ROSE NATALIE HEUER

Versus

TWO FLAGS TRADING (PRIVATE)

And

PROVINCIAL MINING DIRECTOR – MASVINGO

And

MINISTER OF MINES & MINING DEVELOPMENT N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 31May 2023 & 15 June 2023

Opposed court application

M. Tshuma, for the applicant
T. Mpofu, for the 1st respondent

DUBE-BANDA J

[1] This is an application for an interdict. The applicant seeks an order that it is the lawful holder of certain sixteen mining claims, i.e., Claims No. 12967; 12968; 12969; 12970; 12971; 12972; 11688; 11689; 11690; 11691; 11359; 11360; 11361; 11479; 11480; and 11481. The application is opposed by the first respondent (Two Flags). The second and third respondents have not participated in this litigation, and I hold the view that they have taken a position to abide by the decision of this court.

[2] The background to this matter is that on 30 June 2003 Reedbuck Investments (Private) Limited (represented by Robert Michael Mcindoe in his capacity as Liquidator) (Mcindoe) entered into an agreement of sale with the first respondent in respect of the following mining claims:

Annexure "A" to the Sale Agreement

REGISTERED NO.	NAME	DISTRICT

4195 BM	REX 14 W	MASVINGO
4585	LENNOX	MASVINGO
4586	LENNOX 2	MASVINGO
4587	LENNOX 3	MASVINGO
4588	LENNOX 4	MASVINGO
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		MASVINGO

[3] On 28 November 2006 and in terms of Forfeiture Notice No. 4 /06 the following mining claims were forfeited in terms of s 260(1) of the Mines and Minerals Act [Chapter 21:05]:

REG. NO	NAME OF BLOCK	OWNER	MINERAL	LOCALITY
REGN NO.	REEF	Reedbuck gold	Asbestos	Balmain Farm
4195BM	REX 14 W		Gold reef	Ruvuli Farm
4585	LENNOX 2			
4586	LENNOX 2			
4587	-DO-3			
4588	-DO-4			
4629B	REX 18		Asbestos	Crown land
4631BM	REX 10			
4632BM	REX 19			
4633BM	GARDINA			
4678	-DO-D		Gold reef	Ruvuli Stateland
4679	CROWN A			
4680	-DO-B			
5099MB	DEVON		Copper	
5100BM	THOR			
5101BM	DUNDEE			
5102BM	COUNTLESS			
5103BM	MOUNT ‘DOR			
5104BM	-DO-2			
5105BM	-DO-3			Sans Souci Farm
5106BM	BRAZARS			
5128BM	DEVON 2			Ruvuli Stateland
5145	EMPRESS E		Gold Dump	
5333	EMPRESS F		Gold rubble	
5240	SWEEP		Gold reef	
5341	DUNDEE 2			
6563	EMPRESS Y			

6564	EMPRESS X			
6565	SWEEP Z			
6566	EMPRESS Y2			
6567	-DO-V			
6568	-DO-S			

[4] Therefore, the mining claims subject to the agreement of sale between Mcindoe and the Two Flags were forfeited on 28 November 2006. And between 2009 and 2013 the applicant acquired sixteen of the forfeited mining claims through original acquisition.

[5] Subsequent to the forfeiture Two Flags sought a *declaratur* that the agreement of 30 June 2003 was lawful and binding. Then in the case of *Two Flags Trading (Pvt) Ltd v R M Mcindoe & Provincial Mining Director, Masvingo & The Minister of Mines and Mining Development N.O.* HC 11857/15 (HC 11857/15) this court ordered that:

i. The agreement of sale between the applicant (Two Flags) and the 1st respondent (Mcindoe) dated 30 June 2003 be and is hereby declared lawful and legally binding. The applicant be and is hereby declared to be the sole lawful owner of the building, furniture and fittings, plant, tools and equipment located at the mining claims listed in Annexure 'A' to this agreement of sale.
ii. The 2nd respondent be and is hereby ordered to immediately transfer the mining claims described in paragraph 1 of this court order into the applicant's name.
iii. The 2nd respondent to pay costs of suit.

[6] It is clear that Annexure 'A' of the agreement of sale referred to in HC 11857/15 contains the mining claims forfeited on 28 November 2006.

[7] Again, this court in *Two Flags Trading P/L v Provincial Mining Director, Masvingo & Professor F.P. Gudyanga* HC 2901/16 (HC 2901/16) ordered that:

i. The first and second respondent (Ministry of Mines) be and are hereby directed to comply with the order of this Honourable Court in case number HC 11857/15 dated 27 January 2016 not later than 30 working days of granting of this order.
ii. Failure to comply with para (1) above, applicant (Two Flags) may enroll this application on the unopposed roll.
iii. There shall be no order as to costs of suit.

[8] It appears to be common cause or not seriously disputed that pursuant to the orders in HC 11857/15 and HC 2901/16 the mining claims subject to the agreement of sale of 30 June 2003 were transferred to Two Flags.

[9] Two Flags contending that it holds rights to contiguous mining locations with applicant, sued out court proceedings seeking an order that the Provincial Mining Director and the Minister of Mines (Ministry of Mines) ascertain the physical extent of the rights of the parties. This court then in *Two Flags Trading (Private) Limited v Natalie Rose Heuer & Singende & Provincial Mining Director, Masvingo and Minister of Mines & Mining Development (N.O)* HC 6149/21 ordered that:

i. The application be and is hereby granted.
ii. The third and fourth respondents be and are hereby ordered to conduct a beacon verification and inspection to ascertain the extent of applicant's mine relative to that of first and second respondent.
iii. In the event that the beacon verification and inspection determine that there exists an encroachment by the first and /or second respondent, it be and is hereby ordered that they vacate the applicant's mining claims to the extent of the encroachment.
iv. In the event of the first and second respondent failing to vacate applicant's mining claims as set out in paragraph 3 of this order the Sheriff of his lawful deputy be and is hereby directed and ordered to eject the first and second and / or second respondent from the applicant's mining claims within five days of the grant of this order.
v. There be no order as to costs.

[10] The applicant appealed the judgment in HC 6149/21, and in *Rose Natalie Heuer v Two Flags Trading & Lonstrom Resources (Private) Limited & Provincial Mining Director –*

Masvingo & Minister of Mines and Mining Development SC 250/22 the Supreme Court dismissed the appeal.

[11] The Report from the Ministry of Mines prepared pursuant to the order in HC 6149/21 concluded that:

> From the observation made as depicted on the attached survey diagram, it is clear that indeed the respective mining locations held by the three parties do have some significant overlaps on the ground. However, other considerations would need to be made in order to have a conclusive position on which party is supposed to be where.

[12] The applicant's case is that between 2009 and 2013 she pegged 16 mining claims through original acquisition. She registered the claims and have been mining those claims for several years. She has registration and inspection certificates for the claims. The applicant disputes that she holds contiguous mining claims with the first respondent, she contends that first respondent's claims were forfeited in terms of Forfeiture Notice No. 4/06. Thereafter she proceeded to obtain the claims through original acquisition. She avers that the first respondent in a bid to reacquire the forfeited claims, sued out court proceedings and obtained an order for the transfer to it of the claims. The applicant avers that the first respondent attempted to have transferred to it forfeited claims and did not join her to the suit and therefore obtained a non-existent order.

[13] The avers two matters HC 11857/15 and HC 2901/16 were sued out long after she had acquired the mining claims. The applicant contends further that the first respondent's scheme of fraudulently obtaining a court order for the transfer of the claims amounts to a *brutum fulmen* as those claims did not exist at the time the order was obtained.

[14] On the other hand the first respondent contends that the parties hold contiguous mining locations, and disputes have arisen between them regarding the physical extent of those locations. In a bid to resolve the dispute the first respondent sued out proceedings in HC 6149/21 seeking an order that the Ministry of Mines ascertain the physical extent of the rights of the parties. This court ordered a process to resolve the dispute between the parties, and the applicant participated in the process ordered by the court. The dispute between the parties is

therefore resolved. The applicant appealed the judgment in HC 6149/21 and the appeal was dismissed.

[15] It is contended further that in HC 11857/15 this court declared that the first respondent was the lawful owner of the mining claims and directed in HC 2901/16 that the Ministry of Mines transfers and registers the claims in the first respondent's name. The orders are extant and have not been set aside. It is contended that it does not matter that applicant argues that these orders should not have been granted, they remain extant orders of this court and ought to be given effect to.

[16] It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary points

[17] The first respondent raised three preliminary objections. At the commencement of the hearing, I informed Counsel for the parties that I shall adopt a holistic approach to avoid a piece-meal treatment of the matter. Wherein the preliminary points are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on preliminary points despite that they were argued together with the merits. I now turn to the preliminary points, *viz, res judicata*; that the relief sought is at variance with the cause of action; and that this application is an attack on the report prepared by the Ministry of Mines disguised an as application for an interdict.

[18] First respondent argued that applicant's claim is *res judicata*. *Res judicata* is the legal doctrine that prohibits a litigant from having a metaphorical second bite of the cherry. It bars continued litigation of the same case, on the same issues, between the same parties. The principle precludes the court from re-opening a case that has been litigated to finality. See: *Transalloys v Mineral-loy* [2017] ZASCA 95; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472 A-B; *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45 E-G.

[19] To be successful, where *res judicata* is raised, all the requisites for the plea must exist. See: *Anjin Investments (Private) Limited* v *The Minister of Mines and Mining Development & Ors* CCZ 6/18. The underlying rationale of the principle of *res judicata* is to give effect to the finality of judgments, to limit needless litigation, and to promote certainty. The immediate question then is whether the same cause for the same relief between the same parties has been litigated. Cases HC 11857/15 and HC 2901/16 cannot anchor a plea of *re judicata*. I say so because the applicant was not a party to those proceedings. Again, case HC 6149/21 did not resolve the dispute between the parties, it left the resolution of the dispute to the Ministry of Mines. Again, the Ministry did not resolve the dispute, it merely said it was clear that the respective mining locations do have some significant overlaps on the ground. It concluded that other considerations would need to be made in order to have a conclusive position as to the location of the respective parties. Therefore, the dispute of the extent of the overlap on the ground between the mining claims has not been resolved. In the circumstances a plea of *res judicata* has no merit and is refused.

[20] The first respondent submitted that the relief sought in this application is at variance with the cause of action, in that this is an application for an interdict and the relief sought is a *declaratur*. The applicant sought to amend the draft order, by introducing paragraph 2 which reads as follows: "The first and second respondent are hereby interdicted from unlawfully interfering with applicant's rights of exclusive ownership of the aforementioned claims." The first respondent opposed the amendment. However, my view is that the amendment sought does not change the import of the remedy sought by the applicant as originally framed in the draft order. It merely clarifies that these are the mining claims that the applicant would want to be left to enjoy in peace, thereby interdicting interference by the first respondent. I perceive no prejudice to any party that might be caused by the granting of the amendment. In fact, the amendment sought answers to the applicant's cause of action. In the circumstances, the amendment is allowed. Therefore, the draft order is not at variance with the cause of action, in fact it answers to it. In the result, this preliminary point has no merit and is refused.

[21] The first respondent argued that this application is merely an attack on the report prepared by the Ministry of Mines disguised as an application for an interdict. This point cannot be

elevated to a point of law dispositive of the matter without going to the merits. It can only be answered by interrogating the merits of the matter. Therefore, it has no merit and is refused.

[22] I now turn to the merits of the application.

Merits

[23] This is an application for a final interdict. The requisites for a final interdict are trite. The requirements are a clear right; an injury actually committed or reasonably apprehended; and an absence of similar or adequate protection by any other ordinary remedy. See: *Econet Wireless Holdings and Others v Minister of Finance and Others 2001* (1) ZLR 373 (S); *Setlogelo v Setlogelo* 1914 AD 221 at 227. It was submitted on behalf of the applicant that the applicant has complied with all the requisites of a final interdict and has in particular proved a clear right in respect of the relief sought and that, consequently, this court should grant the relief sought.

[24] In opposing the application, the first respondent contends that the applicant has not established the requisites of a final interdict. The first respondent contends that it is a holder of rights in the mining claims by lawful authority and therefore it cannot be interdicted, least the interdict itself becomes unlawful.

[25] The applicant contends that the first respondent's claims were forfeited and it proceeded to obtain original title in those claims. In a bid to reacquire the forfeited claims, the first respondent instituted proceedings without citing the applicant and obtained an order for the transfer of non-existent claims to it. The claims are said to have been non-existent because at the time the order in HC 11857/15 and HH 2901/16 were granted the claims were not the property of the Ministry of Mines, but of the applicant.

[26] The two matters in HC 11857/15 and HH 2901/16 where instituted long after the applicant had acquired its mining claims. It was argued that the first respondent instituted proceedings for the transfer of non-existent claims. Mr. *Tshuma* submitted that the orders might be extant, but that does not change the principle that a transferor must be capable of transferring ownership. Counsel submitted further that the first respondent's scheme of fraudulently obtaining a court order is thus fruitless in that the order which it obtained for the transfer was a *brutum fulmen* as those claims did not exist anymore.

[27] Mr *Tshuma* argued, citing *Lewis & Marks v Middel* 1904 TS 291 that where legal proceedings are initiated against a party, and he is not cited to appear, they are *null* and void, and upon proof of invalidity the decision may be disregarded without the necessity of a formal order setting it aside. I take the view that the facts of *Lewis* are distinguishable from the facts of this case, in that in *Lewis* the court was dealing with a report made by the Land Commission. In *casu* this court is dealing with an order of court of unlimited jurisdiction. See: *Manning v Manning* 1986(2) ZLR 1 (SC). A Land Commission is not a court of unlimited jurisdiction. Therefore, *Lewis* is no authority for the proposition argued by Counsel, that an order of a court of unlimited jurisdiction where an interested party has not been cited is *null* and void and may be disregarded without the necessity of a formal order setting it aside.

[28] Counsel relied further to what in South Africa is referred to as the *Motala* exception. In *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO & Others* [2011] ZASCA 238, 2012 (3) SA 325 (SCA)('*Motala*') at paras 11–13 the South African Supreme Court developed a rule that if a court issues an order without 'jurisdiction' it is not binding, even if it is not challenged in the proper way – usually on appeal or in a rescission application. The court said:

> "In my view, as I have demonstrated, Kruger AJ was not empowered to issue and therefore it was incompetent for him to have issued the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect *(Schierhout v Minister of Justice* 1926 AD 99 at 109). Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing. For as Coetzee J observed in *Trade Fairs and Promotions (Pty) Ltd v Thomson & another* 1984 (4) SA 177 (W) at 183E: '[i]t would be incongruous if parties were to be bound by a decision which is a nullity until a Court of an equal number of Judges has to be constituted specially to hear this point and to make such a declaration'. (See also *Suid-Afrikaanse Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren & others and the Taxing Master* 1964 (1) SA 162 (O) at 164D-H.)."

[29] In the view that I take of this case it is not necessary to engage with the question whether the *Motala* exception is applicable in this case or not. I say so because it is clearly distinguishable from the facts of this case. In the *Motala* case the learned judge had usurped

for himself a power that he did not have. That power had been expressly left to the Master by the Act. In HC 11857/15 and HH 2901/16 this court was empowered and had jurisdiction and the competence to make the orders it made. Therefore, the *Motala* exception has no relevance in this case.

[30] In fact coming back home in *Manning v Manning* 1986(2) ZLR 1 (SC) the court said an order of a court of unlimited jurisdiction must stand until it is set aside. That it is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.

[31] In *Mauritius and Another v Versapak Holdings (Private) Limited and Another* SC 2 / 2022 the court said:

> "It is trite that once a court has made an order it binds all and sundry concerned. Everyone bound by the court order has a duty to obey the order as it is until it has been lawfully altered or discharged by a court of competent jurisdiction or statute.
>
> > In Hadkinson v Hadkinson ROMER LJ recited the duty to obey court orders with remarkable clarity when he said: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of the obligation is shown by the fact that it even extends to where the person affected believes it to be irregular or even void."

[32] The jurisprudence in this jurisdiction is that a court order is binding and must be given effect unless overturned on appeal or through rescission proceedings, or some other proceedings. The applicant has never sought to have the orders in HC 1187/15 and HH 2901/16 set aside. That being so, they remain binding. It therefore renders nugatory the relief the applicant seeks in these proceedings as the validity of the orders has not been vitiated. Until the court orders are set aside by a court they exist in fact and have legal consequences that cannot simply be overlooked. It follows that for so long as the two court orders continue to exist this court cannot order that the applicant is the lawful holder of the mining claims listed in the draft order, and interdict the first respondent as argued by the applicant. This goes to the heart of what the applicant sought to achieve in this application. If the order sought by the applicant is granted, the net effect of it is that it will be at variance and conflict with the orders in HC 11857/15 and HH 2901/16.

[33] The applicant contends that the orders in HC 11857/15 and HH 2901/16 HC 11857/15 and HH 2901/16 were fraudulently obtained and that it relates to property that was non-existent, even if it were so, I am unable to hold that such orders are a *brutum fulmen* and that they can just be disregarded without more. If such were to be permissible that once a litigant opines that an order of court of unlimited jurisdiction was fraudulently obtained, and proceed to disregard it, such can breed unthinkable chaos. Each man will be law unto himself, in that court orders will be disregarded willy nilly. No system of law could countenance such anarchy. Without a court rescinding or setting aside such an order, it remains extant and must be given effect to.

[34] I repeat what I said in *Fletcher v The Minister of Lands, Agriculture Fisheries, Water and Rural Development* HB 102/23, that:

> "If a court order is not set aside on appeal or rescinded on application it cannot simply be ignored, that could be a fatal blow to the rule of law. Respecting court orders is a core foundation of our legal system. An important founding value of the Constitution of Zimbabwe is the rule of law. Derived from this founding value is the principle of legality, which is an incident of the rule of law, and one of the controls through which the power of this court is regulated by law. It requires that extant orders of courts of unlimited jurisdiction be complied with. Certainty in the administration of justice is another principle of the rule of law. Litigants place reliance on extant orders of courts and arrange their affairs around them, with the expectation that they will be complied with. If a court order could simply be disregarded without the need for a process to pronounce on its validity that could lead to chaos and a fatal blow to the rule of law. It just cannot be countenanced."

[35] I therefore find that the applicant has failed to satisfy the requirements of a clear right. Absent any such right, there can also be no harm or perceived imminent harm against which an interdict should offer protection.

[37] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicant must pay the first respondent's costs.

In the result, I make the following order:

The application be and is hereby dismissed with costs.

Webb, Low & Barry Incorporating Ben Baron & Partners, applicant's legal practitioners
Tabana And Marwa, 1st respondent's legal practitioners