ZIMASCO (PVT) LIMITED
(Under Judicial Management)
versus
CHINAZIM INTERNATIONAL MINERALS CORPORATION LIMITED
and
OU LIN

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
Harare, 7 July 2022

T.S Manjengwah, for the plaintiff
T.J Muhonde, for the defendant

Trial Cause

CHIRAWU-MUGOMBA J: The defendant issued summons in April 2017 claiming against the defendants jointly and severally the following:-

a. Damages in the sum of US$1 067 139. 67 being the net value of processed value of chrome ore stolen by the defendants from the plaintiff.

b. US$557 031. 77 as consequential damages arising from additional costs to be incurred by plaintiff as a result of defendants' sterilisation of its claims.

c. Damages in the sum of US$ 56 925. 07 being the cost of rehabilitating plaintiff's mining claims, mined illegally by the defendants.

d. Interest on the sums claimed at the prescribed rate from the 22nd of May 2016 to the date of final payment.

e. Costs of suit on a legal practitioner to client scale.

In their plea the defendants made the following averments.

a. The second defendant is not personally liable for the plaintiff's claims
b. The defendants did not steal the ore as alleged
c. The value of the processed ore is not as alleged
d. The plaintiff did not suffer consequential damages as claimed
e. No rehabilitation is required as claimed.

On 25 September 2018, an order was issued by this honourable court in respect of this matter as follows.

1. The following questions arising from the present proceedings be, in terms of Section 19A of the High Court Act [*Chapter 7:06*] referred for inquiry and report by a referee.

    a) The quantum of chrome concentrates obtainable from 40 000 tonnes of chrome ore from the area mined by the first defendant being Aver 21 Reg. No. B1322M, Aver 22 Reg. No. B1323BM. Aver 27 Reg. No. B1328M.

    b) The market value or price of the resultant chrome concentrates as at the 22nd of May 2016, being the date of discovery of the mining by the plaintiff.

    c) The additional costs of mining to be incurred by the plaintiff as a result of the defendant's mining activity on Aver 21 Reg. No. B1322M, Aver 22 Reg. No. B1323BM. Aver 27 Reg. No. B1328M, which activities sterilized the claims.

    d) The additional costs of rehabilitation of the claims at Aver 21 Reg. No. B1322M, Aver 22 Reg. No. B1323BM. Aver 27 Reg. No. B1328M as a result of the defendant's mining activities.

2. The Chamber of Mines of Zimbabwe shall within seven (7) days of receipt of this order appoint an expert to act as a referee and carry out an enquiry and report in the issues listed in 1(a) to (d) above, a copy of the letter of appointment shall be filed with the Registrar of the High Court within the said seven (7) days.

3. The referee so appointed, in terms of Clause 2, shall within twenty-one (21) days of such appointment, inquire and report to this honourable court in writing, with a copy to both parties on the questions set out in clause 1(a) to (d) of this order.

4. The costs of the referee shall be borne equally by the plaintiff and the respective defendants.

5. Subject to the court's powers in terms of Section 19A, the findings of the expert and the report thereof shall be binding on the parties.

A Mr Gambiza was appointed by the Chamber of Mines to conduct the inquiry. However, no report was filed within the stipulated period. As a result another order was issued on 2 September 2019 that reads as follows.

1. Matter be and is hereby removed from the roll.

2. The referee appointed in this matter by the Chamber of Mines, Mr Gambiza, shall proceed to attend to the inquiry and file a report on issues raised in Clause 1 of the consent order pertaining to directives issues by MUNANGATI-MANONGWA J on 25 September 2018.

    2.1 A report be filed with this court within 30 days from the date of service of this order on the referee.

    2.2 The plaintiff to ensure that service of the order is effected on the referee.

3. This matter shall not be set down before any judge until the report of the referee has been duly filed with this court.
4. The plaintiff to bear the day's wasted costs.

Still no report was placed before the court.

The matter was placed before me for trial and noting that the report was still outstanding and that there was lack of a blue print in case no inquiry was conducted and no report produced as stipulated, on 12 July 2021, I issued the following order.

1. The order of this Honourable Court in HC 320/17 dated the 2nd of September 2019 is varied and amended by the deletion of sub-paragraphs 2.1 and 2.2 and the insertion of new sub-paragraphs as follows:-

   2.1 The referee shall prepare and file a report within a period of Ninety (90) days from the date of service of this order on him.

   2.2 The plaintiff and the defendants shall fully cooperate with the referee in the preparation of the report.

2.3 The referee shall in the event of non-cooperation by the plaintiff and the defendants in the preparation of the report within the stipulated time frame, file an affidavit with the court detailing the non-cooperation. Such affidavit shall be served on the plaintiff and the defendants.

2.4 Any party may within fourteen (14) days from the date of service of the affidavit as stipulated in para 2.3 above make a chamber application on notice for the dismissal of the plaintiff's claim or the striking out of the defendant's plea and granting of the order sought in the summons and declaration as the matter maybe.

2.5 Should the time period of ninety (90) days stipulated in paragraph 2.1 lapse and for good cause shown, the plaintiff may make a chamber application on notice for an extension of the time frame

3. The trial is postponed *sine die* pending the preparation and submission of the referees report.

4. Costs shall be in the cause.

This new order seems to have done the trick as the referee prepared and submitted the report.

To put the matter into perspective, I shall proceed to summarise the plaintiff claim and the defendants' plea.

The plaintiff's claim is as follows. It is the lawful holder of the mining claims known as Aver 21 Reg. No. B1322M, Aver 22 Reg. No. B1323BM. Aver 27 Reg. No. B1328M. situated in the Midlands province. The plaintiff in May 2016 discovered that the defendants acting jointly and severally had carried out illegal mining activities. A survey by the plaintiff established that a total of 40,069 tonnes of chrome owe had been illegally mined. The defendants admitted liability via e mails for the illegal mining. The ore would have produced 23,505 tonnes of chrome concentrates. As at 22nd of May 2016, the ore would have fetched US$39.60 per tonne from an ex –works of US$85 per tonne thus giving a total value of US$1 067 139.76. The defendants conducted shallow mining resulting in increased mining costs. As a result, the plaintiff would incur an additional cost of US$557 031.77. The defendants also carried out mining without rehabilitation and an amount of US$56,925.07 would be required.

The defendants' plea can be summarised as follows. The mining claims are in respect of Aver 21 and 22 only. The first defendant admitted carrying out mining chrome to an amount of 40 000 from the two areas with the full knowledge of the plaintiffs executives. From this, 16 800 concentrate of ore was produced with a net cost of US$48 after taking into account other factors. There was no shallow mining as alleged and the first defendant did not reach the 18 metre depth as it was stopped from doing so. Therefore the claim for US$557 031.77 does not arise. On rehabilitation, the first defendant was willing to mine to a depth of 18 metres and rehabilitate the area in accordance with international best practices and relevant mining laws. The defendants further proposed settling the matter through a deed of settlement.

The pre- trial conference issues were identified as follows.

1. What is the value of compensation the first defendant should pay to plaintiff for the 40 000 tonnes of chrome concentrates it mined from the plaintiff's claims?
2. Whether the first defendant mining on the claims in issue increased cost of future mining by the plaintiff and if so by how much?
3. What is the cost of rehabilitating all the areas mined by the first defendant?
4. Whether second defendant is jointly and severally liable with the first defendant to plaintiff for any amount found due?

At the trial, Namatai Mapfumo, the Chief Operations Officer for the plaintiff gave evidence which can be summarised as follows. He is responsible for the day to day running of mining, smelting, operations and development as well as group supplies. The plaintiff and the defendant had a running contract for Reva claims in an area known as the CSC in the southern part. This contract ran its natural course. The claim before the court is in respect of Aver 21, 22 and 27. There was no contractual relationship between the plaintiff and defendant in respect of these claims. During routine maintenance, it was discovered that there was some mining activity in these three claims. The people on the ground indicated that the first defendant was responsible for this mining. At that time, there were talks between the two parties for extension of the mining contract alluded to already. The plaintiff brought to the attention of the first defendant, the illegal mining activities. The plaintiff proceeded to quantify the prejudice suffered by it and advised the first defendant. The witness took the court through a meticulous process of how its claim was quantified. As for the expert's report, there was an attempt to re-calculate the 40 000 tonnes of ore when it was never an issue. He also tried to re-establish the boundaries thus creating a new dispute between the parties. The expert requested for some information from the plaintiff in the form of audited statements on the actual mining that took place. The plaintiff did not have this information and they advised the expert of this. In other words, the plaintiff did not accept the expert's report.

Ou Lin gave evidence on behalf of both defendants. He stated that he is a director of the first defendant. Sometime in 2012, the plaintiff and the first defendant entered into a contract for the mining of chrome. The work done was that the first defendant would mine ore and then further process it into ore. After the expiry of this contract, the plaintiff engaged first defendant for a renewal or an extension. However, despite a draft being produced and signed by the first defendant, it was not signed by the plaintiff. Despite the contract not being signed by the plaintiff, the first defendant proceeded to mine after approval by the plaintiff's general manager towards end of 2015. The mining was only done on claims 21 and 22 of Aver and never on claim 27. Despite this mining, the first defendant did not deliver any ore to the plaintiff. The defendants therefore accepted the expert's report. The witness further stated that the first defendant was prepared to conduct the rehabilitation. The issue of liability was not contested by the defendants except to the extent that the second defendant is not liable jointly and severally with the first defendant for the loss. The issues for decision

therefore in my view relate to the compensation to be paid for the 40 000 tonnes of chrome mined and the extracted chrome ore, whether the mining led to an increase in costs of mining and if so by how much, the cost of rehabilitation and the liability of the second defendant.
From the evidence led, it is common cause that the plaintiff and the first defendant had a prior relationship related to mining chrome. The contract came to an end and there was a process of negotiation of a renewal. Although a draft contract was produced, there was no signing of it by all parties. It was never the intention of the parties that they should mine based on an oral contract. The evidence led by the first defendant did not point to any authority from the plaintiff to continue mining. Names were thrown around but it is clear that there was no contract. It is also clear that the first defendant proceeded to mine without authority. It is noted that there was a half-hearted attempt to deny liability. The first defendant's witness admitted that no produce from the mining was given to the plaintiff. Therefore the mining by the first defendant was illegal. The first defendant's evidence was not convincing of the shallow mining. On rehabilitation, the report of the expert was accepted by the first defendant.

The legal issues therefore for the court to determine is the liability of the defendants. The plaintiff rejected the expert's report whilst the defendants accepted it. The plaintiff's witness as stated took the court through a meticulous process. Exhibit one of the plaintiff's bundle of documents is a mining certificate for Aver 21, 22 and 27 and is termed 'ore theft'. It shows what the plaintiff considers to be stolen ore quantity, waste volume left un-rehabilitated and sterilised in-situ ore quantity. According to Mapfumo, this document shows that the total ore mined illegally is 40 0069 tonnes. There is a difference of 69 tonnes between the figures of the plaintiff and the first defendant. The second table shows the volumes of waste which was left outside the pits which were created during the mining and which would require to be pushed back into the pits so that full rehabilitation can be achieved. When rehabilitating, the quantity is important because equipment is used and costs are charged per cubic metre. The volume was calculated at 69 420 cubic metres. The third table shows the tonnage that would need to be extracted at a depth of 18 metres and the total is slightly over 50 000 tonnes. Exhibit two shows the costs associated with rehabilitation. This calculation shows that a total of $56 925.07 is what would be required for rehabilitation. Exhibit 3 shows the movement from shallow to depth mining. If mining is done at a depth of 6 metres, it is

close to the surface so the amount of waste is little compared to a depth of 18 metres. Exhibit 4 shows the prejudice suffered due to the cost of illegal mining.

The bulk of the evidence led by the plaintiff related to technical matters on how the figures claimed were reached. The expert's report therefore becomes critical. Essentially the expert report has the same value as opinion evidence. The Civil Evidence Act [*Chapter 8:01]* provides for expert opinion evidence as follows:-

22 Expert and lay opinion evidence

(1) The opinion of a person who is an expert on any subject, that is to say, of a person who possesses special knowledge or skill in the subject, shall be admissible in civil proceedings to prove any fact relating to that subject which is relevant to an issue in the proceedings.

In National *Justice Compania Naviera S.A* v *Prudential Assurance Co Ltd* 1993, (2) Lloyds Reports 68-81, the duties of an expert are set out as follows.

> "1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> 2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.
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> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
>
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
>
> 5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In the case of where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."

Section 19 A of the High Court Act [*Chapter 7:06]* states as follows:-

19A Reference of question for inquiry and report by referee

(1) The High Court may refer any question arising in civil proceedings, including:
(*a*) any question requiring extensive examination of documents or any scientific, technical or local investigation which, in the opinion of the High Court, cannot conveniently be conducted by it; or
(*b*) any question relating wholly or partly to accounts;
for inquiry and report by a referee appointed generally or specially by the High Court.

(2) The High Court may adopt, wholly or partly and with or without modification, the report of a referee appointed under subsection (1), or may remit the report to him for further consideration or may take such other action in regard to the report as the High Court considers necessary or desirable.
(3) Any part of a referee's report which has been adopted by the High Court under subsection (2) shall have effect, subject to any modifications the court may have made, as if it were a finding by the High Court in the civil proceedings in question.

It is clear that the court is given a discretion regarding a report by a referee. What is important to note is that courts guard their roles jealously. Therefore despite the appointment and report of an expert, ultimately the court has the final say as per section 19A(2) of the High Court Act (*supra).* A court therefore is not expected to rubber-stamp an expert's report. In *casu, the* critical findings appear on pp 5-10. These relate to each of the three claims by the plaintiff. Regarding the first claim, the expert found that the amount in question should be US$728 000.00 as against the sum of US$1 067 139.70 claimed by the plaintiff. For the second claim, the expert reported as follows.

> "The expert could not estimate based on a planning model since the plaintiff resumed mining hence the need to rely on actual costs being incurred. The plaintiff was therefore requested to avail the audited business segment report with actual costs mining costs being incurred on Aver 21, Aver 22 and Aver 27 as they are a true reflection of the situation on the ground. The plaintiff hasn't provided the requested information".

On p 10 of the report, the expert put the rehabilitation costs at US$103 885.50. This is against the claim by the plaintiff of US$56 925.07.

The question before the court is then what should it do about the report? In this matter, the court will adopt wholly the report of the expert. This is due to the following reasons.

1. The court order of the 25th of September 2018 is clear in clause 5 that the findings shall be binding on all parties.
2. The person who prepared the report was identified through the Chamber of Mines of Zimbabwe and his appointment was not challenged by any party and hence his expertise was never in doubt.
3. The report captures the terms of reference in terms of the relevant court order and addresses each and every aspect.
4. As stated by Mapfumo in his evidence-in-chief, the issues before the court are technical. The expert was not called upon to answer questions that the court can decide. This is under what is termed the ultimate issue doctrine- See *Holtzhausen* v *Roodt*, 1997 (4) SA 766(WLD). The questions answered by the expert or the issues are such that the court on its own cannot decide due to their technical nature.

5. The plaintiff did not place an alternative report before the court. The evidence of Mapfumo was very technical in nature and the court is not an expert in such matters such that it could reach a conclusion on the technical issues.
6. The pre-trial conference issues reveal that the liability of the first defendant was not in doubt.

The issue of liability of the second defendant was contested as amplified in the pre - trial conference issues. The court notes that there was never any evidence led by the plaintiff's witness imputing liability to the second defendant. Accordingly, he is found not liable.

Given the time it has taken for the report to come before the court, I did not consider it necessary to remit the matter back to the expert especially since it is a very candid report and I did not see any value in such remittal. The plaintiff's witness also testified that they were not able to submit the information requested by the expert.

Having adopted the report by the expert wholesale,

1. The court will find against the first defendant in the sum of US$728 000. If the plaintiff so desires, it can still pursue the remainder of the claim in the sum of US$727 998.93. The court will return a decree of absolution from the instance at the end of the defendant's case in respect of that portion of the amount claimed.
2. The court will also return a decree of absolution from the instance in relation to the claim for US$557 031.77. The court notes again that the expert stated that he requested certain information which was not forthcoming. If the plaintiff so wishes to still pursue the claim, it can still do so. The court is not a technical expert and cannot rely on the evidence of the plaintiff's witness.
3. On the claim for US$56 925. 07, the expert actually put a higher figure of US$103 885, 50. Whilst the court accepts the report, it is to the extent that the plaintiff claimed. The report was done in December 2021. The plaintiff did not seek an amendment to its claim. The court cannot therefore amend the claim. This is different from the figure of US$728 000 which is less than what the plaintiff claimed. The court rejects the defendants' evidence that they can rehabilitate the mined portion. As stated by Mapfumo, the relationship between the parties has broken down and in any event, there is no counter claim.

The amounts to be awarded shall be paid at the prevailing rate of the Zimbabwe to the United States Dollars as at the date of payment. I do not perceive of any reason why the amounts should be payable in United States Dollars strictly as the plaintiff in my view does not fall within the exceptions on payment solely in United States Dollars. See *Breastplate Service (Pvt) Ltd* v *CAMBRIA AFRICA PLC* - SC – 66-20.

It is trite that costs are at the discretion of the court. In this matter no party has been one-hundred percent successful. Therefore an appropriate order for costs is one that each party should bear its own costs.

In view of the above, the matter was disposed of as follows.

DISPOSITION

1. The first defendant shall pay the plaintiff the sum of US$728 000 with interest at the prescribed rate calculated from the date of summons to date of payment.
2. A decree od absolution from the instance is returned in respect of the amount of US$727 998.93 being the difference between the amount claimed by the plaintiff in the sum of US$ 1 067 139.76 and the amount of US$ 728 000
3. A decree of absolution from the instance at the close of the defendant's case is returned with respect to the claim for US$ 557 031.77.
4. The first defendant shall pay plaintiff the sum of US$ 56 925.07 with interest calculated from the date of summons to date of full payment.
5. The payment in para (1) and (4) above shall be paid at the prevailing official exchange rate between the United States and the Zimbabwe dollar as at the date of payment.
6. Each party shall bear their own costs.

Wintertons, plaintiff's legal practitioners
Muhonde Attorney's, defendants' legal practitioners