SUNNY YIFENG TILES ZIMBABWE (PRIVATE) LIMITED

Versus

QUARRY PRODUCT DISTRIBUTION (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

Commercial Division

CHIRAWU-MUGOMBA J

Harare, 26 and 28 November 2024.

A. Nyamukondiwa, for the applicant

H. Muromba, for the respondent

OPPOSED APPLICATION

CHIRAWU-MUGOMBA J- This matter was placed before me as one for a claim of *rei vindicatio.* The applicant is the holder of two mining claims over a forty hectare piece of land situate at Stonehurst farm under certificates of registration 066987 DA and 066988 DA. The registration numbers are 5029BM and 5028 BM respectively. Both certificates were issued on the 8th of May 2019.

It is common cause that on the 5th of October 2022, the applicant and respondent entered into an agreement of sale in respect of the two mining claims and machinery. This agreement was varied through an addendum signed on the 24th of November 2022. Such variation resulted in the clause on arbitration being the first port of call in disputes, falling away. The applicant locates its claim in *rei vindicatio.* It states that on the 11th of May 2023, the

agreement of sale between the parties was cancelled at the instance of the applicant. This relates to both the mining claims and the machinery. As the lawful holder of the rights to the claims, applicant states that it can enforce them against any entity including the respondent. Put simply, the respondent is occupying the claims and holding on to the machinery without the consent of the applicant. The respondent is continuing with mining activities without any legal basis. The certificates of registration with respect to the claims were never transferred to the respondent. The contract was never perfected.

The applicant thus seeks an order that it is entitled to absolute ownership of the two mining claims and that the respondent be ordered to surrender them within seven days from the date of the order. Further that the respondent be ordered to pay costs of suit on a legal practitioner and client scale.

The respondent strenuously opposes the application. The opposing affidavit starts by laying what respondent says is a factual basis. It makes reference to clause 5.3 of the agreement in relation to what it acquired from the applicant. With reference to the addendum, the major thrust was to revise the payment terms in the main agreement. Indeed, this comes out clearly in the addendum. Further that in November 2022, the parties entered into a tribute agreement over the same mining claims. The respondent duly paid for the tribute agreement as statutorily expected. A dispute arose in relation to the tribute agreement and the respondent has since appealed to the Minister of Mines. The respondent surmises that it is occupying the claims on the basis of the tribute agreement and not the agreement of sale. Further that the cancellation of the agreement of sale is illegal. The applicant has failed to abide by the terms and these infringements are laid out in paragraph 8:5 of the

opposing affidavit. These include an alleged failure to complete installation of crushers by the 30th of October 2022, failure to handover remaining machinery and failure to effect transfer of the mining claims. The attention of the applicant has been brought to these infringements. As a result, the applicant cannot claim cancellation of the agreement when it is in breach. The respondent contends that the applicant has not averred any facts which would entitle it to the relief sought. The respondent has complied substantially with the agreement including part payment of the purchase price.

At the hearing, Mr. *Muromba,* raised a preliminary issue in relation to a previous matter filed by the applicant in HCHC 398/23 (not HCHC 393/23 as submitted). He submitted that the applicant in that matter sought the same relief as in *casu.* The applicant abandoned that application before seeking its reinstatement in HCHC 13/24 before withdrawing that matter and now persisting with HCHC 190/24. The challenge is that the order in HCHC 398/23 has not been vacated and the conduct of the applicant is akin to forum shopping. The court has already pronounced itself on the issues arising in the dispute between the parties. In other words, there is no longer a live issue between them. An order remains extant unless it is set aside and parties are bound by it- *Mugausi vs. Jekera and anor,* SC-54-22 and *Sunko (Mauritus) and anor* vs. *Versapak and anor,* SC-2-22. Mr. *Nyamukondiwa,* located the preliminary issue under the doctrine of *res judicata.* He countered the submissions made by stating that in HCHC 398/93, the matter was not decided on the merits. The order granted is not final- *Toro vs. Vodge Investments (pvt) Ltd and anor,* SC-15-17.

To deal with this preliminary issue and whether or not the claim is *res judicata,* it is imperative that the court looks at the order in HCHC 398/23 if any.

The plea of *res judicata* was aptly captured in the *Toro* matter, as follows,

> "In the case of Chimponda (*supra*) MAKARAU JP (as she then was) at pp 329G to 330 C said:
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> The requirements for the plea of *res judicata* are settled. Our law recognizes that once a dispute between the same parties has been exhausted by a competent court it cannot be brought up for adjudication again as there is need for finality in litigation. To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute.
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> For the plea to be upheld, the matter must have been finally and definitively dealt with in the prior proceedings. In other words, **the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties, by making a finding in law and / or in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or to defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment.**
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> A judgment founded purely in adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter does not in my view constitute a final and definitive judgment in the matter. It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved." (emphasis added)""

As a matter of fact, there was no order issued by a Judge or a court in HCHC 398/23. What is on record is a letter from the Registrar to the applicant dated the 5th of January 2024. The letter reads as follows:-

'We note that this court application was issued on 5 June 2023. In terms of Rule 35r5 of the High Court (Commercial Division) Rules, 2020 the matter was supposed to have been set down within 6 months from the date of issue. To date, the matter has not been set down in accordance with the rules of court. Be advised that in terms of the aforementioned rule, the matter is deemed lapsed. Be guided accordingly'.

The applicant proceeded to apply for reinstatement of that matter but withdrew the application. In my view, that is neither here nor there. In the *Mugauzi* matter (supra) what the court considered is the issue of a court order as follows,

> 'When a court grants an order all subsequent acts affecting the dispute between the parties rely on the court's order and not the reason or facts the court based its judgment on. Execution of judgment debts is based on court orders and not the reason for which the court order was granted. Therefore a party or the parties cannot disregard a court order as they are bound by it. In the case of *Chiwenga v Chiwenga* SC 2/14, it was stated that:
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>> "The law is clear that an extant order of this Court must be obeyed or given effect to unless it has been varied or set aside by this Court and not even by consent can parties vary or depart therefrom. See also *CFU v Mhuriro & Ors* 2000 (2) ZLR 405 (S)."

Reliance on that case by the respondent's counsel is certainly not correct. In *casu,* what we have is a letter from the Registrar and not a court order. That is the major distinction. There can therefore be no *res judicata* to talk about. The preliminary has no merit and is dismissed.

Having dismissed the preliminary issue, the only consideration is whether or not the applicant has met the requirements for *rei vindicatio.* The issue of the tribute falls away and both parties agreed that under HCHC 174/24, this court set aside the agreement and that judgment is now subject of an appeal before the Supreme Court. It therefore ceases to have relevance in this matter.

Mr. *Nyamukondiwa* submitted that there was no dispute over ownership of the mining claims. The respondent had cast its mast on the tribute agreement which issue has fallen away. Therefore they do not have a legal to stand on. Their entire opposition crumbled on the basis of reliance on the tribute agreement. The respondent cannot challenge the cancellation of the agreement through the notice of opposition. The cancellation remains in force until set aside. Once the respondent admitted that the applicant has title, it cannot remain on the claims without authority.

Per contra, Mr. *Muromba* disputed the contention that the sole defence of the respondent rested on the tribute agreement. While conceding that this particular issue had fallen away and also that the title of the applicant to the mining claims cannot be disputed, he submitted that the nub of the defence is

that there was no unlawful dispossession. The respondent is occupying the claims lawfully following the agreement of sale.

The heads of argument filed by both parties aptly capture the law. And this issue has been decided in a plethora of cases. Mr. *Nyamukondiwa* made reference to the leading case of *Savanhu vs. Hwange Colliery Company,* SC-8-15, cited in respondent's heads of argument. In that matter, the Supreme Court eloquently outlined the requirements for *rei vindicatio* as follows,

> "The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in *Chetty v Naidoo*:
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> > "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right).
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> > The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner… (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) at pp 382E, 383)…"

As already stated, the issue of ownership has not been contested. The respondent has not disputed that the applicant has cancelled the agreement. What it contests is the legality of the cancellation as its defence. The question then becomes one of whether or not the respondent has established any right to remain on the claims and to hold on to the machinery. I am in agreement with Mr. *Nyamukondiwa* that the respondent hoisted itself on its own petard by unequivocally stating that the reason that it was occupying the claims was the tribute agreement. Once that fell away, it had no leg to stand on. Instead it has made vague allegations that the applicant has 'breached' the agreement of sale. It has not even stated that the respondent has fulfilled its end of the bargain. Instead as posed to Mr. *Muromba,* the respondent seemingly is seeking adjudication over the propriety of the

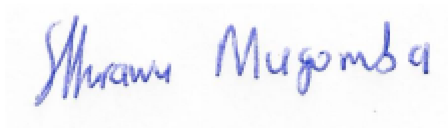
cancellation, an issue that is not before the court. The respondent clearly has not established any right to remain on the claims in the absence of authority from the applicant.

On costs, although the applicant seeks these on a legal practitioner and client scale, I do not perceive of any circumstances that warrant such. Accordingly the applicant has made a case for the granting of the order sought save for costs on a higher scale.

DISPOSITION

It is ordered that:-

1. The application for rei vindicatio be and is hereby granted.
2. The Applicant be and is hereby entitled to absolute ownership of two mining locations situate at Stonehurst Farm with registration certificates numbers 066987 DA and 066988 DA respectively.
3. The Respondent be and is hereby ordered to hand over possession of two mining locations situated at Stonehurst Farm with registration certificates numbers 066987 DA and 066988 DA respectively to the Applicant within seven (7) days from the date of this order.
4. Should the respondent fail, refuse or neglect to act as aforesaid in paragraph 3 of this order, the Sheriff of the High Court be and is hereby authorised to act and restore possession of the applicant to the mining claims as described in paragraph 3.
5. The Respondent be and is hereby ordered to pay costs of suit



Igwani Chipetiwa Group, applicant's legal practitioners

Kantor and Immerman, respondent's legal practitioners/