NYIKA NHUNDU
versus
AFRICAN LITHIUM RESOURCES (PVT) LTD
And
MINISTER OF MINES & MINING DEVELOPMENT
And
THE PROVINCIAL MINING DIRECTOR MASVINGO N.O
And
THEBE RESOURCES (PVT) LTD

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 27 February & 14 March 2024

Opposed application: Declarator

R. T Mutero, for the applicant
I. Muchini, for the 1st respondent
A. Zikiti, for the 2nd and 3rd respondents
D. Charamba, for the 4th respondent

ZISENGWE J: This matter is your typical farmer *versus* miner clash – a phenomenon that is all too familiar. The applicant as farmer and the first respondent as miner lock horns over the exercise of their respective rights on the same piece of land. The applicant occupies a piece of land by virtue of land occupation permit issued to him in 2001 at the height of the land reform programme. The first respondent on the other hand is, on the face of it, the holder of certain mining rights over the same piece of land which it acquired by virtue of a contract to that effect with the fourth respondent. The mining claim was initially registered in the name of the fourth respondent before being later transferred to the first respondent.

The applicant seeks to assert his rights over that piece of land chiefly against the first respondent who is the current holder of the said mining rights. To this end he seeks a declaratory

order confirming his entitlement thereto and consequential relief. He claims that ever since the piece of land was allocated to him, he has always enjoyed its occupation and utilisation and has effected significant improvements thereon. He avers that unbeknownst to him, and without his consent the first respondent, has in the meanwhile in opaque and fraudulent circumstances acquired from the second and third respondents mining rights over the same piece of land.

The piece of land in dispute was identified by the parties in their respective papers as plot 17 shallock farm Masvingo ("the property"). The thrust of the applicant's case is that the property being less than 100 hectares in extent, in terms of section 31 (1) of Mines and Minerals Act *[Chapter 21:05]* ("the Act"), his consent was required before anyone could acquire or exercise any mining rights thereon. The said section provides as follows:

> **31. Ground not open for prospecting**
>
> (1) Save as provided in parts V and VII, no person shall be entitled to exercise any of his rights under any prospecting licence or special grant to carry our prospecting operations or any exclusive prospecting order-
>
> a-f [*not relevant*]
>
> g) except with the consent in writing
>
> (i) of the owner or of some person duly authorized thereto by the owner, upon any holding of land which does not exceed one hundred hectares in extent and which is held by such owner under one separate title:
>
> (ii) …

The applicant avers that he never gave any such consent and therefore that the fourth respondent's mining rights which it purported to subsequently transfer to the first respondent are a nullity. He therefore seeks an order in the following terms:

IT IS DECLARED AND ORDERED THAT:

1. The applicant is the lawful holder of an offer letter in respect of subdivision 17 Shallock Farm, Masvingo Province.

CONSEQUENTLY

2. The applicant has full entitlement to use of subdivision 17 Shallock Farm, Masvingo.
3. The certificate of registration No. 023598, Licence Number 028403BA in respect of first respondent are invalid.
4. The certificate of registration 004599, Transfer Number T10420 issued in respect of the first respondent are invalid.
5. The second and third respondents be and are hereby ordered to cancel the certificates referred to in paragraph (3) and (4) of this order.
6. The respondent shall bear costs of suit on a higher scale of league practitioner and own client, jointly and severally, the one paying the other to be absolved.

According to applicant, the third respondents should have *mero motu* rescinded its decision in terms of section 50 (1) (a) of the Act upon realizing that it had erred in registering a mining claim over a land holding less than 100 hectares without the consent of the land holder.

Furthermore, the applicant complains that the first respondent has excavated gulleys and trenches on the property and is regularly conducting blasting activities thereon which according to him pose a hazard to the property's inhabitants and livestock alike.

The application stands opposed by all the respondents save for the fourth respondent, who (*albeit* for a different reason) purports a support the application.

The first respondent opposes the application on various grounds which grounds may be summarised as follows:

a) That Shallock Farm on which the property sits in greater than 100ha in extent and that therefore section 31 (1) (g) of the act does apply.
b) That the non-joinder of the Ministry of lands renders the application defective.
c) That this application is nothing more than application for the review of the decision of the 2nd and 3rd respondents to grant the 4th respondent the mining licence disguised as an application for a declarator designedly to escape the consequences of a non-timeous application of the application for review.
d) That a period in excess of two years as provided in terms of section 58 of the Act having lapsed, the application has prescribed.

Additionally, it was averred on behalf of the first respondent that the applicant had failed or set forth in his founding affidavit the requirements for the granting of declarator and had also failed to demonstrate that those requirements were satisfied in the present case.

The third respondent, also opposes the application. Through an opposing affidavit deposed to by its Provincial mining director for Masvingo province, Marshal Muzira it is averred that the application lacks merit for a number of reasons. Firstly, it is averred that the third respondent was unaware of the existence of plot No. 17 of Shallock farm as a separate entity distinct from Shallock Farm as a whole. It is submitted in this regard that the third respondent relied on maps within its office showing Shallock Farm as a single piece of land holding greater extent than 100 hectares.

By necessary implication therefore, no consent was required from anyone before granting any prospecting or mining right to a prospective prospector or miner.

The third respondent equally denies any fraud in the registration of the mining location attributing any non-compliance with section 31 (1) (g) to oversight of the subdivisions effected to Shallock Farm. He also avers that a dispute resolution process in terms of section 345 of the Act had commenced, a process consented to by the applicant and the first respondent. According to third respondent what was only outstanding was delivery of the determination. He would therefore express surprise that the applicant would virtually abandon those proceedings to mount the present application.

The fourth respondent as earlier stated, weighed in favour of the application being granted. It however gives different reasons than those presented by the applicant for the granting of the application. Through an affidavit deposed to by one Bernard Brund, its director, its asserts that the first respondent failed to pay the purchase price for the mining claim in full. He further avers that the first respondent with the help of the third respondent used forged documents to transfer rights from fourth respondent to first respondent and therefore that no right could legally flow to the latter.

The first issue that falls for determination is the effect, if any, of the non-joinder to this application of the Ministry of Lands. It is not immediately clear why joinder of the Ministry of Lands would have been necessary. No relief is sought against the Ministry of Lands in the context of this dispute. None of the respondents disputed the authenticity or validity of the applicant's permit, a copy of which was attached to the applicant's affidavit. In any event the non-joinder of a party does not necessarily render an application fatally defective. Rule 32 (11) of the High Court Rules, 2021 provides that:

> "No cause or matter shall be defeated by reason of misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

See *Sobusa Gula Ndebele* v *Chinembiri Energy Bhunu* SC 29/11 & *Wakatama & Ors* v *Madamombe* SC-10/12.

The first basis for opposing the application is therefore unsustainable.

The second issue relates to whether or not the present application is no more than an application for review disguised as one for a declarator and if so the consequences, if any, that ensue. In this respect, the first respondent relying on the following authorities argues that the application ought to be dismissed on that basis, *Attalia Mukanganise & Ors* v *Simangele Mwale & Ors* HB 131/21, *Dr Madondo N.O* v *Dauramanzi & Ors* HH 214/17 & *Khan* v *Provincial Magistrate* & *Ors* HH 39/06.

The first respondent insists that should the applicant have been aggrieved by the registration of the mining claim, he ought properly to have brought an application for a review seeking to set that decision aside.

In countering that argument Mr Mutero insisted that the availability to an applicant of the avenue of review for redress is not always a bar to an application for a declaratory order.

There has not always been convergence of opinion on whether the option the availability of the option of review constitutes a bar to an application for a declarator. Some authorities state that it does and others give a contrary view.

The decision in *Musara* v *Zinatha* 1992 (1) ZLR 9 (H) is authority for the position that where a litigant considers a decision to be null and void *ab initio,* a court should be slow to turn away a petitioner solely because he ought to have pursued a review instead of a declarator. In that matter the court granted the declaratory order sought by the petitioner despite the fact that he could have proceeded by way of review had the time limit for bringing a review not expired, ROBINSON J said:

> "By the same reasoning, this court should be slow to turn the petitioner away where he seeks a declaratory order about his status in the respondent, so that it is known whether he can stand as a candidate for election within that organisation, especially where ex facie the papers before this court, it is clear that the petitioner's suspension was invalid and therefore null and void ab initio."

The court continued further down in the same judgment as follows:

> "I consider that the same approach should be adopted by the court in a civil case where, on the papers before it – the more so where those papers seek a declaratory order – an act of glaring invalidity is, as in this matter, staring the court straight in the face. For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void ab initio on some technical ground would, I agree, be to ignore the court's fundamental duty to see that justice is done which, after all, is the duty which the layman expects the court to discharge"

The same approach was adopted in *Geddes* v *Taonezvi* 2002 (1) ZLR 479 (S). In that case, the Supreme Court referred with approval to the decision in *Bayat & Ors* v *Hansa & Ano* 1955 (3) SA 547 where at 552 C-D CANEY J said:

> "… the situation, as I see it, is that if the second respondent did decide the question of contractual rights adversely to the applicants, it remained open to them either to review the decision of the second respondent, notwithstanding that they had taken part in a contest before the second respondent on the very question, or ignoring the second respondent's decision on that question and treating it as a nullity as being beyond the powers of the second respondent, to bring proceedings for a declaration of rights …". (the underlining is for emphasis)

Further down in the same judgment the court continued as follows:

> "Setting aside of a decision or proceeding is a relief normally sought in an application for review. When one looks at the grounds on which the application was based and the evidence produced in support of them, there is, however, just enough information to support the learned judge's decision that the application was for a declaration of rights.

The court went on to refer to the following passage from *Musara* v *Zinatha* (*supra*):

> > "At the outset I would observe that the bulk of the petitioner's petition raises matters, such as malice, gross irrationality, the application of the *audi alteram partem* principle and bias, which relate to the subject of review and which would only render the act in question voidable and not void. Consequently, those issues are not properly before this court in the present application which seeks a declaratory order specifically and exclusively on the ground that the petitioner's purported suspension is null and void. Fortunately for the petitioner, there is just sufficient information on the papers to enable the court to consider the petition as one seeking a declaratory order in regard to the petitioner's suspension …".

I will respectfully stand guided by the above decisions and find that the fact that one could have approached the court by way of review is not always a bar for one launch an application for a declarator. What is important is presentation by the applicant fulfilment by the applicant through the evidence of the requirements for a declaratory order. In the context of the present matter, it is clear that the applicant deems the registration of the mining claims on the property in question by the second and third respondents without his consent as required by s31 of the Act was null and void ab initio. It therefore means that the applicant is on firm ground in asserting his rights by

means of a declarator rather than an application for review. This leg of the first respondent's opposition to the application therefore falls away.

Whether the applicants claim has prescribed by operation of section 58 of the Act

Section 58 of the Mine and Minerals Act provides as follows:

"58. Impeachment of title when barred

> When a mining location or a secondary relief in a mining location has been registered for a period of two years it shall not be competent for any persons to dispute the title in respect of such location or reef in the ground that the pegging of such location or reef was invalid or illegal that the provisions were not compiled with prior to the issue of the certificate of registration."

According to 1st respondent the certificate of registration having been issued on 11 April 2019, therefore the period within which any proceedings for its impeachment having expired, the present application cannot not succeed.

Per contra, Mr Mutero for the applicant mounted a doubled pronged argument. Firstly, he submitted that section 50 (1) creates an exception to section 58 and permits the cancellation of certificate of registration notwithstanding the provisions of s58 of the Act. Secondly, he argued that in any event the prescription contemplated under section of the Act only started running from the time that the applicant was aware of the existence of the registration of the mining claim (which was sometime in 2022).

Section 50 of the Act reads:

50. Cancellation of certificate of registration

(1) Subject to subsection (2), the Mining Commissioner may notwithstanding subsection (1) of section fifty-eight, at any time cancel a certificate of registrate issued in respect of a block or site if he is satisfied that-

(a) at the time when such block in sight was pegged it was situated on ground reserved against prospecting and pegging under section thirty-one or thirty-five or ground not open for pegging in terms of subsection (3) of section two hundred and fifty-eight, or

(b) provisions of this Act relating to the method of pegging a block were in a substantially compiled with respect of such block sight.

The above provision is clear and requires no elaboration. Although s58 of the Act is wide in protecting the registration of mining by claim by prescription, section 50 creates

two exceptions one of which is where ground is reserved against prospecting. The holder of a mining registration cannot hide behind the shield of prescription provided under s58 to defeat non-compliance with s31. The rationale for this is not too far to find - a mining registration may be so defective or so far reaching in its consequences, particularly in its infringement of the holder of a small holding of land, that it cannot be allowed to stand merely on account of prescription.

On this basis alone, I believe there is scope for an application such as the present to compel the Mining Commissioner to act in terms of section 50 (1) of the Act to cancel a mining registration.

Whether the requirements for a declaratory order were specifically pleaded and set out in the founding affidavit.

Section 14 of the High Court Act provides for the granting of a declaratory order, it reads:

> "**14. High Court may determine future or contingent rights**
>
> The High Court may in 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."

The requirements for granting of declarator are well known. They were set out in *Johnson v Agricultural Finance Corp* 1995 (1) ZLR 65 (S) where GUBBAY CJ said:

> "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……"

Although the applicant did not set forth in his founding affidavit the above requirements the relief that he seeks namely that of a *declaratur* was never in doubt. Not only does he specifically assert as much in the notice of application but also in the final three paragraphs of his founding affidavit.

It is not so much about the setting out of the requirements for the granting of a particular relief that is critical, but the production of evidence to satisfy those requirements.

This brings me to the crux of this application namely whether s31(g) of the Act was complied with. That the consent of the owner of a land holding less than 100 hectares in extent is required before any prospecting or mining rights can be inferred to a miner is common cause. Equally common cause is the fact that the written consent of the applicant was not obtained. The only question is whether the landholding in questions is less than 100 hectares in extent.

The applicant attached his application not only a permit issued to him in respect of Plot 17 Shallock Farm Masvingo but also a map obtained from the Ministry of lands showing that plot 17 is 91 hectares in extent. None of the respondents provided proof to the contrary. The fact that the third respondent laboured under the mistaken belief that Shallock Farm was one undivided unit exceeding 100 hectares in extent does not change the fact that the plot in question is in fact 91 hectares in size. Neither does the first respondent's Masvingo with the applicant's prevarication between 80 hectares and 91 hectares regarding its extent. I am satisfied that at least on a balance of probabilities the applicant was able to establish that the land holding in question is below 100 hectares.

That the applicant being the holder of a permit issued to him in respect of the contested piece of land is an "interested person" as contemplated in s14 of the High Court Act is not open to debate.

Equally incontestable, in my view is the fact that the applicant needs to know his rights in respect of the piece of land *vis-à-vis* those, if any, of the first respondent.

Ultimately, therefore, the evidence in my view undoubtedly shows that the applicant is entitled the relief he seeks as the requirements for the granting of a declarator were amply met.

Costs

The applicant had sought costs on the attorney and own client scale. No proper justification was proffered for costs on that scale nor can I find any such justification myself. Cost on the ordinary scale suffice.

Accordingly, the application succeeds as follows:

IT IS DECLARED AND ORDERED THAT:

1. The applicant is the lawful holder of an offer letter in respect of subdivision 17 Shallock Farm, Masvingo Province.

CONSEQUENTLY:

a) The applicant has full entitlement to use of subdivision 17 Shallock Farm, Masvingo.
b) The certificate of registration No. 023598, Licence Number 028403BA in respect of first respondent are invalid.
c) The certificate of registration 004599, Transfer Number T10420 issued in respect of the first respondent are invalid.
d) The second and third respondents be and are hereby ordered to cancel the certificates referred to in paragraph (b) and (c) of this order.

2. The first respondent shall bear applicant's costs of suit.

Tabana & Marwa, applicant's legal practitioners.

Kachere Legal practitioners, 1st respondent's legal practitioners

Civil Division of the Attorney General's Office; 3rd respondents' legal practitioners

Ndlovu & Hwacha; 4th respondent's legal practitioners