DAVID JAJI HWEHWE
And
HWEHWE INVESTMENTS
v
FALCON GOLD ZIMBABWE LTD
And
PROVINCIAL MINING DIRECTOR
MIDLANDS PROVINCE (N.O)

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 10 September 2024
Judgment delivered on 7 March 2024

Opposed application

WT.Davira, for the applicants
G. Nyabawa, for the 1st respondent

ZISENGWE J: The applicants and the first respondent lock horns over a number of issues related to the rather acrimonious end to their mining tribute agreement, chiefly being the propriety of its termination by the first respondent. The broad framework of the tribute agreement was that the first applicant as tributor would be allowed to work (and extract ore) on certain of the respondent's (as grantor) mining claims. In exchange, the first applicants would pay the first respondent a certain agreed monthly royalty. The mining claims to which the tribute agreement relates were identified as Rolly 11 (Reg No..PM21368), Rolly 12 (Reg No. PM 21369), Rolly 13 (Reg No. PM 21370) and Rolly 14 (Reg No. PM 21371).

The first applicant is a director and shareholder of the second applicant. The second respondent is a government functionary whose remit is to superintend mining related matters in

the Midlands province. In that capacity he approved what the parties referred to as a "standard Tribute agreement" between the first applicant and the first respondent.

The dispute revolves, in the main, the validity of the first respondent's unilateral cancellation of the tribute agreement ostensibly on clause 15 of that tribute agreement. The applicant avers that the cancellation was defective and ineffectual for want of compliance with the condition precedent to a valid cancellation under the said clause. He therefore seeks a declaratory order to that effect. Additionally, the applicants seek a declaratory order confirming that they enjoy the right of first refusal in the event that the first respondent is desirous of disposing of the mining claim.

The first respondent apart from resisting the main claim justifying the cancellation on basis of an alleged material breach of the terms of the agreement, on the part of the applicant also launched a counter- application. In terms of the latter, the first respondent seeks payment of what it believes are outstanding royalties due to it by the first applicant in terms of the tribute agreement. For purposes of convenience the parties will be referred throughout this judgment by their original designations as applicants and respondents, respectively.

The Background

The tribute agreement which forms the subject matter of the application was entered into on 20 January 2023 but the operation of its terms was antedated to 1 January 2023. It was however preceded by the initial Tribute agreement concluded in 2016 to which an *addendum* was affixed in 2017. In terms of the 2023 tribute agreement, it was agreed that it (i.e., the agreement) would subsist until 30 December 2026.

However, hardly a year into the agreement, on 20 December 2023 to be exact, the first respondent unilaterally terminated the agreement as aforesaid. It did so *via* a letter directed to the applicant. Because of the centrality of the contents of that letter to the dispute, it is reproduced verbatim. It reads:

> Re: Notice of Termination of Tribute agreement: Falcon gold Zimbabwe Limited: David Jaji Hwehwe: Rolly 11,12,13,14 claims - Shurugwi.

Reference to the earlier correspondence regarding Tribute Agreement conditions not fulfilled, this letter serves to advice you that the current tribute agreement is terminated.

In this agreement clause 15- Other conditions- Point 2 states the following-

2. *The granter will have the right to terminate this tribute agreement by providing the tributor with 3(three) months written notice, in the event that the granter considers mining on those claims, or on the event that disposal of these claims [is] considered.*

To this end, this letter serves to formally advise you that we hereby issue the required three months' notice for the termination of the Standard Tribute agreement between yourselves and Falcon Gold limited. The 3 month period starts on Monday 1st January 2024.

Please ensure that all equipment is removed, in good time at the end of that 3 months' notice period"

This letter was signed by Q Nkomo. the first respondent's finance Director.

Aggrieved by the turn of events the applicants mounted the (main) application seeking an order in the following terms:

IT IS ORDERED THAT:

1. The application for a declaratory order be and is hereby granted.
2. The purported termination of the Tribute agreement concluded between the 1st applicant and the first respondent on 20 January2023, though a letter dated 20 December 2023 in respect of Rolly 11(Reg No.PM 21368), Rolly 12 (Reg No. PM21369), Rolly 13 (Reg No. PM 21370) and Rolly 14(Reg No. PM 21371) mining claims be and is hereby declared null and void.
3. The 1st applicant has a right of first refusal in respect of Rolly 11 (Reg No.PM 21368), Rolly 12 (Reg No. PM21369), Rolly 13 (Reg No. PM 21370) and Rolly 14(Reg No. PM 21371) mining claims in the event that the 1st respondent intends to dispose of the

same during the subsistence of the tribute agreement concluded between the parties on 20 January 2023.

4. The 1st respondent to pay costs of suit on an Attorney and client scale.

In his founding affidavit, the first applicant chronicled in comprehensive detail the history of the tribute agreement from its inception in 2016. He also detailed the trials and tribulations that he has had to endure in a bid to steer his mining venture to economic viability. He further set out in elaborate detail the massive capital investment he made for the operation.

The first applicant further averred that before the inception of the tribute mining agreement, he entered into an agreement with the first respondent for a water abstraction at his farm for use at the first respondent's plant. According to him, the first respondent was to pay a monthly fee of US$300 for such abstraction of water.

Additionally, the first applicant recounted in detail the financial difficulties he has encountered at various stages of his mining operations which at times forced the second applicant to borrow money from Fidelity Gold Refinery. He also recounted the various indulgencies he sought and obtained from the first respondent in light of the viability headwinds the applicants were facing. Most significantly, he claims that the first respondent agreed to review the monthly royalty from US$5000 to US$2500

Further the applicants aver that they enjoy the right of first refusal in respect of the mining claims in question. In this regard the first respondent asserted that he was verbally advised by the first respondent's personnel that in the event that the mining claims were to be sold, he would have the right of first refusal. This is particularly so given that the mining claims are located on a farm (Slades farm) registered in his name. He therefore brands the cancellation of the tribute a sham and charges that the first respondent simply wants to reap where it did not sow by utilising the resources which the applicants set up at considerable cost.

At the core of the application, however, is the applicant's contention that the purported termination of the tribute agreement was a nullity given that the clause upon when it was predicated, namely clause 15, requires a reason to be disclosed for such termination. More specifically the applicant pointed out that the first respondent was required to provide the applicants with three months' written notice in either of two situations; namely its intention to mine the claims or where the disposal of the claims was considered.

According to the applicants, the purported cancellation did not refer to either of these two situations rendering the cancellation defective.

In opposing the application, the first respondent enumerated a number of alleged breaches of the tribute agreement on the part of the first respondent, most prominently being the first applicant's failure to:

a) pay the royalties racking up a total of US$67 000 as of the time of deposing to the opposing affidavit.
b) provide a monthly development and mine output data as required by clause 2 (h) of the tribute agreement.
c) provide a statement (duly supported by documents) of tonnages recovered from the operators of the previous month.

In heads of argument filed in support of the first respondent's position reliance was placed on the *exceptio non adimpleti contractus* defence. It was submitted that the applicants could not seek to enforce an agreement that they themselves were in breach of.

It was further averred by the deponent to the first respondent's opposing affidavit, Qubeka Nkomo, that having cancelled the tribute agreement, the first respondent has since sold and transferred the claims to a third party which it identified as Shurugwi Empowerment Trust. It undertook to produce the relevant certificates of transfer in due course.

The first respondent attached a schedule showing a breakdown of how the figure of US$67 000 in outstanding royalties was arrived at. The first respondent further denied that it had an

obligation to pay the sum of US$300/month for the abstraction of water as averred by the applicants.

It was asserted by the first respondent that the persistent failure to remit the royalties was not only a material breach of the agreement but was also emblematic of applicant's failure to run a viable business enterprise-hence the termination was justified.

The first respondent therefore seeks a dismissal of the main application with costs on the punitive scale and an order granting its counter claim ordering the applicants to pay it the US$67 000 (also with costs on the punitive scale).

The first respondent took issue with the filing by the applicants of their answering affidavit to the main application after the parties had filed their heads of argument. It was averred that this was highly irregular and therefore that the offending affidavit had to be expunged from the record.

The chronology with which the parties filed the relevant court documents was as follows - the main application was filed on 21 March 2024 and the first respondent filed its notice of opposition and opposing affidavit together with the counter-application on 16 April 2024. The applicant did not immediately file an answering affidavit prompting the first respondent to take the initiative towards having the matter set down for hearing. It did so by filing composite heads of argument on 3 May 2024.

In response, the applicant filed its own heads of argument on 13 June 2024 simultaneously with the answering affidavit in the main application.

The first respondent argues that the filing of an answering affidavit, post the filing of heads of argument was highly irregular and potentially prejudicial to it. It claims that the answering affidavit potentially addresses issues raised in the heads of argument. To that end, the first respondent's legal practitioners in a letter dated 20 June 2024 directed to the applicant's legal practitioners taking umbrage at the course of action taken by the applicants in this regard. Reliance

was placed in that letter to the case of *Tarner & sons (Pvt) Ltd* v *Master of High Court & Ors* HH 498/15.

For the very reason that the supposedly offending answering affidavit was filed after the first respondent's heads of argument, the latter did not address this perceived anomaly in the said heads of argument. Tellingly, however, no supplementary heads of argument were submitted to address this point. Counsel for the first respondent was content with making an oblique reference to this question.

This particular point was not pursued with any vigour at all leaving the court hamstrung on the true extent of the complaint. The first respondent did itself a disservice by failing to follow through with its threat to have the supposedly irregular answering affidavit expunged from the record.

The rules are however silent on whether an answering affidavit can be filed after heads of argument had been filed. They only provide in the proviso to r 59 (10) that no answering affidavit may be filed less than 10 days before the hearing of the application.

Be that as it may, Mamimine SP in his work "*Civil procedure of the High Court and Supreme court in Zimbabwe*" at p81 under the heading: **"can a litigant file an answering affidavit after the heads of argument have already been filed?** posits as follows:

> "Although the Rules are silent on whether leave is required if an answering affidavit is to be filed after heads of arguments have been filed, an applicant who intends to file an answering affidavit after the filing of heads argument must seek leave of the court and must be able to establish a proper and satisfactory explanation why the answering affidavit was not filed in the proper sequence. The usual factors determining whether condonation should be granted will be taken into account. If condonation is not granted, the affidavit must be expunged from the record."

The parties did not provide substantive arguments on the subject. A perusal of the contents of the answering affidavit, however, coupled with the fact that it was the first respondent which in its haste to have the matter resolved expeditiously caused the matter to be set down. In the course of doing so it filed its composite heads of argument, prompting the applicants to react by filing two separate heads of argument (one for each of the main and counter applications) together with

the answering affidavit to the main application. I did not get the impression that the answering affidavit was designed to exploit the contents of the first respondent's heads of argument. It is for that reason that I condone in terms of rule 7, of the High Court Rules, 2021, the belated the filing by the applicants of the answering affidavit to the main claim.

The point in *limine* raised by the applicants in respect of the counter claim will be dealt with when dealing with that counter-claim.

The Main claim

By way of recap, there are two main facets to the main claim, namely a declaration of the invalidity of the termination of the tribute agreement and secondly an order declaring that the applicants enjoy the right of first refusal should the first respondent be desirous of disposing the claims during the subsistence of the tribute agreement.

The requirements for the grant of a *declaratur*.

Section 14 of the High Court Act [Chapter 7:06] grants the High Court the discretion to grant declaratory orders. It reads:

> **"14. High Court may determine future or contingent rights.**
>
> The High court may, it its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

In interpreting this provision, GUBBAY CJ in *Johnsen* v *Agricultural Finance Corp* 1995 (1) ZLR 65, had this to say:

> "The condition precedent to the grant of a declaratory order under section 14 of the High Court of Zimbabwe Act, 1981 is that applicant must be an "interested person" in the sense of having a direct and substitutional interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties…"

The principles governing the granting of a declaratory order have since been distilled to consist of the following:

a) The applicant must be an interested person in the sense that he or she must have a direct interest in the right to which the order relates;

b) There is a right or obligation which becomes the object of the inquiry;

c) The applicant must not be approaching the court for what amounts to a legal opinion upon an abstract or academic matter;

d) There must be interested parties upon which the declaration will be binding; and

e) Considerations of public policy favour the issuance of the *declaratur*.

See *MDC* v *The President of Republic of Zimbabwe & Ors* HH-28-2007 & *Family Benefit Society* v *Commissioner for Inland Revenue & Anor* 1995 (4) SA 130 (T).

Using the model above, save for the fifth requirement only, the other requirements are amply satisfied in respect of both claims. The applicants, particularly the first applicant are undoubtedly interested persons as they are directly affected by the cancellation of the termination of the tribute agreement as well as the question of the existence of the right of first refusal. Similarly, the validity of the cancellation and the existence or otherwise of the right of first refusal form the subject matter of this inquiry, thus satisfying the second requirement. It is the outcome of such an inquiry that is contentious as between the parties. Needless to say, as far as the fourth requirement is concerned, the outcome of this inquiry will bind the parties in *casu*.

The validity of the cancellation of the tribute agreement.

Earlier I reproduced the contents of letter termination. It decidedly referred to clause 15 of the Tribute agreement. The relevant part clause 15 of the Tribute agreement reads:

“15. Other conditions on the conditions on the right to work claims

- The grantor will have the right to terminate this Tribute Agreement by providing the Tributor with 3 (three) months written notice, in the event that the grantor considers mining on these claims, or in the event that disposal of these claims [is] considered. "

This clause is clear. It admits of no ambiguity on what the first respondent needed to do should it have intended to terminate the agreement on the basis of its terms. The first respondent therefore could not indicate left but proceed to turn right. Having relied on clause 15 to purportedly terminate the agreement, (which clause has nothing to do with breach), it cannot rely on breach to justify the termination. Its actions were tied to the mast of its preferred reason for termination.

Should the first respondent have sought to terminate the tribute agreement on the basis of clause 15, then the requirements of clause 15 needed to be satisfied. The stems from the trite position that parties will be held to the terms of the contract. In *Wells* v *Southern African Alumenite Company* 1927 AD 69at 73 Innes J stated as follows:

> "If there is one thing which more than another, public policy requires is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contract, when entered into freely and voluntarily, should be held sacred and shall be enforced by the courts"

See also *Fastgrip Investments (Pvt) Ltd v Klipstringer* HB-286-17

Similarly, in *Book* v *Davidson* 1988 (1) ZLR 365 (S) at 378G -379C the following was said about the sanctity of contract:

> "There is however another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts. Jessel MR made the point in *Printing and Numerical Registering Co* v *Sampson* (1875) LR 19 Eq 462 by saying at p 465:
>
> > 'If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract.'"

The first respondent, as earlier stated relies on the *exceptio non-adimpleti contratus* defence, which principle postulates that a party to a contract cannot enforce an agreement which they themselves breached. Several cases were cited in this regard.

What the first respondent however overlooked was that this is not an application for specific performance *per se*. It is simply an application for a declarator to set the record straight as regards the validity of the purported cancellation.

Having concluded that the first respondent decided to invoke an inapplicable clause for the termination of the agreement I believe a proper case was made for the granting of an order declaring the termination of the agreement to be invalid.

The claim for the right of first refusal.

As intimated earlier, the applicants claim that the first respondent through its personnel had verbally advised the applicants that in the event that the mining claims were to be sold the first applicant would have the right of first refusal. The applicants further alleged that pursuant to that assurance on 5 July 2023, the first applicant had written to the first respondent seeking to exercise that right. This was because he (i.e.; first applicant) had been made aware that the first respondent intended to dispose some of its claims. He followed this up on 12 November 2023.

The first respondent completely denied the existence of such an arrangement. It posed the rhetorical question as to why such an important arrangement would not be reduced to writing. It further pointed out in its opposing affidavit that in the letter dated 12 November 2023, the applicants had not made any reference to the existence of such a right. It dismissed the allegation of the existence of such a right as an afterthought and a figment of the applicant's imagination (although it did not say so in as many words)

A right of first refusal entitles the holder to the first opportunity of buying the property in question should the seller decide to sell it. See *Owscanick* v *African Consolidated Theatres* 1967 (3) SA 310 (A) 316; *Hirschowitz* v *Moolman* 1985 (3) SA 739 (A) 756-762

The onus to prove such a right of first refusal reposes on the party alleging its existence. The respondent referred, rightly so, to a number of cases reinforcing the time-honoured principle of our law that the onus rests on the party alleging the existence of a particular set of facts to prove the same, *Macro Plumbers (Pvt) Ltd* v *Sheriff of Zimbabwe N.O. & Anor* HH-57-15; ZFC (Pvt) Ltd v Furusa SC15-18 & *ZUPCO* v *Parkhorse Services* (Pvt) Ltd SC-13-17, being some of them. In *casu,* there is a paucity of evidence suggestive of the existence of such a right. Apart from the letter dated 12 November 2023 wherein the applicant offered to purchase the mining claims in question, there is precious little to confirm the existence of such a right of first refusal. The letter in question does not in the least allude to the existence of such a right of first refusal. It reads:

> **"Follow up on the offer to purchase of claims Rolly 11,12,13,14**
>
> In reference to the above matter, I wish to bring to your attention that I am kindly seeking response to the letter which I wrote to you on the 5th of July 2023 offering to buy Rolly 11 (Registration No. 21368) Rolly 12 (Registration No 21369, Rolly 13 (Registration No. 21370) and Rolly 14 (Registration No. 21371) which all belong to Falcon Mine. I took forward to your response to this matter will be supremely appreciated."

The distinct impression created by this letter, therefore, is that the first applicant was offering to buy the mining claims in question rather than that he was exercising his right of first refusal.

To compound matters, the applicant failed to indicate which of functionaries of the first respondent had made that offer. Further unfortunately for them the applicants claimed to have misplaced the correspondences between it and the first respondent indicative of the existence of the right of first refusal.

It is on that basis that I dismiss the second of the applicants' two claims.

The Counter claim

The applicants' point in limine.

The applicant while disputing the amount set out in the respondent's counter application also took issue with the fact that first respondent opted to proceed by way of application.

They claim that there are material disputes of fact regarding the true extent of the applicant's indebtedness.

The first respondent vehemently disputes the existence of material disputes of fact. Its maintain that the applicants are creating fictitious disputes of facts in a bid to deflect what it deems to be applicants' incontrovertible obligation to pay it US$67 000.

In opposing the counter application, the applicants do not dispute that they were obliged to pay a fixed sum of US$5000 per month as royalties with effect from January 2023. However, they allege that the figure was reviewed downwards to US$2 500 after applicants made representations of its financial dire-straits. Further, according to applicants, this arrangement was to cease once production on the claims improved. Additionally, the applicants aver that they entered into a separate agreement wherein the respondents would pay the sum of US$300/month for abstracting water on the property. They claim that the first respondent had not honoured that arrangement racking up an unpaid bill of $27 500. The applicants therefore seek that the latter figure be used to set off their indebtedness to the respondents.

In *Supa Plant Investments (Pvt) Ltd* v *Edgar Chidavaenzi* 2009 (2) ZLR 132 (H) MAKARAU JP (*as she then was*) defined a material dispute of fact in the following terms;

> "A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence".

Material disputes of fact can also arise where the respondent admits the allegations contained in the applicant's affidavit but alleges other facts which the applicant disputes. In this regard, the following was stated in *Savanhu* v *Marere & 2 Ors* SC22/99:

> "The appellant chose to proceed by way of a court application to claim the order of specific performance against the first respondent. As the proceedings were by way of a court application and there were disputes of fact the final relief could only have been granted if the facts stated by the first respondent together with the admitted facts in the appellant's affidavit justified such an order. Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634H-635B."

The extent of the applicant's indebtedness to the first respondent in respect of arrear royalties is fiercely contested. The applicant averred in his founding affidavit that the royalties were reviewed downwards from US$5000 to US2500 per month. He also claimed that the breakdown provided by the first respondent with an overall figure of US$67 000 was merely to spite or getting back at him for having dared to institute proceedings against them. Further he claimed that there was a water abstraction agreement which had caused the first respondent to accumulate a sizable bill. He therefore seeks to have that latter amount set off part of his indebtedness. In its opposing affidavit as well as in its counter-application the first respondent denied both the downward revision of the royalty as well as the issue of the water abstraction agreement. This in my view created a typical dispute of fact.

It is trite that where material disputes of fact emerge in application proceedings there are basically four avenues available to the court namely;

(i) to dismiss the application should applicant have foreseen material disputes of fact arising; *Masukusa* v *National Foods and Anor* 1983 (1) ZLR 232; *Bevcorp (Pvt) Ltd* v *Nyoni & Ors* 1992 (1) ZLR 352; *Wenzhou Enterprises (Pvt) Ltd* v *Chen Shialong* HH 61-15

(ii) to refer the matter to trial in terms if r 46(10) of the High Court Rules, 2021; see *Chirinda* v *Chitepo* SC 42/92; *Dulys (Pvt) Ltd* v *Brown* SC 172/93; *Masukusa* v *National Foods & Anor* (*supra*)

(iii) to hear oral evidence in terms of r 58(12) of the Rules of the High Court, 2021; see *Barcklie* v *Bridle* 1955 SR 350; *Bhura* v *Lalla* 1974 (1) RLR 31

(iv) to take robust approach and decide the matter on the available evidence, see *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Leech* 1987 (2) ZLR 338; *Musevenzo* v *Beji & Anor* HH 268/13

The general approach however is to take a robust common-sense approach and decide the matter on the available evidence; *Muzanenhamo v Officer in Charge CID Law Order & Ors* 2013 (2) ZLR 604 & *Soffiantini v Mould* 1956 (4) SA 150 (E), *Zimbabwe Bonded Fibreglass v Peech* 1987 (2) ZLR 338 (SC), otherwise the efficacy of application proceedings would be eroded by the mere raising of illusory disputes of fact.

In present case it is common cause that in terms of the addendum to their 2023 Tribute agreement, the first applicant and first respondent agreed that the farmer would pay a monthly royalty of US$5000. This effectively superseded clause 15 of the tribute agreement which hitherto provided that royalties would be pegged at 5% of the value the minerals won by the first applicant.

These are not, I think, the kinds of dispute of fact which can be said to be incapable of resolution on the papers.

On the basis of the above principles the overall amount that the applicants would have been ordinarily obliged to pay to 1st respondent as royalties in terms of the addendum to the Tribute agreement would be as tabulated by the first respondent under the column headed "obligation" in the schedule to its counter application. Similarly, the actual payment made by the applicants is reflected under the column headed actual "payment"

The applicants would therefore have the onus to prove that the amounts payable from January 2023 was reviewed downwards from US$5000/month to US$2500. In this regard, apart from the applicants' mere say so, there is hardly any proof corroborative of the applicants 'assertions.

Given that the first respondent and first applicant took the trouble to record an addendum altering the previous position where 5% was levied to one of a fixed amount of US$5000/month it is hardly likely that they would not do the same for a further variation of term.

For the tribute agreement in general, it is apparent that any terms or any alteration thereof was reduced to writing. To conclude this segment therefore, there appears to be no credible evidence of such a downward review.

The question of the water abstraction claim appears quite credible. The question of the water abstraction is separate and distinct from the tribute agreement. It needed not be reduced to writing. It is not conceivable that in a relationship such as the present, every arrangement needs to be reduced to writing. In its notice of opposition, the first respondent in disputing the existence of a water abstraction agreement gives a rather curious response. It acknowledges the existence of the boreholes in question and but claims that they were drilled by the first respondent. The 1st

applicant had not referred to any boreholes as such. He had only averred in paragraph 7 of its founding affidavit that prior to 2016, he had an agreement where the first respondent would extract water from his (i.e. first applicants) farm for use at the first respondent plant at a charge of US$$300/month. He further averred that these.... were used in offset royalties for period between 2016 to 2022.

Two things appear to emerge from the two main protagonist versions which peonage me to accept the first applicants account. Firstly, the very fact that the first applicant made a concession in this regard adverse to its case-namely to accept that it had been paid for water abstraction for same six years (i.e. 2016-2022) albeit indirectly through the setting off of part of the 5% royalties due to the first respondent. Had the applicant been hell bent on claiming a non-existent.

Secondly, if no such arrangement exist, why would the first respondent confirm the existence of boreholes which it installed on the applicants' farm. It unwittingly let the cat out of the bag.

The third aspect which emerges from the set of facts outlined above is the fact that having been paid, albeit indirectly, through an offset of part of the royalties from 2016 to 2022, the applicant cannot legitimately claim a further credit for that period. He can only claim credit for the 12 months from January to December 2023, a period of 12 months. This would give a grand credit total of US$3 600. If this is set off against the $67 000 it owes the first respondent it would leave a balance of US$63 400.

Costs

The general rule is that the substantially successful party is entitled to his/her costs

In *casu*, the applicant has scored a measure of success in both the main application and in the counter application. The same holds true for the first respondent. Ultimately therefore the best course of action is to order that each party bears its own costs.

Ultimately, therefore, the following order hereby made.

Main claim

1. The application for a declaratory order be and is hereby granted.
2. The purported termination of the Tribute agreement concluded between the first applicant and the first respondent on 20 January 2023, through a letter dated 20 December 2023, in respect of Rolly 11(Reg No. PM21368), Rolly 12 (Reg No. PM21369), Rolly 13 (Reg No. PM21370) and Rolly 14(Reg No. PM 21371) mining claim be and is hereby declared null and void.
3. The application for a declaratory of the existence of the right of first refusal in respect of the mining claims referred to above is hereby dismissed

The counter claim succeeds as follows: The first applicant to pay first respondent the sum of US$63 400 with interest at the prescribed rate from date of judgment to date of full payment.

There shall be no order at costs.

Gundu Dube& Pamacheche, Applicants legal Practitioners

Gill, Godlonton& Gerrars, first respondent's legal practitioners