C1’ reflects that applicant filled in the form and signed it while ‘C2’ reflects that 4th respondent filled in the form and signed it.

The applicant avers that her husband Petros Mutema was appointed as her Manager and Agent as per Annexures ‘D1’ and ‘D2’.

Annexure ‘D1’ reflects that Petros Mutema is the applicant’s Agent accepting transfer from 4th respondent.

Annexure ‘D2’ reflects that 4th respondent agrees there was an alienation agreed upon on 30 June 2017 and that there is no written agreement relating to the transfer other than that dated 30 June 2017 and attached hereto.

On 9 August 2017, 3rd respondent was formally notified of applicant’s newly acquired rights, title and interest in the mining rights held by Enfield Syndicate. This is encapsulated in Annexure E.

Annexure ‘E’ is an affidavit by 4th respondent which was signed on 8 August, 2017 which reads as follows:-

“That I have sold my whole interests on Coronation 2 Mine, registration number 5244 named under Enfield Syndicate located in Bruceham and Victoria Park Farm to Sarah Mutema. May the Provincial Mining Director effect transfer of the abovenamed claim Coronation 2 to Sarah Mutema upon lodging of transfer forms?”

I note here that Annexures ‘B’, ‘C1’, ‘C2’, ‘D1’ and ‘D2’ were all signed on 30 June, 2017.

On 11 August 2018 so applicant contents 3rd respondent accepted and confirmed the existence of the sale and purchase agreement as per Annexure 'F'.

Annexure 'F' is a letter written by the Acting Mining Director for Masvingo Province dated 11 August 2017 which reads as follows:-

“This serves to confirm that Sarah Mutema ID No has bought into Enfield Syndicate. She now wholly represents interests of Robert Kangandi. Transfer of mining title to include Sarah Mutema will be done after the conclusion of the estate of the now deceased Ephraim Tachiona who was the other member of Enfield Syndicate”

The applicant contends further that she deployed her employees to Coronation 2 to commence mining operations. In April 2018 first respondent started to disturb her mining operations by harassing and making efforts to remove her employees and agents from Coronation 2. The harassment and victimisation still persists.

The applicant contends that 1st respondent registered Coronation 2 as part of his father's estate and wholly owned by his father. He sturdily disputes that 1st respondent's father held 100% shares in Enfield Syndicate.

Effectively that 1st respondent misrepresented to 2nd respondent that Estate Late Ephraim Tachiona is the sole and lawful holder of 100% of shares in Enfield Syndicate.

Applicant contends that the fact that Estate Late Ephraim Tachiona Muzunze has not been finalised is not a bar to her benefitting from her acquired share in Enfield Mine.

Further that 3rd respondent has no lawful right to refuse transfer of her shares as same does not dispute that the 50% shares were lawfully acquired. That there is no prejudice to the respondents if the application is granted as per the draft order.

The first respondent opposes the application.

He contends as follows:-

He is the executor dative in the Estate Late Tachiona Ephraim Muzunze. From the outset he contends that 4th respondent never held 50% rights, title or interest in Enfield Syndicate.

Applicant could not have bought shares from 4th respondent as he could not sell shares he never held. The Enfield Syndicate has always been under the sole control of Late Tachiona Ephraim Muzunze and by operation of law squarely falls within the deceased's estate. Had 4th respondent been a member of Enfield Syndicate applicant should have produced a certificate of registration after transfer reflecting that mining rights were transferred to him.

1st respondent contends that the mining certificates and payments Annexure ‘A1 – A3’ (referred to in 1st respondent’s opposing affidavit apparently erroneously as 1A – C) do not prove nor do they mention the composition of shares in Enfield Syndicate.

Annexure ‘B’ is void *ab initio* as 4th respondent never owned part of Enfield Syndicate. The documents produced by applicant were not endorsed by Ministry of Mines officials and are not completed in full.

‘C1’ and ‘C2’ lists the number of claims on Coronation 2 as 7 and interests to be transferred as whole yet applicant alleges there was an agreement of sale for 50% of interest in Enfield Syndicate which is the holder of Coronation 2.

The stance that the documents produced by applicant were incomplete and apparently not lodged with the relevant authorities was repeated in oral submissions.

Although *Mr Chakabuda* was of the view that this was a novel point being brought for the first time during oral argument, this was clearly not correct as seen above.

1st respondent further contends that Annexure ‘E’ describes rights and interests which are not part of the agreement of sale between 4th respondent and applicant. Applicant also attacks Annexure ‘F’ on the same grounds as above.

1st respondent attacks the agreement of sale as being void at law. In a nutshell 1st respondent contends that the merx should be definite and ascertainable that there should be a price and a meeting of the minds. There is no such agreement as appears in paragraph A of the draft order, 1st respondent contends.

Second respondent filed a Master’s report in terms of Rule 248 of the High Court Rules 1971. Second respondent confirms the registration of the estate late Ephraim Tachiona Muzunze with her office. She further avers that a preliminary inventory was filed upon registration of the estate reflecting that Coronation 2, Registration No. 5244 is listed among other assets. The Master’s Report also states as follows:-

“The executor Mr Devies Muzunze is yet to file an Executor’s Inventory which will specify the percentage of gold claim owned by the estate and file proof thereof. The estate is yet to be distributed and finalised. I have no further submissions to make and I will abide by the court’s decision”.

It becomes clear that all the parties have in one way or another placed input to assist the court in reaching a decision

In the light of the fact among other things that there is a document ‘Annexure F’ emanating from 3rd respondent Annexure ‘F’ their opinion was very important in the resolution of this matter.

The contribution by 3rd respondent was very crucial whereby they were supposed to narrate events behind surrounding and leading to the issuance of ‘Annexure F’.

The 3rd respondent would have narrated what documents were brought to their attention for them to bring applicant into Enfield Syndicate. They would have interrogated what documents or evidence convinced them as an office to contend that Enfield Syndicate had two members, namely Robert Kagandi and the applicant.

As it turns out 3rd respondent not only filed a notice of opposition, but they also filed an opposing affidavit. In that affidavit 3rd respondent is of the view that his office has never refused to transfer the tile from 4th respondent to applicant.

Applicant’s heads of argument were served upon the first to third respondents according to Rule 238 of the High Court Rules 1971 on 4 April, 16 April and 2 April 2019. It should be noted here that 4th respondent had already filed a notice of consent to judgment on 27 July 2018.

In spite of being served with applicant’s heads of argument 3rd respondent failed to adhere to Rule 238(2)(9) wherein he should have filed heads of argument not less than 10 days after receipt of applicant’s heads of argument or at least five days before the hearing.

I am entitled by Rule 238 (2b) to deal with the matter on the merits or direct that it be set down for hearing on the opposed roll. I will proceed to deal with the matter on the merits.

The intriguing part of this application is that the Syndicate agreement is nowhere on record.

The applicant who claims he arguably held 50% of shares in the Syndicate should have introduced the Syndicate agreement. He who alleges must prove.

It is up to applicant to prove her case on a balance of probabilities. It was not for other parties to produce the said Syndicate agreement.

What the applicants did is to place an affidavit by 4th respondent reflecting that he sold his 50% shares in Enfield Syndicate without first proving that he initially owned the 50% shares in the first place.

The next set of documents proffered by applicant do not assist her to prove her case. The documents continue from the defective position of relying on an affidavit by 4th respondent.

The Annexures pointedly Annexures ‘A1’ to ‘A3’ do not assist to prove that application owns 50% shares in Enfield.

The 1st respondent is correct to aver that the documents ‘C1’, ‘C2’, ‘D2’ and ‘E’ do not prove that they were received by the 3rd respondent. There are no official stamps on these documents, neither is there any other indication that the same were lodged and accepted by the 3rd respondent.

The same documents contain blanks and on face value appear to have been written by the same person.

A close examination of Annexure ‘C1’ reflects that the portion on the form demanding an enumeration of the consideration of the “interests in the mining location” is left blank. Further down on the same Annexure ‘C1’ there is a terse statement that “*there is not any agreement condition or understanding between me and the said*” The sentence is not complete.

There is reference on Annexure ‘C1’ of a written agreement dated 30 June 2017. The number of claims is given as 7 and interests to be transferred are given as “whole”. Basically the same gaps are contained in Annexure ‘C2’. There are clearly blanks in Annexures ‘D1’ and ‘D2’ clearly rendering the documents unreliable, misleading and incomplete.

A close examination of Annexure “F” reflects that it is titled “Affidavit”.

However instead of being signed before a Commissioner of Oaths what appears is a Commissioner of Oaths stamp but certifying the same as a true copy of the original. In fact there are two Commissioner of Oaths stamps with the same date of 8 August 2017. One stamp appears around the middle of the document while the other appears on the portion reserved for the Commissioner of Oaths. The document appears doctored. The bottom line however is that the document claims the interests in Coronation 2 from nowhere. The basis has not been established why 4th respondent should swear that he was the legal holder of interests in Coronation 2 Mine.

Annexure ‘B’ itself is hardly what is called an agreement. It is a one sided document wherein 4th respondent declares that he has sold his mine, Coronation 2. There appears to be a stark contradiction between selling a mine and selling 50% of shares in a mine. Suffice to say Annexures ‘A1’ – ‘A3’, ‘B’, ‘C1’- ‘C2’, ‘D1’- ‘D2’, ‘E’ and ‘F’ do not prove the applicant’s case.

Annexure 'F' has been dealt with earlier. From a consideration of the circumstances 3rd respondent appears to have been duped into issuing Annexure 'F' in light of the incomplete and suspect documents in the form of the other Annexures adverted to.

It is important to note that Annexure 'F' goes on to indicate when transfer may take place after conclusion of the estate of the late Ephraim Tachiona Mazunze. I have not been informed why the 3rd application came to this conclusion.

Clearly the 3rd and 4th respondents appear to be on applicant's side. The 4th respondent may be a crony of applicant who is assisting him to gain interest in Enfield Syndicate. If he indeed is a member of Enfield Syndicate he has not proven it and that is to the applicant's disadvantage. As for 3rd respondent the fact that he states without more that applicant now represents 4th respondent's interests does not help applicant's case.

It is unknown what inspired the legal conclusion he reaches it in the absence of proof reflecting 4th respondent as holding 50% shares in Enfield Syndicate.

The draft order refers to an agreement of sale entered into between applicant and 4th respondent.

Effectively the implication is that there was a contract entered between the parties for a sale.

TREGOLD CJ in *Lewis v Banket Holding (Pvt) Ltd* 1956 R & N 98 (FS) 104 – 5 stated as follows:-

“In considering whether a contract is concluded between two parties, a court is not interested in the state of mind of the parties considered in the abstract. It must decide the issue on the state of mind of the parties as manifested by word or deed. It is idle for a party to avow mental reservations or unspoken qualifications if these are inconsistent with what is said or done”.

R.H. CHRISTIE in *Business Law in Zimbabwe* at page 50 emphasises the need for both parties to sign a written contract

“What brings the normal written contract into existence is its signature by both parties (Hadington v Carruthers 1991 SR 33, 38, Patrikios v African Commercial Co. Ltd 1940 SR 45, 56 -) no particular form or words being necessary to precede the signatures, and initials or any mark applied by a party which identifies the contract as being sufficient”.

In the instant case the requirements as stated above are lacking.

There is effectively no agreement of sale to talk about in this case. Paragraphs 2 and 3 of the draft order are predated upon the agreement between applicant and 4th respondent being held lawful and legally binding. I have already found that there is no such agreement. There is thus no merit in granting the application for applicant has failed to prove on a balance of probabilities that she deserves the relief she seeks in the draft order.

To that end I make the following order:-

The application is dismissed with costs.

Chakabuda Foroma Law Chambers, applicant's legal practitioners
Muzenda and Chitsama Attorneys, 1st respondent's legal practitioners