MABWE MINERALS ZIMBABWE (PRIVATE LTD)
versus
BASE MINERALS ZIMBABWE (PRIVATE LIMITED)
and
PETER VALENTINE
and
DEPUTY SHERIFF BINDURA N.O

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 27 & 29 August 2014

Urgent Application

T Magwaliba, for the applicants
F Katsande, for the respondents

TSANGA J: This is an urgent application in which the applicant, Mabwe Minerals (Pvt) Ltd, seeks an order for immediate vacation from its mine by the first and second respondents on the basis that the latter's occupation of the mine on the 21st for August was illegally obtained. The applicant is presently the holder of six mining claims which emanated from a 100% sale to it by one John Richard Needham Grooves some time in 2012, through his company Chiroswa Minerals (Pvt) Ltd. The sale is however disputed under HC 4112/13 as having been fraudulent on the basis that the first and second respondents owned 50% of the shareholding at that time. Of relevance to this matter is that at the time of the sale, it appears that a tribute agreement had also been entered into between John Richard Needham Grooves and the second respondent in May 2008 for a three year period. For a variety of reasons which are not the subject matter of this application, the tribute agreement was finally registered sometime in February 2014.

The occupation which is being challenged was obtained by the respondents through a writ in a chamber application brought before Justice Mafusire in HC 5926/14. The writ was in pursuance of enforcing a judgment in the matter HH 261/11, previously heard before Justice Patel in terms of which the registration of the tribute agreement was one of the things

ordered. The applicant states that the nature of the order the respondents obtained i.e. a writ of occupation is not founded on any recognisable rule. The essence of a writ is a written command in the name of a court or other legal authority to abstain from acting in a particular way. It can be in the form of a court order or a decree. The applicant has sought clarity from the judge in question on its granting and as such the issue needs no further commentary. The applicant further highlights that this particular order was also granted on the very day when opposing papers were filed and before the expiry of the *dies induciae* relating to the application. The Applicant also points out that it is not a party to the matter brought before Justice Mafusire and that as such the order cannot be enforced against it. The order is in favour of the first and second respondents against Chiroswa Minerals (Pvt) Ltd. As has already been stated, and as the history of the various cases that have been filed with this application shows, Chiroswa (Pvt) Ltd through Mr Grooves were the sellers from whom the applicant bought the disputed mining claims. The applicant however emphasises that it seeks to assert its rights on the basis of the registered mining rights in its possession and not on the basis of the sale. Moreover, the applicant highlights that when the Respondents previously tried to take occupation of the mines without following due process, it successfully obtained a spoliation order and an interdict on 7 March 2014 under case No. HH. 119/14. This was heard as an urgent application before Justice Tagu. Of significance to this urgent application is that this matter was appealed under SC 136/14. The appeal was dismissed. Much in this urgent application is founded on what is alleged to have been the foundation for dismissal of that appeal.

I will address the issue of urgency. The applicant essentially places its application for urgency on the basis that the Supreme Court‘s findings regarding the tribute are being circumvented. This finding, according to the applicant’s understanding, was that the tribute of 2008 had expired and that it could not be enforced. It insists that this was at the heart of the dismissal of the appeal. As such the applicant asserts that the decision on which the respondents rely for giving force to the tribute agreement, namely a judgment by Justice PATEL in HH 261/11 is not capable of enforcement because the three year period which was the term for which the tribute had been granted has long since expired. Consequently, it is therefore its averment that the chamber application which sought the writ of occupation on the strength of HH 261/11 was improper and a calculated measure to circumvent of the Supreme Court order.

The essence for the urgency is that the court cannot allow what amounts to flagrant violation and contempt of the Supreme Court's findings to take place. Accordingly as part of the provisional order sought, in addition to the irreparable harm that will result if the order is not granted, Applicant seeks a special order as to costs, *de bonis propris,* against Mr *F.M Katsande*. This is on the basis that his conduct in obtaining the order leading to the occupation on the 21st for August falls below the ethical standard expected of a legal practitioner.

The first and second respondents and their counsel Mr *F.M Katsande* deny these averments with the latter taking great umbrage at the insinuations on his character and standing as a legal practitioner. He strongly asserts that expiry of the tribute agreement was never the basis of the dismissal of the appeal as the Supreme Court did not want to look at the merits relating to the tribute. He maintains that the tribute agreement had not expired and was registered in 2014.

There are several difficulties in deciding on the true urgency of this matter. Firstly the written reasons for the dismissal of the appeal are yet to be availed. What the order granted by the Supreme Court in SC 136/14 on 15 July 2015 merely states is that the appeal is dismissed with costs. Another difficulty is that the reasons for the granting of the writ in HC 5926/14 which was granted on 30 July 2014 through a chamber application have been sought but are also yet to be availed. The applicant is yet to formulate its specific action in relation to that judgement once the reasons are availed.

The respondents vehemently assert that there is no urgency in this matter for the following reasons. They aver that the applicant were aware at the time that they entered into negotiations to acquire the claims that there was a tribute agreement whose enforcement was *res litigiosa.* In every day parlance, this simply means that a thing or an object is the subject matter against which legal proceedings have been instituted. It is argued that because applicants acquired property which was *res litigiosa,* they did so subject to any judgment which is eventually passed in relation to that property. That judgment was in the case of HH 261/11 by Justice PATEL, which they were now enforcing. It is also argued that since there was never an appeal against the decision in HH 261/11, there is nothing irregular about seeking to enforce the tribute in terms of the order that was granted. The respondents further argue that they decided to enforce this judgment since the entire challenge which had led to their appeal of case HH 119/14 which granted the applicants an interdict was that they had

gone onto the property without following due process. In support of the *res litigiosa* argument they cited the case of *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132.

In an urgent application proof of what is sought is provided through written affidavits and documents. An oral hearing with the parties involved further helps to elucidate whether the provisional order sought should be granted or not. A provisional order may of course be denied in the face of a serious challenge to the grounds upon which it is sought. In casu the Respondents deny that the Supreme Court found their tribute agreement to have expired. With counsel for both parties having represented their clients in the Supreme Court hearing, and both having seemingly heard the Supreme Court differently, the written judgment is material to corroborating the applicant's claim of the wrongfulness of the respondent's conduct. It needs to be sought. Indeed whether there has been any violation at all as alleged by the applicant can only come from a reading of the reasons. The nature for the provisional order sought which also seeks to censure Mr *Katsande* for disobeying a court order cannot be assessed for its propriety outside a full understanding of the Supreme Court's findings which he is said to have violated. Equally the reasons for the High Court order granted by Justice MAFUSIRE which has led to the current occupation of the mine by the respondents would also need to be availed for an informed decision to be made on urgency. There is no knowing when both these sets of reasons will be availed.

Whilst finding that the matter is not urgent by virtue of the absence of the reasons in the above two matters, which would have helped to make an informed decision on urgency, clearly in enforcing their judgment under these challenged circumstances, the respondents do so at their own risk. They could be liable to paying significant damages in the event that a written judgment of the dismissal of their appeal by the Supreme Court in SC 136/14 confirms that the court indeed found their tribute to have expired. Similarly, a finding that the High Court order upon which they have assumed occupation was improperly obtained also puts them at risk for any harm caused.

In the circumstances, my finding is that the matter is not urgent. There will be no order as to costs.

Sibanda & Mawere: applicant's legal practitioners
FM Katsande & Partners, 1st & 2nd respondents' legal practitioners