MONACHROME (PVT) LTD
versus
KEHRAI INVESTMENTS (PVT) LTD
and
LABENMON INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 3 & 30 March 2020, 22 July 2022 and 7 August 2023

Civil trial

Ms *S Dizwani with* Mr *S Murondoti*, for the plaintiff
No appearance for the 1st defendant
Mr *M Kuwana*, for the 2nd defendant

CHINAMORA J

Factual Background

This is a trial cause which opened before me on 30 March 2023. The plaintiff claims delictual damages in the sum of US$8 173 188.00 against the defendants. The plaintiff's case is that, for an extended period of time the defendants illegally extracted approximately 88.839 tonnes of saleable alluvial chrome from the plaintiff's mining claims. The claims are numbers 122 to 127 located in Guruve North Dyke. As a result of the defendants' mining activities, the plaintiff argues that it suffered loss amounting to $8 173 188.00. It is evident that what the plaintiff claims, is the amount it perceives to be the profit that would have been realized from the sale of the chrome. Nevertheless, the plaintiff does not state for how long these illegal activities went on.

When the parties appeared before me at the commencement of the trial, the plaintiff obtained a default judgment against the first defendant who was not present at the hearing. I was satisfied from the Sheriff's return of service that service had been properly effected. The second defendant then remained as the only defendant in the matter. The plaintiff relied on two witnesses, namely, Misheck Mufari ("Mufari") and Priscilla Chikowero ("Chikowero"), while the second

defendant relied on one witness, Daniel Mlalazi "Mlalazi"), to testify on its behalf. I will begin by examining the plaintiff's case.

The plaintiff's case

The plaintiff opened its case by leading evidence from Mufari, who testified in his capacity as a registered and approved prospector with the Ministry of Mines and Mining Development ("the Ministry"). His evidence was that he had worked with the plaintiff since 2009 by registering its claims, namely, Msasa 122-127. Further, he testified that sometime in 2013 he discovered that the defendants were illegally mining from the plaintiff's claims and took pictures of a stockpile of ore deposits and the washing plant. Those pictures were tendered into evidence and marked as Exhibit 1. The witness told the court that he informed the owner, Nikolaus Kleuters ("Kleuters"). His additional testimony was that he was engaged to do a geological survey of the chrome ore, and he compiled a chromite estimation report. It was also Mufari's evidence that the same claims were erroneously forfeited by the Ministry, which forfeiture was later reversed. Additionally, he told the court that it was part of the Ministry's report that the defendants had conducted mining activities on ground which was not open to prospecting and pegging. The witness further stated that even though the defendants had certificates in respect of the same claims, they were liable to pay the plaintiff the amount claimed because the plaintiff's claims predated theirs.

The plaintiff's second witness was Chikowero, who gave evidence in her capacity as the operations manager of the plaintiff since 2011. She stated that when she became aware of the illegal extraction of ore from their claims, she alerted Kleuters who was not in the country most of the times. The witness told the court that she physically visited the site in the company of two other gentleman who eye witnessed the site. Those two gentlemen were not brought to court to testify on what they saw, since one of them is deceased. She continued with her testimony by stating that the parties began to engage each other through letters. Chikowero said that in one of the letters, the defendant admitted that it had indeed conducted mining activities. This witness also testified that the plaintiff made a complaint to the Ministry, which compiled a report marked as Exhibit 4. In addition, she stated that the report highlighted that defendant's claims encroached onto the plaintiff's claim, and that such encroachment occurred after the forfeiture had been reversed. The plaintiff closed its case after Chikowero had given evidence. As I said, the plaintiff did not call the two gentlemen who, according to Chikowero, had accompanied her to the site. She said one

of them had passed on, but she did not proffer a reason (or reasons) for the failure to call the remaining gentleman, who is still alive. I move on to examine at the case of the second defendant.

The second defendant's case

I have already observed that the second defendant relied on the evidence of its only witness, Mlalazi, who testified in his capacity as the human resource and operations manager of the second defendant. It was his testimony that their company was incorporated in 2006. He then told the court that, sometime in 2017, the second defendant entered into a mining agreement with the first defendant. A term of that agreement was that the second defendant would mine alluvial chrome from its mining claims, whilst the first defendant would mine nickel. It was the witness' evidence that, given that the first defendant was authorized to mine at the site of the second defendant's claims, the second defendant cannot be liable for the damages which were being claimed by the plaintiff or alternatively the quantities.

Applicable law

This claim is steeped in the law of delict. In other words, it is an *Aquilian* action. The *lex Aquilia* or *Aquilian* action is a general delictual action used to claim damages for patrimonial or financial loss. Therefore, it is imperative for me to examine the law relating to Acquilian action. In this jurisdiction the position of the *lex aquilia* is settled. The first observation that I make is that, it is trite that upon appropriate proof thereof, damages suffered by a party must be borne by the wrongdoer. In this respect, for one to succeed in a claim of this nature, such a party must show the following:

1. The defendant committed a wrongful act;
2. There must be some quantifiable financial loss stemming from the defendant's conduct;
3. There should be a causal link between defendant's conduct and the ensuing loss;

In the South African case of *Minister of Police* v *Skosana* 1977 (1) SA 31 (A), CORBETT JA expressed the law as follows:

> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to … the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the

> negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue, or whether, as it is said, the harm is too remote".

This approach was endorsed by the Supreme Court in *Mapingure* v *Minister of Home Affairs & Ors* SC 22-14 (per PATEL JA). It is self-commending.

> See also *Nyaguse* v *Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H); *Rinenote Printers (Pvt) Ltd* v *A Adam & Co (Pvt) Ltd* 2014 (2) ZLR 314 (H).

Analysis of the case

I will now proceed to analyse the evidence led before me and see if the requirements set out by the law have been met. The first requirement is to ascertain whether or not there has been a wrongful act by the defendants. The plaintiff alleges that the second defendant illegally mined on its claims, Msasa 122 to 127, and produced certificates which show that it owns those claims. In addition, the plaintiff stated that the defendants started illegally mining at their claims at a period unknown to them. The plaintiff's witness also gave evidence that they became aware of the illegal mining in 2013. To prove this, the plaintiff produced pictures which it said were taken during this time. I note that, despite saying that illegal mining started as far back as 2013, the plaintiff only took action to address this in 2019 when a report was made to the Ministry. It seems to me that, given the value placed by the plaintiff on the loss arising from the illegal mining, it is inconceivable that no action was taken as soon as plaintiff became aware of the illegal mining activities.

The second defendant also gave evidence that, at some point, the plaintiff and second defendant entered into an agreement in which the second defendant was authorized to mine alluvial chrome from the plaintiff's claims. The second defendant's witness (Mlalazi) further testified that, sometime in 2016, the same claims belonging to the plaintiff were wrongfully forfeited by the Ministry which forfeiture was later reversed. This raises more questions than answers. I say this because the period that the second defendant carried out mining activities on the claims is critical to the plaintiff's cause of action. In other words, the question that requires an answer is whether mining was done during the time of forfeiture of the claims or outside that period. In my view, it was incumbent upon the plaintiff to prove that, indeed, the second defendant illegally mined at their claims. Nowhere in the evidence led by both the first and second witnesses of the plaintiff was it shown that the mining complained of occurred before 2016, a period when the second

defendant did not have any authority to mine at those claims. I observe that the pictures which were produced by the plaintiff were meant to prove that the mining activities began in 2013 instead of 2016**.** However, under cross examination Counsel for the second defendant, the plaintiff's witness said that the pictures had been captured in 2011. From this evidence, I do not see how pictures that were taken in 2011 could be used to explain a state of affairs which existed in 2013. Nothing convincing was said by the witness or their legal practitioner to explain this disparity. Additionally, no plausible explanation was proffered on why there was a long delay in making a report or taking any action to stop the illegal activities. My view is that the plaintiff placed no evidence to satisfy the court that indeed the second defendant did not act lawfully when it carried mining activities on the disputed claims. In this context, in *Rinenote Printers (Pvt) Ltd* v *A Adam & Co (Pvt) Ltd* 2014 (2) ZLR 314 (H), this court stressed the need for proof of both wrongfulness and fault.

The next fundamental requirement for an Acqulian action to succeed is that, there must be a quantifiable financial loss stemming from the defendant's actions. The plaintiff testified that their loss was in the sum of $8 173 188.00 inclusive of VAT. Nevertheless, the plaintiff did not show the court how that figure was arrived at. In respect of this figure, Mufara told the court that he was engaged by the plaintiff to conduct a geological survey of the mined chrome in order to ascertain the value of the mined ore, and he compiled a chromite estimation report. No further evidence was given as to demonstrate how the figure of US$8 173 188.00 was computed. The plaintiff's argument is that the report gives an estimate of the value of ore that could have been mined by the second defendant. The court is unable to find that the plaintiff's claim has been established. In this respect, the case of *Mbundire* v *Buttress* 2011 (1) ZLR 501 (S) is instructive. It was stated that in a case where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. The Supreme Court also said that, where this cannot be done, the plaintiff must lead such evidence as is available to it that enables the court to quantify the damages that it can award.

Let me make the pertinent comment that the underlying principle for awarding damages in an Aquilian action, is to compensate the plaintiff by assessing an amount that places the plaintiff in the position they would have been in had the wrongful act not been committed. A critical observation needs to be made. The plaintiff's first witness confirmed in his evidence that there

were no mining activities or developmental work ever conducted by the plaintiff at the claims in dispute. Therefore, it seems to me that no basis has been laid for the claim for US$8 173 188.00. In other words, there were no historical evidence placed before the court of any quantities previously mined on the claims and their value. I am therefore unable tell from the geological survey on its own how the plaintiff could have reasonably made a possible profit of that magnitude.

As I have already said, the plaintiff's evidence did not show the period when the second defendant mined on the disputed claims. Put differently, the evidence before me does not prove that the second defendant carried out mining activities at a time that it had no authority to do so. Secondly, the plaintiff did not prove the amount of loss that it alleges to have suffered. Since the plaintiff has failed to prove the quantum of damages, I cannot award damages against the first defendant despite its default in appearing for the trial. Consequently, my conclusion is that the plaintiff failed to provide evidence to sustain its cause of action and, thereby, entitle it to an award of the damages claimed. I am inclined to dismiss the plaintiff's claim. There is no reason for departing from the traditional rule that costs follow the result. I will award costs on the ordinary scale.

In the result, the plaintiff's claim is dismissed with costs on the ordinary scale.

Absolom Attorneys, plaintiff's legal practitioners
Zimudzi and Partners, defendant's legal practitioners