REPORTABLE ZLR 14

Judgment No. SC 18/09
Civil Appeal No 175/07

HEM GRANITE INDUSTRIES (PVT) LTD v KEELEY GRANITE (PVT) LTD

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & GARWE JA
HARARE, SEPTEMBER 9, 2008

E T Matinenga, for the appellant

R M Fitches, for the respondent

MALABA DCJ: At the end of hearing argument for both parties we dismissed the appeal with costs. As the appellant had withdrawn an application it had intended to make for leave to lead further evidence we ordered it to pay the costs relating to that application. We indicated at the time that reasons for the decision to dismiss the appeal would follow in due course. These are they.

On 4 December 1994 the respondent which was then known as Boma Granite (Pvt) Ltd entered into a tribute agreement with the appellant. The appellant owned a mining location registered as number 22391 BM situated in the district of UMP Zvataida in Mutoko. Whilst the appellant was holder of the title to the minerals within its location it did not have the necessary capital for digging up, extracting, processing and disposing of the actual minerals for its own benefit and account.

The appellant entered into the tribute agreement with the respondent in terms of which it gave to the latter (the tributor) the rights to mine, extract, process, remove from site, the minerals and dispose of them for its own benefit and account subject to payment of an amount of royalty of 10% of the "at quarry" value of the minerals won for a period of three years commencing 1 March 1995 and terminating on 28 February 1998.

The relevant provisions of the tribute agreement in terms of which the parties defined the rights and obligations of their relationship are these. Under clause 2(a) the parties agreed that:

> "2(a) The Tributor shall have the right to work the said Mining Location to develop, to extract granite/dolorite blocks and treat the blocks from the same and dispose of the products for own account, but subject to the conditions of this agreement."

One of the conditions of this agreement set out in Clause 4 was that:

> "4. In consideration of the rights granted by the Grantor to the Tributor under this agreement, the Tributor shall pay to the Grantor a royalty amount of 10% of the "at quarry" value of the blocks of granite or other valuable products won and removed by the tributor from the said mining location."

In a memorandum of clarification dated February 1995 the parties defined for themselves the meaning of the words "at quarry" value in clause 4 of the tribute agreement. They agreed that it meant "the value free on truck Harare as determined by the Minerals Marketing Corporation Zimbabwe for the said blocks of granite less the cost of transporting the said blocks of granite from the quarry to Harare".

Under Clause 8 the parties agreed that the Tributor had a right to terminate the tribute agreement if it was unable to continue mining operations due to causes beyond its control subject to it giving the Grantor three months written notice of its intention to do so. Under Clause 10 they provided that on the termination of the tribute agreement in terms of Clause 8 the Tributor had to remove its machinery or plant from the Mining Location within three months.

The respondent took occupation of the mining location and exercised the rights given to it under the tribute agreement of mining, extracting and removing the granite blocks for its own account. It also discharged its obligation by paying to the appellant the amounts of royalty of 10% of the "at quarry" value of the granite blocks removed from the Mining Location for sale calculated in terms of Clause 4 as read with the memorandum of clarification.

The respondent was obliged to sell the granite blocks at prices prescribed for the industry by the Minerals Marketing Corporation Zimbabwe (MMCZ). The granite blocks extracted from the appellant's Mining Location were of poor quality. The respondent found it difficult to sell the granite blocks at the price prescribed by MMCZ for the lowest category of grades of the quality of granite blocks. As the MMCZ was unwilling to create another category of poor quality granite blocks the operations of the respondent became increasingly uneconomic.

In October 1997 the respondent gave written notice to the appellant of its intention to terminate the tribute agreement on 28 February 1998 in terms of Clause 8 of the agreement. The appellant accepted that the termination was due to causes beyond the respondent's control. Within three months of the termination of the tribute agreement the respondent removed its machinery or plant from the mining location. As of 28 February 1998 the respondent ceased to have the rights to mine, extract and remove minerals from the mining location.

At the time of termination of the tribute agreement the respondent had under its possession and ready to be removed from the mining location 188 granite blocks. These were blocks the respondent had won as a result of the exercise of the rights given to it under the tribute agreement. Its officials regularly visited the mining location to check on the security of the granite blocks. At times they brought potential buyers as they attempted to sell the blocks on behalf of the respondent. The appellant did not at the time dispute the ownership of the granite blocks by the respondent.

In 2005 MMCZ created a new category in the price structure for granite blocks of the quality similar to those extracted by the respondent from the appellant's mining location. Prices of granite blocks in the international market had generally improved. The respondent's officials went to the mining location in December 2005 with the intention of removing the 188 granite blocks for sale. The appellant's officials prevented the removal of the blocks claiming that they belonged to it.

On 21 March 2006 the respondent made an application to the High Court for an order authorising the removal of the 188 blocks of black granite from the appellant's mining location subject to payment of an amount of royalty of 10% of the "at quarry" value of the blocks within 30 days of their removal. The ground on which the application was made was that at the time of termination of the tribute agreement the 188 granite blocks were owned by the respondent. The contention was that it had the right to remove them from the mining location without hindrance from the appellant.

The application was opposed on three grounds. These were:

"(a) That ownership of the granite blocks vested in the appellant by virtue of it being the owner of the Mining Location until after payment of royalty.

(b) That if ownership vested in the respondent by virtue of clause 2(a) of the tribute agreement the respondent had abandoned the granite blocks at the termination of the agreement as being worthless.

(c) That all the rights of ownership which could have vested in the respondent reverted to the appellant as a result of the termination of the tribute agreement as a new agreement on the royalty to be paid by the respondent would have had to be entered into by the parties."

The court *a quo* in a well reasoned judgment upheld the respondent's contention that it had the ownership of the granite blocks at the time of termination of the tribute agreement and did not lose its right to remove the blocks from the mining location as a result of the termination of further contractual relationship with the appellant. The defences proferred by the appellant to the claim by the respondent were dismissed and the order appealed against granted.

The argument that the granite blocks were owned by the appellant because it owned the mining location was clearly untenable. Whilst retaining title to the mining location the appellant had in terms of the tribute agreement given some of the rights such as the right to mine, extract, process and remove for own account the granite blocks to the respondent. The granite blocks won by the respondent in the exercise of the rights given to it belonged to the respondent. Ownership of those granite blocks could not vest in two people at the same time. The tribute agreement itself recognised the fact that the granite blocks won in terms of clause 2(a) would be the property of the respondent.

Equally untenable was the argument that the respondent had abandoned the granite blocks when it left them at the mining location upon termination of the agreement. The regular visits to the mining location by the respondent's officials to check on the security of the granite blocks and at times to show them to potential buyers without any objection from the appellant were accepted by the court *a quo* as sufficient evidence of determination on the part of the respondent to retain ownership of the granite blocks.

Mr Matinenga argued the appellant's case on one ground. This was that:

> "The learned judge erred at law in finding that the termination of the Tribute Agreement between the appellant and the respondent on 28 February 1998 did not in any way change the respondent's rights to blocks of granite mined but left at the appellant's claim.
>
> He ought to have found that as the contract (Tribute Agreement) between the appellant and the respondent had terminated there had to be a new agreement on royalty before the respondent could remove the blocks of granite from the said claim."

The contention advanced on behalf of the appellant in argument was that the right of ownership which the respondent may have had in the granite blocks went together with its obligation to pay the amount of royalty of 10% of the "at quarry" value in terms of Clause 4 of the Tribute Agreement extinguished by the termination of the agreement on 28 February 1998. Mr Matinenga submitted that the rights which the respondent had acquired in the granite blocks ought to have been exercised during the period of tribute (the underlining is mine for emphasis). Reliance was placed on the *dictum* in *Durma* (*Pvt) Ltd v Siziba* 1996(2) ZLR 636(s) at pp 637G-638B EBRAHIM JA said:

> "A tribute agreement is one whereby mineral rights are let by one person (the grantor) to another (the tributor). It is not a lease of land, or even of minerals. It is a concession by the mine owner to the tributor of a portion of his own incorporeal right in respect of the minerals namely, to win precious metals (or other minerals) if he can find them. A condition is attached that the tributor will pay a certain proportion of the minerals won to the mine owner *Spearman & Magden v Snodgrass* 1912 SR 161. It is a contract *sui generis*, being neither a lease nor a sale at common law, though the principles to be applied are not very different: *Naested v Kia Ora* "Syndicate 1935 SR 117 at 124, *Graham & Roof Mine Tribute v Rixom* NO 1941 SR 51 at 62. The tributor is given the right to mine the land and to win from it as much of the minerals sought as he can during the period of the tribute and to dispose of the mineral So won for his own profit." (the underlining is mine)

The contention accepts as its premise that the respondent had at the time of termination of the tribute agreement acquired the rights of ownership in the granite blocks including the right to remove and dispose of them for its own benefit and account subject to payment of the amount of royalty of 10% of the "at quarry" value of the blocks determined in terms of Clause 4 of the agreement. It is important to emphasize the fact

that the right to remove the granite blocks lay together with the obligation to pay the royalty. The royalty would be the amount calculated on the value of the granite blocks determined in terms of Clause 4 of the tribute agreement. The amount was to be payment for the specific rights given to the respondent and realized by it in terms of that agreement.

The question then is, did the termination of the tribute agreement have the effect of extinguishing the rights and obligations which had accrued to the respondent as contended by the appellant? The general rule of the law of contract is that termination of a contract operates *ex nunc, de futuro* only and does not affect rights which have accrued to the parties. Termination or extinction of the obligation to perform is restricted to the executory portion of the contract leaving intact rights which were accrued due and enforceable before termination. In *Walkers Fruit Farms Ltd v Sumner* 1930 TPD 394 GREENBERG J with the concurrence of SOLOMON J at p 401 spoke about the effect of acceptance of a repudiation of a contract on accrued rights. He said:

> "No doubt it is correct that, where there is repudiation and where the other party elects to treat the contract as at an end the latter cannot thereafter enforce the contract. But it appears to me that this only applies to the executory portion of the contract; but where a certain right has accrued to the one party before the election such right is not affected after the election. He treats the contract as at an end as from the date when he makes his election; up to that date the rights have come into existence and can be enforced."

In *Crest Enterprises (Pvt) Ltd v Rycklof Beleggings (Edms) BPK* 1972(2) SA 863AD HOLMES JA expounding on the rule 870B:

> "when Greenberg J used the word "accrued" in the foregoing passage, it is clear that he meant accrued, due and enforceable". I say this for three reasons. First, the learned Judge contrasted the executory portion of the contract' to a right

which "has accrued". Second a few lines after the above-cited paragraph he used the expression "accrued due". Third, on the facts of that case the right in question had not merely vested but had become enforceable prior to the cancellation of the contract … .

Seen in that light, the rule is worth preserving because -

(a) It has in it elements of fairness and common sense, such as a crisp balancing of contractual performance and prestation when the plaintiff sues.

(b) It has been recognized in a number of cases over the past forty years and more, e.g. in *Arnold v Viljoen* 1954(3) SA 322(C) even if it was applied somewhat widely in some of them, eg. in *Maw v Grant* 1966(4) SA 83(C), the latter being the subject of comment in the 1965 issue of the Annual Survey of South African Law at 153-4.

(c) It accords with English principles which are relevant since the doctrine of anticipatory repudiation came to us from England. In *Salmond & Williams* On Contract 2 ed (1945), the learned authors say at 566, …

> "… every obligation which has accrued due between the parties before the rescission of the contract, and which so creates a then existing cause of action remains unaffected by the rescission and can still be enforced".

To sum up on this aspect, the rule in the *Walker* case, *supra*, is confined to cases where, prior to the rescission of a contract by one party's acceptance of the other's repudiation, there exists a right which is accrued, due and enforceable as a cause of action independent of any executory part of the contract".

In *Thomas Construction (Pvt) Ltd v Grafton Manufacturers (Pvt*) Ltd 1986 (4) SA 510 (N) NIENABER J stressed the importance of the qualification in the *Crest Enterprises* case *supra* that the rule operates only to the extent that the accrued rights are independent of the executory portion of the contract. The rule is, further more, not restricted to instances of repudiation.

In this case the granite blocks had already been won by the respondent in the exercise of the rights given to it under Clause 2(a) of the tribute agreement. They were in its possession ready to be removed from the mining location at the time of termination of the contract. The granite blocks had become the property of the respondent by reason of its having performed its side of the bargain subject, of course, to payment of the amount of royalty which had to be calculated in the manner expressly provided for under Clause 4 of the tribute agreement.

The right to remove the granite blocks from the mining location had accrued to the respondent at the time of termination of the tribute agreement. The right was enforceable against the appellant in the event of interference with its exercise. Mr Fitches submitted that the only limitation to the exercise of the right of ownership in the granite blocks by the respondent was the obligation to pay the amount of royalty determined in the manner specified in Clause 4 of the agreement.

I agree with Mr Fitches that the obligation was a subtraction from the respondent's *dominium* in the granite blocks. The amount of royalty determined in the manner specified would be consideration for the particular rights already had by the respondent. The rights accrued to the respondent. So did the obligation to pay the amount of royalty as agreed. The contention that there had to be a new agreement on the royalty to be paid was based on the illogical proposition that ownership of the granite blocks was somehow lost to the appellant by reason of the termination of the contract.

Both the rights and obligation could not be extinguished by the termination of the tribute agreement which affected the executory portion of the contract only.

The executory portion of the tribute agreement which was terminated was that the respondent no longer had the rights to develop, extract, treat and remove granite blocks from the mining location as from the date of termination. The accrued right to remove the granite blocks already won and the obligation to pay the amount of royalty for them determined in terms of Clause 4 of the tribute agreement were not affected. They were enforceable independent of the executory portion of the contract. By preventing the removal of the granite blocks from the mining location the appellant acted unlawfully vesting the respondent with a cause of action to enforce its rights.

The appeal was accordingly dismissed with costs.

ZIYAMBI JA: I agree

GARWE JA: I agree

Gutu & Chikowero, appellant's legal practitioners

Costa & Madzonga, respondent's legal practitioners