BARRINGTON RESOURCES (PVT) LTD
versus
PULSERATE INVESTMENTS (PVT) LTD
and
PROVINCIAL MINING DIRECTOR MASHONALAND EAST
and
MINISTER OF MINES AND MINING DEVELOPMENT
and
OFFICER COMMANDING ZRP MASHONALAND EAST
and
HOPE MINING SYNDICATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 27 June 2023 & 21 July 2023

Opposed Application

R T Mutero with *L Matapura,* for the applicant
W Ncube, for the 1st respondent
C Chibidi, for the 2nd - 3rd respondents
No appearance for 4th & 5th respondents

MUTEVEDZI J: The liberalization of participation by Zimbabweans from all backgrounds in the mining industry, the Government's deliberate policy of attracting foreign investors who in many instances commit huge financial resources into the industry, the tendency of mining companies to displace local communities from areas where minerals are discovered, the nature of the mining business itself and the seemingly bottomless potential returns generated from extracting mineral resources is always a recipe for conflicts. Some of those reasons directly led to the dispute in this case. On the face of it the dispute appears convoluted. It pits as the main protagonists an *in cola* corporate which is the applicant and a *peregrines* corporate as the first respondent. The allegations however directly suck in the Minister responsible for Mining and Mining Development in Zimbabwe in his personal capacity and some of his officials in relation to the execution of their official functions. It indirectly drags in some traditional leaders who appeared to have been standing against the perceived violation of the traditional rights of their indigenous populations and to claim a share of the proceeds from what they believe are their resources.

For inexplicable reasons, the applicant in this case is described in imprecise terms. In fact it is not described at all. In the application itself it is simply cited as Barrington Resources (Pvt) Ltd. I will refer to it from now on the applicant. At the beginning of the founding affidavit, the deponent barely says anything about the applicant serve to state that he is the managing director of the applicant company. He thereafter went on to describe the respondents in full betraying his appreciation of the need for a comprehensive narrative of who the parties to any court application are. In the case of *Yvonne Musarurwa & Ors* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* HH 751/22 I had occasion to deal with the same omission and remarked at p 2 of the cyclostyled judgment that:

> "I must hasten to say that it is elementary that litigants, especially where they are represented by legal practitioners must be aware that in court applications, it is important to fully describe the parties. The reasons why each party appears in the application must be made known to the court from the onset. Simply mentioning people's names or their titles is not helpful."

For reasons which I will illustrate later in this judgment, it was important for the applicant to have indicated its incorporation status. For the same reasons, the court would not be off the mark to infer that the applicant deliberately withheld that information.

The first respondent is Pulserate (Pvt) Ltd (hereinafter the 1st respondent). As already indicated Pulserate is a foreign owned corporation but which is domiciled in Zimbabwe. It is involved in the business of exploration and exploitation of lithium. Before its current status, it was wholly owned by Sure Group Limited, domiciled in the Seychelles. The second respondent is the Provincial Mining Director in Mashonaland East Province. He is cited in his official capacity as the officer responsible for the registration of mining claims, the administration of mining activities and wrongly assumed to be responsible for the resolution of mining disputes in that province. He is also specified as the official who made the decisions which the applicant seeks to impugn in this application. The third respondent is the Minister of Mines and Mining Development ostensibly cited in his capacity as the Minister responsible for the administration of the Mines and Minerals Act [*Chapter 21:05*] (hereinafter the Act) and kindred legislation in Zimbabwe. As already said however, some of the accusations traded by the parties entangle him in this dispute in his personal capacity. The fourth respondent is the officer commanding the Zimbabwe Republic Police in Mashonaland East Province. He is cited as the official responsible for the maintenance of peace and order in that province. The fifth respondent is Hope Mining Syndicate (Hope Mining). Its involvement in this application is that it is the syndicate from which the first respondent alleges to have acquired the mining claims in dispute

in this case. The applicant also alleges that Hope Mining conspired with the second respondent to forge and manipulate mining documents in an effort to appropriate the applicant's mining claims and disenfranchise it from those blocks.

The applicant's claim is labyrinthine. I will endeavor to summarise it in the way that I understood it. The applicant claimed that it brought the application in terms of s 345 (1) of the Act which confers this court with original jurisdiction to determine every civil matter, complaint or dispute arising from the Act. That jurisdiction, so it is alleged, is exercisable as long as a complainant and a respondent have not both given the mining commissioner their consent in writing to preside over the dispute at the first instance. The applicant added that the first respondent, refused to give that consent and sought alternative methods to resolve the dispute. That refusal, needless to say, ousted the jurisdiction of the second respondent to determine the matter. In addition, the mining commissioner expressly advised the applicant to approach this court for any remedies which it required.

If the application had ended on the above premises, no difficulty would have arisen. Unfortunately it did not. The applicant proceeded to base its application on other grounds. In para 8 of the founding affidavit, it made the averment that the application was for:

> "The setting aside of the 2nd respondent's decision obtained in letter dated 21 April 2022 which unilaterally confirmed and conferred a set of new and altered of coordinates to 1st respondent's mining claim, Good Days K Registration No. ME130BM in Mutoko District."

The applicant then proceeded to state the basis of the application as that the decision was unilateral because it had been arrived at in the absence of the applicant, yet it impinged on the applicant's mining rights in that it over pegged the applicant's entire two mining blocks in respect of its registered title in Good Days Mine Registration No. 33908BM and Good Days 6, Registration No. 33909B. It was the applicant's further ground that the unilateral decision was a conspiracy between the first and second respondents after falsifying mining documents.

In para 10, the applicant set out another basis for the application by alleging that:

> "The application is also for the setting aside of 2nd respondent's unilateral decision of 2nd and 15th December 2022 in which the 2nd respondent purportedly exercised jurisdiction of a mining dispute long after he had divested himself of authority and jurisdiction to deal with the mining dispute and in contravention of s 345(1) of the Mines and Minerals Act."

In para 11, the applicant further sought consequential relief in the following terms:

> "i. An order directing that the 1st respondent's purported registered block Good Days K, ME 130BM was fraudulently registered and is accordingly cancelled or ALTERNATIVELY an order declaring that the 1st respondent's Good Days K, ME 130BM over pegs applicant's Good Days claims, Registration No. 33908-9BM

ii. An order confirming the applicant's coordinates as depicted on the original map registered in favour of Andrew Zuze by the Mining Commissioner on the 2nd of June 2008."

Although worded differently, the applicant's draft order essentially sought the same relief as indicated in the basis of the application. After setting out the application, the applicant gave a background to the dispute. I will once more attempt to summarise it without detracting from its essence.

The Mining claims in dispute are commonly called Good Days 33908 and Good Days 33909. I will refer to them as 'the claims' henceforth. The claims were initially registered in the name of Andrew Zuze in 2008. In mid-2012, the applicant alleges it purchased two Good Days mines from Andrew Zuze but registration of the transfer was only done on 17 March 2017.

Further the applicant stated that from then it has maintained the original boundaries and beacons of Good Days mine. In turn the second respondent has been inspecting the mining location periodically. The latest of those inspections was on 12 March 2022. As a result it was contended that the claims in question had neither been forfeited to the state nor had their boundaries been shifted.

In addition, so continued the argument, the applicant had gathered that on 16 September 2016, a Mining Syndicate called Hope Mining Syndicate had allegedly registered a one hundred and fifty hectare mining block called Good Days K, Registration No. ME130BM. That block was adjacent to the applicant's claims. It was the block which was subsequently sold and transferred to the first respondent. The transfer was effected on 2 July 2018 under transfer number ME183BM.

In para 21 of the affidavit, the applicant further averred that from the time it acquired the mining claims in 2017 up to about mid-2020, it enjoyed peaceful and undisturbed possession of its mining blocks.

The facts upon which the present application was predicated were given as follows:-

Around May 2020, the applicant said it started noticing illegal mining activity around the claims. Upon investigation it determined that the illegal activities were being sponsored by a local traditional leader, acting Chief Nyamhanza. The applicant reported this to the second respondent's offices and requested assistance to remove the illegal miners. The respondent in turn sought police assistance and the illegal miners were removed. In April 2022, the illegalities resurfaced. Investigations revealed once more that another local chief called Chief Chimoyo was making attempts to have the area declared a national heritage site and out of bounds for

mining activities. After the intervention of the department of National Museums and Monuments the chief was muscled out. Thereafter and in the periods between May and July 2022, the deponent to applicant's founding affidavit says he was approached by one Mr Manyere who claimed to be a representative of the first respondent who indicated that the respondent was seeking to buy the applicant's claims. He was advised that the claims weren't for sale. Soon after those overtures, there were discoveries of large quantities of minerals as a result of the drilling programme which the applicant was undertaking on the claims. The discovery unfortunately spurred more illegal mining activities. The second respondent at the behest of the applicant once more sought police assistance to end the illegalities. When the applicant sought police assistance in Mutoko, the police indicated that they were now confused because they also held a similar letter from the second respondent which indicated that the claims belonged to the first respondent whom they were also obliged to assist by removing the illegal miners. The police could not proceed without clarification as to which between the two companies was the owner of the claims. It was then that the applicant said it learnt that the first respondent was also asserting claim to the same mining location. The applicant decided to address a complaint to the second respondent indicating its concerns. The second respondent replied with a letter to the applicant dated 18 October 2022 indicating that there was a dispute between the applicant and the first respondent. The second respondent pursued that declaration of the dispute by inviting by letter dated 22 October 2022, both first respondent and applicant to a hearing. The applicant, represented by the deponent to the founding affidavit attended the hearing but the first respondent did not turn up. The hearing, so the story continues, was aborted. The second respondent send to the parties, a second invitation dated 30 October 2022. Once again the first respondent did not turn up. On investigation why the respondent was not honoring the invitations, the applicant says it was advised by the second respondent that the first respondent had addressed a letter of complaint to the Vice President of Zimbabwe complaining about the unprocedural acquisition of its lithium claims by applicant. For that reason, the first respondent was not willing to submit itself to the jurisdiction of the second respondent. The second respondent declared incapacitation to exercise his powers and said he had sought and received advice from the Permanent Secretary of the Ministry of Mines.

Thereafter the applicant said it then discovered a letter which had been written by second respondent to first respondent. It was dated 21 April 2022. It confirmed the location of the first respondent's mining blocks. The applicant alleges that on inspection, it noted that the confirmed coordinates sat right on top of its entire claims in question. The applicant further

alleged that it was that letter which the first respondent was using to claim that the mining blocks belonged to it. The applicant's official subsequently confronted the second respondent whose explanation was that indeed he had written the confirmation letter after a request by the first respondent. Thereafter it appears there was a lot of haggling between the applicant's officials and the second respondent on the issue particularly the maps which had been used to determine the disputed coordinates. The applicant says it later sought the assistance of the Permanent Secretary of the Ministry to whom it addressed a letter containing their grievances.

To compound the applicant's woes, so the applicant further alleged, the second respondent proceeded to make another unilateral decision when on 2 December 2022 he wrote a letter to the first respondent authorizing it to have access to its (1st respondent's) entire eight-four blocks which included the disputed claims. That letter was followed by a similar one on 15 December 2022. Critically, the applicant alleges that the two letters were a purported resolution of the dispute between it and the first respondent which he had earlier divested himself of jurisdiction to resolve.

It was after those letters that the applicant requested from the second respondent copies of all documents, entries, applications, letters, maps and other relevant material from the first respondent's docket kept at second respondent's office. Although the official doesn't state it, it is clear that the information was availed because he says it was then that he discovered what he calls the forgery, connivance, deception and chicanery employed by first and second respondents. The applicant then attached a variety of the referenced documents to support its claim.

After acquiring that information, the applicant alleges that it gathered information from what it refers to as a reliable source, a one A. Pazvakavambwa who is a former surveyor within the Ministry. He allegedly advised that the information was not authentic. The applicant then went on to recite the version which Pazvakavambwa gave from his recollection of events. I omit to restate his explanation because Pazvakavambwa did not depose to an affidavit in that respect. The requirements for the inclusion of his hearsay evidence in the applicant's founding affidavit were not met. His assertions are therefore obviously inadmissible. See the case of *Hitunen* v *Hiltunen* HH 2008(1) ZLR 296.

The applicant went on to allege that the map which had been supplied by Hope Mining Syndicate was unendorsed, that the second respondent had issued a new certificate of registration to the first respondent on 10 May 2022 with a new Registration No. 1458BM which bore an altered description. There is a difference between the certificate of registration after

transfer issued on 18 July 2018 and the one issued on 10 May 2022. The description on the initial certificate read:

> "On state land approximately 3.6 km N.E of Nyakurgwe Hill Adjacent Old Good Days Mine.

That on the certificate of 10 may 2022 read:

> 'On state land approximately 3.6 km N.E. of Nyakurgwe Hill and astride Old Good Days Mine.'"

The applicant went on to further allege that the discovery notice submitted by Hope Mining in 2016 looked suspicious. He once more alleged that he said so because he had been reliably informed by another person. The applicant conceded in para 50 of the founding affidavit that the second respondent addressed a letter to the Permanent Secretary of Mines on 22 October 2022 in which he confirmed that judging by the public maps and the map submitted by Hope Mining at registration, there was no encroachment between the applicant's and first respondent's mining blocks. The applicant proceeded to allege that the information on what he described as the reef card or record card was inconsistent with the information given on the description on the original certificate of registration. He then alleged that the reef card had been tampered with.

After this lengthy narration of the facts giving rise to the application, the applicant dedicated seven more pages to what is described as the law. In those pages which ran from para(s) 52 to 72 on the founding affidavit the applicant dealt with numerous provisions of the Act which included in some instances a full recital of sections of the Act. For example in para(s) 55 and 68 the applicant reproduced verbatim ss 345(1) and s 177(3) of the Act respectively. In addition the applicant referred to ss 352, 353, 376 and 58 of the Act. As if that was not enough the applicant made conclusions of law such as in para(s) 56, 57, 59, 60, 67, 69, 70 and 71. To illustrate this in para 69 the applicant after reciting in full the provisions of s 177(3) concluded:

> "By applying the above provision it is common cause that the 1st respondent is the subsequent pegger and its rights cannot be subordinated to those of the 1st respondent. 1st respondent should therefore be ordered to give way to the applicant and move out of the disputed area."

Such conclusions appear in all the paragraphs I have already stated. I do not need to repeat them and other legal utterances in the affidavit because as will be shown they cannot properly be part of an affidavit.

The supporting affidavit of Andrew Zuze

He confirmed that indeed the mining blocks in dispute were originally his. He said he is a registered prospector. The rest of his deposition was as stated by the deponent to the founding affidavit.

The supporting affidavit of Romeo Tapiwa Chinyemba

He stated that he is a duly registered and practicing prospector. He sought to impugn the first respondent's registration papers on the basis of his suspicion that they were invalid. He based his views on the fact that the map was not endorsed by the first respondent's office. Secondly he contended that the first respondent acquired the mining claims from the fifth respondent in 2018 and could not therefore be a prior pegger to the applicant who bought them from Zuze who in turn had registered them in 2008.

The Opposition

The first respondent commenced its opposition by raising several preliminary objections. I find that it is neater, more convenient and that it brings more clarity for me to deal with each objection, discuss it and make a determination on it before turning to the next. Although the second respondent filed opposing papers, he neglected filing his heads of argument as required by law. Sub rules (20) – (22) of R 60 of the High Court Rules, 2021 (the Rules) provide for the filing of heads of argument in court applications. They state thus:

> "(20) Where an application, exception or application to strike out has been set down for hearing in terms of rule 65 and any respondent is to be represented at the hearing by a legal practitioner the legal practitioner shall file with the registrar, heads of argument clearly outlining the submissions relied upon by him or her and setting out the authorities, if any, which he or she intends to cite, and immediately thereafter he or she shall deliver a copy of the heads of argument to every other party.
>
> (21)…
> (i)…
> (ii)…
>
> (22) Where heads of argument that are required to be filed are not filed within the period specified in subrule (21), the respondent concerned shall be barred and the court or judge may deal with the matter as unopposed or direct that it be set down for hearing on the unopposed roll." (Underlining is mine for emphasis)

At the hearing counsel for the second respondent attempted to make representations in a bid to withdraw some affidavits and replace them with what he said was a report. He was clearly off side. He could only address the court if he intended to apply for the up-liftment of the bar operating against his client. He did not seek to do so. The third respondent, right from the onset, did not attempt to file any papers at all. As a result, the court proceeded to deal with the matter as unopposed by the second and third respondents.

As already stated, the first respondent opposed the application. With the company's authority, the opposing affidavit was deposed to by one Salim Bobat. He indicated that during

the course of 2018 the first respondent had acquired eighty-four lithium mining blocks in Mutoko one of which was subject of this dispute. To put the dispute into context, the first respondent gave an introductory narrative. In 2022, the first respondent brought on board a Chinese investor as a shareholder and technical partner. The plan was that together with the investor, they would not only mine lithium but would also set up a spodumene processing plant in the same area in an effort to comply with the country's laws on value addition on minerals. As a wholly foreign owned company, from the time it decided to invest in Zimbabwe, so said the first respondent, it sought assurances from the Presidium of the country, institutions such as the Reserve Bank of Zimbabwe, the Zimbabwe Investment Authority, The Ministry of Finance and Economic development, The Minerals Marketing Authority and the Ministry of Mines and Mining Development. The insinuations by the applicant that the first respondent's engagements and pleas to the Vice President were tainted are therefore unfortunate and unwarranted. In addition, the first respondent further alleged that it had equally sought and obtained guarantees from the second respondent that the mining rights it had acquired were not encumbered in any way.

The preliminary objections raised by the first respondent ran as follows:

a. The Application is non -suited

The argument was that whilst the applicant's understanding of s 345(1) is correct, the facts of the application in this case point in the opposite direction. There is no question that the High Court has jurisdiction to hear a dispute or complaint at the first instance. Throughout the founding affidavit supported by various attachments, the applicant prays for the setting aside of the decisions which were made by the second respondent regarding the ownership dispute between applicant and first respondent. If there was any doubt to it the draft order shows in no uncertain terms that the applicant's prayer is for the setting aside of the second respondent's decisions. In para 9 the applicant sets out that:

> "This is an application for the setting aside of the 2nd respondent's decision obtained in letter dated 21 April 2022…"

The prayer to set aside the second respondent's decisions is repeated throughout the application as shown by para(s) 10, 62, 63 and 71 of the founding affidavit. To support that, the applicant extensively deals with the grounds for review of those decisions when it points out in para 9 that the decision was unilaterally arrived at; in para 12.1 where it is alleged that the second respondent violated the *audi alteram partem* rule; in para 12.5 where it is stated that the second respondent did not follow the procedure provided in the Act and in para 65 where

it was alleged that he was clearly biased. There were various other instances where the grounds for review were pursued. The relief sought is further muddled by other allegations that make the application look like an appeal. If it is that would compound the grave errors in the application as an appeal cannot be brought by application.

Section 345(1) of the Act provides as follows:

> **"345 Jurisdiction of High Court and mining commissioners**
> (1) Except where otherwise provided in this Act, or except where both the complainant and defendant have agreed in writing that the complaint or dispute shall be investigated and decided by the mining commissioner in the first instance, the High Court shall have and exercise original jurisdiction in every civil matter, complaint or dispute arising under this Act and if in the course of any proceeding and if it appears expedient and necessary to the Court to refer any matter to a mining commissioner for investigation and report, the Court may make an order to that effect."

What the above provision means does not call for debate because it is plain. There are only two instances when the High Court cannot assume jurisdiction over a mining dispute or complaint at first instance namely where the Act itself provides that it cannot and where the parties have, in writing submitted to the jurisdiction of the mining commissioner. The only other time where a window is provided for the mining commissioner to hear a dispute is where this court in the course of any proceeding and where it appears to it expedient and necessary, determines to refer a matter to a mining commissioner for investigation and thereafter to report to it. See the case of *Chamu Mining Syndicate* v *Sibongile Mpindiwa N.O. & Anor* HMA 31/17.

The question whether a provincial mining director is a mining commissioner is a tired debate. In a long line of cases this court has decisively dealt with the issue. These range from the 2018 case of *Gombe Resources (Pvt) Ltd* v *Provincial Mining Director Mashonaland Central & Ors* HH 405/18; *Pahasha Somalia Mining Syndicate* v *Eathrow Investments (Pvt) Ltd & Ors* HH 450/21 to DEME J's recent decision in the case of *Chanakira Masuku* v *Tariro Ndhlovu N.O. & Ors* HH 299/23. The indifference shown by the Ministry of Mines and Mining Development regarding the regularization of the anomaly which the courts have pointed to in relation to the status of officials called provincial mining directors is astounding. Repeatedly, the High Court has said provincial mining directors are not recognised in the Act. Perhaps I should put it more emphatically than before. I am not sure whether the officials in that Ministry who are responsible for sponsoring amendments to the law are not reading the judgments of this court or whether they benefit from the confusion arising from the illegalities committed by provincial mining directors who sit as presiding officers of the mining commissioner's court. When he/she sits to determine mining disputes, the mining commissioner does so not as some

administrative official from the comfort of his office. He/she will be sitting as a court. A court is a formal institution which can only be presided over by a person designated by law to so preside over it. No amount of arrogance or posturing to persist with the illegality of pretending that provincial mining directors are mining commissioners who can preside over those courts will sanitise its unlawfulness. Whether anyone likes it or not, the law as interpreted by the courts is that if a provincial mining director presides over a mining commissioner's court and purports to make a decision as such, that decision is a nullity. The sooner whoever is responsible for those issues realizes that the better for everyone with interest in the mining industry.

In this case, there are a lot of allegations and counter allegations made in relation to the supposed hearing before the second respondent. The applicant accused the first respondent of deliberately refusing to attend the hearings called for by the second respondent. In turn the first respondent alleges that it could not attend a hearing which it believed was predetermined because the second respondent is a surrogate of the third respondent who is the beneficial owner of the applicant against whom it was pitted in the dispute.

In the court's view, when determining the issue of whether or not the High Court has jurisdiction to hear this application, all such arguments and accusations become high sounding nothing. The court must not be distracted by the reasons why the dispute could not be heard by the second respondent. What is clear is that the Act does not preclude the court from hearing the dispute and that the applicant and the first respondent did not both agree in writing that the dispute be heard by the second respondent. The second respondent did not have the power to do so because he is not a mining commissioner in the first place. Even if he had been, he had no jurisdiction to determine that dispute. The reality however is that he did not preside over any such dispute. When a mining commissioner determines a mining dispute, he sits as a court. He exercises judicial powers by virtue of s 346 of the Act which states that:

> "**346 Judicial powers of mining commissioners**
> (1) A mining commissioner may hold a court in any part of the mining district to which he is appointed, or at his discretion in such place outside the said mining district as may be convenient to the parties interested, and may adjourn such court from time to time and from place to place as occasion may require." (My emphasis)

The same section clothes the mining commissioner with elaborate judicial powers. In addition s 347 outlines the procedure which must be followed in the mining commissioner's court. That procedure includes the issuance of summons after receiving an application by a complainant. The summons must be duly served on the defendant and must advise him/her of

the date and place of hearing. There must be proof of service of the summons on the defendant. As such, any mining commissioner or any complainant or defendant would be lost to suppose that the hearing envisaged under the Act is some informal or *adhoc* process. The hearing is a court hearing which the Act says is akin to that of a civil magistrates' court. Unfortunately the arguments by both the applicant and the first respondent in this case betray that ill-conceived understanding. They are both convinced that the second respondent made judicial decisions regarding their dispute when in truth he did not. The letters which he wrote directing the parties to appear before him were not summonses as envisaged by the Act which required them to be in the prescribed form. The parties whom he invited to appear had not consented in writing to have their dispute resolved in his court. The letters subsequently or previously written appear to me to have been more administrative than judicial. They were not pursuant to a court sitting. They could not therefore have had any judicial effect. It is from that misconception that the applicant thought it could bring a motion motivating this court to annul the administrative conduct taken by the second respondent. The letters written by the respondent at any date are not the source of the dispute. In terms of the Act they are neither reviewable nor appealable. In fact, it does not appear that there is allowance for a review of the decision of a mining commissioner in terms of the Act. A party who seeks such review must proceed in terms of the provisions of the High Court Act [*Chapter 7:06*]. The Act provides under s 361 for an appeal against the decision of a mining commissioner's court to the High Court in the following terms.

> "**361 Appeal from mining commissioner's court to High Court**
> Any party who is aggrieved by any decision of a mining commissioner's court under this Act may appeal against such decision to the High Court, and that court may make such order as it deems fit on such appeal."

If it was attempting to do so and if the second respondent had made any decision, the applicant would only have been entitled to seek review in terms of the High Court Act and not under the Mines and Minerals Act. As can be discerned and needless to say, what is before the court is not an appeal. In my view therefore, the first respondent cannot persuade the court to decline jurisdiction to deal with this dispute on the basis the applicant is seeking a review of the second respondent's decisions. The applicant denies that it does so. It however equally follows that the relief which the applicant prays for in para(s) 1-3 of its draft order is illogical and cannot be granted. In the circumstances the first respondent's preliminary objection on the basis of jurisdiction is dismissed.

Having resolved the question of jurisdiction, it becomes clear that what is before the court is a boundary dispute between the applicant and the first respondent as illustrated by para(s) 4-6 of its prayer. I am allowed to proceed as such on the strength of the authority of the case of *Zimbabwe Posts (Pvt) Ltd* v *Communication and Allied Workers Union* SC 20/16 where the Supreme Court commenting on the apparent confusion which existed regarding the nature of the application held that:

> "The facts as contained in the founding affidavit cried out for the setting aside of the award on the basis that it was contrary to the public policy of Zimbabwe. Here, rather than an implication of the relief being sought, there was a statement identifying the basis upon which the award was being challenged. There was no need for further amplification and the fact that the applicant thereto described the application as one for a review to the High Court did not change the substance of what it was. The applicant might have been confused as to the form that it was meant to take but the legal principle upon which the award was challenged was clearly stated and identified in the founding papers. The heads of argument filed in support of the application state clearly and succinctly that the challenge to the award was predicated on the ground that recognition of the award would be contrary to the public policy of Zimbabwe. The essence of the application was not lost upon the learned judge who commented that "…… the gravamen of the application is essentially for the setting aside of an arbitral award."

I am satisfied that despite the confused and confusing nature of the application before me the facts stated in the founding affidavit and the principles outlined in the heads of argument all support that this is an application for the resolution of a boundary dispute between the applicant and the first respondent. It is not an application for review.

b. Applicant's claim is prescribed

The argument was that the applicant is seeking to impugn the first respondent's title yet that title was acquired in 2016 when the blocks in question were initially registered by the fifth respondent. It also remained valid and extant following the first respondent's acquisition on 5 July 2018. As a result, so went the argument, the applicant cannot impeach that title because the mining laws prohibit any challenge of a mining title which has been in existence for two years on the ground that the pegging of the mine location was irregular or wrong or that the provisions of the law were not followed in the registration of the title. If the applicant was the prior pegger as it claimed, it was required to have challenged the registration of the first respondent's block in dispute before the expiration of the two year period.

Section 58 of the Act provides for instances when impeachment of title is barred. It is couched as follows:

> "**58 Impeachment of title, when barred**
> When a mining location or a secondary reef in a mining location has been registered for a period of two years it shall not be competent for any person to dispute the title in respect of such location or reef on the ground that the pegging of such location or reef was invalid or

> illegal or that provisions of this Act were not complied with prior to the issue of the certificate of registration."

I should bluntly say it is wrong to equate this bar to ordinary prescription in terms of the Prescription Act. My view is supported by the fact that unlike ordinary prescription the bar in s 58 is premised on prescribed grounds. It follows therefore that outside the grounds indicated under the section, it is permissible to challenge the title in respect of any mining location. The impermissible grounds are simply that the pegging of the location was invalid or illegal or that some provision of the Act was not complied with. In my opinion therefore, any other ground outside those stipulated is permissible and can be used to challenge title to a mining claim even outside the two year period after registration. For instance, where one alleges fraud on the party of the holder of a registered title that challenge cannot be defeated by resort to s 58. Counsel for the applicant urged me to dismiss the objection on prescription on the basis of this court's dictum in the case of *Jin Yang Africa* v *Estate Late George Makurira (Represented by Angela Chandaengerwa) &Ors* HB 18/22 where MAKONESE J held that:

> "The legal position is clear. A prior pegger has superior rights and section 177 (3) of the Act protects the applicant. I am not persuaded that section 58 of the Act can be applied to protect the rights of a claim that was pegged in an area not open for pegging. Once it is established that Applicant has prior rights, the court cannot and should not resort to section 58 of the Act."

With respect I am not persuaded that the interpretation of s 58 as given in the above authority can be correct because what it sanctions is clearly what the bar proscribes. The interpretation directly goes against the import of s 58. Title cannot be impeached on the basis of the illegality of the pegging. A claim which was pegged and registered in an area not open for pegging remains valid if the title is not contested within two years from the date of registration. What determines whether one can challenge title after two years is the reason for the challenge as already stated.

In this case, the applicant alleges that the second respondent's title is a fraud. By its nature fraud is deceitful conduct. It may take time to discover the fraud. It would be absurd then to bar a challenger from contesting such title on the basis that it must have been discovered earlier. I construe such a factor differently from what I would term naked illegality such as pegging in an area not open for pegging. The ground which the applicant advances in this case can therefore be raised at any time. It is not circumscribed by the bar in s 58. On that basis the objection *in limine* is dismissed.

c. That there are material disputes of fact

The first respondent further argued that this is a matter which cannot be determined on papers because it is replete with disputes of fact. The long drawn history and the arguments around how the claims were pegged and registered cannot be resolved without calling oral testimony. Further the applicant has questioned the authenticity of many documents in this dispute which it clandestinely obtained from the first respondent's docket. Those disputes cannot be determined on the papers before the court but would require oral testimonies.

The court agrees that there are numerous disputes of fact in this case. Those that stick out are whether or not the area which the fifth respondent pegged in 2016 was open for pegging; whether or not the coordinates to the first respondent's mining blocks were altered to encroach on to the applicant's claims; whether applicant's original coordinates and registration certificates have been tampered with to encompass an area outside the applicant's original control; whether the documents used by either party to support their causes are fraudulent; that the dates on which the applicant's certificates were issued are not clear. The word lithium on the applicant's certificate seems to have been superimposed by a person with a dissimilar handwriting from the one who initially authored the document in an effort to aid the fraud by the applicant. Further there are allegations that the coordinates which the applicant contend to be the correct ones cannot be proved without showing the court that due process was followed in their pegging. The matter can only be resolved by the production of the original certificates of registration so the argument went. In addition it was contended that what requires proof is not the production of the applicant's certificates of registration but proof that Andrew Zuze followed due process in that he prospected, pegged the ground in dispute and registered it for the mining of lithium in 2008 before the rights were allegedly transferred to the applicant in 2017. The most critical issue is **whether or not the applicant was the prior pegger of the mining location in dispute.**

The law governing the question of material disputes of fact was perhaps best explained by MAKARAU JP (now JCC) in *Supa Plant Investments* v *Chidavaenzi* 2009(2) ZLR 132(H) at 136 F-G which was cited with approval by the Supreme Court in *Dube* v *Murehwa & Anor* SC 68/21 where it was held that:

> "…it is not the number of times a denial is made or the vehemence with which a denial is made that will create a conflict of fact such as was referred to by …in Masukusa v National Foods Ltd and Another 1983(1) ZLR 232 (H) and in all other cases which have followed. A material dispute of fact arises when material facts alleged 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."

What it means is that a material dispute of fact does not simply arise because the parties allege that they disagree. Rather, the respondent must controvert the material facts as stated by the applicant in such a way that, without the submission or adduction of more evidence by the parties, it cannot determine the dispute in one way or the other. What appears important to me is that the word material recurs in the dicta in many authorities which deal with the question of disputes of fact. Put in another way, the dispute must therefore be significant. That significance is not depicted by how heated the disagreement is. It is also apparent that what may be a material dispute in one case may not be a material dispute in another. I construe a dispute to be consequential if its resolution is critical to the determination of the matter before the court. As such no matter how herculean a conflict of fact may appear, if the matter before the court can be resolved without the need to decide that dispute, it is an inconsequential conflict of fact. It is for that reason that the courts have been urged to take an aerobicized and prudent approach to the resolution of material disputes of fact and to resolve the issue despite the apparent conflict. In that endeavor the primary consideration is the possibility of making a determination of the case on the papers without causing an injustice to the other party. In the case of *Muzanenhamo* v *Officer Commanding Police & Ors* CCZ 3/13 the Constitutional Court held that there is a two stage inquiry into the issue of disputes of fact. The first is to determine whether or not a dispute of fact indeed exists. If it does, the next stage would be to ascertain if the conflicting positions are incapable of reconciliation on the papers.

In this case, I have already detailed the numerous seemingly irreconcilable positions of the parties. I have specifically stated the areas of conflict. To me, the major question is whether the applicant is indeed the prior pegger of the mining claims in dispute. The applicant argues it is whilst the applicant is of the view that the applicant is not. All other arguments between the parties are immaterial. In addition and as will be illustrated later, I am convinced that I can take a robust common sense approach to the resolution of that dispute without the need for more evidence other than that which is on the papers. My decision is therefore that despite the number and acuteness of the disputes of fact between the parties and in the absence of any contribution from the second and third respondents, that sole material dispute of fact which fortunately, the court is capable of resolving on the papers is who between the contesting parties is the prior pegger. Its resolution can be dispositive of the application. For that reason, the objection is also dismissed.

d. Applicant wrongly motivated its case with law in its affidavit

The allegation was also made that the applicant contrary to the dictates of the law dedicated an entire section to legal arguments in its founding affidavit. It thus included heads of argument in its founding affidavit yet that affidavit was supposed to simply outline the factual basis of the application. The relevant law is subsequently set out in the heads of argument.

I do not believe that the application can be dismissed on the basis of that preliminary objection. The reason why courts restrict the content of affidavits to facts only and insist on the presentation of only relevant information; that the deponent's opinion is unnecessary and disallow statements of belief and hearsay is to enhance the truthfulness of affidavits. That safety net is required given that it is difficult to assess the credibility of affidavit evidence because it is not subject to cross examination. Where a party has included in an affidavit material that is irrelevant, the court may, on application by one of the parties or on its own initiative strike out all or part of that affidavit. The prejudice caused to the other party may be cured by an award of costs against the party filing the affidavit. In this case, the section of the applicant's affidavit marked *the law* is superfluous and irrelevant. It largely recites the law. It drew conclusions of the law and set out opinions of the deponent. See the case of *Turner & Sons (Pvt) Ltd* v *Master of the High Court & Ors* HH 498/15 in support of that proposition.

Instead of striking out the entire affidavit, which would entail a dismissal of the matter as prayed for by the first respondent, the justice of this case demands that I simply expunge from the affidavit as I hereby do, that offending part. Resultantly, I will proceed as if the annoying section was not part of the affidavit. In the end the point *in limine* cannot succeed and is dismissed.

On the merits the first respondent once more vigorously opposed the application. That opposition as already stated brought to the fore several disputes of fact. Earlier, I enumerated a number of them and that on the face of it they appear irreconcilable. I resolved however to employ the robust common sense approach to the resolution of the dispute between the parties. I stated that to me it appears the only question in issue here is whether or not the applicant is the prior pegger of the mining location in dispute. If it is then its rights supersede those of the first respondent. Conversely, if the applicant is not a prior pegger, it follows that its application cannot succeed. Once more I propose to deal with the grounds of opposition one after the other. In fact, I am convinced that the very first ground is dispositive of the dispute. As such there will be no need for me to determine the rest which in my view cannot be disposed of on

the papers without more. For purposes of completeness however, I will summarise the first respondent's entire opposition. It went as follows:

On the Merits

The first respondent argued that the applicant's claim to the mining location is a fraudulent transaction. It believed so because the registration of companies is done by a public institution and the documents pertaining to such registration are public documents. As such it had made enquiries with the registrar of companies in relation to the directorship of the applicant and its registration. It found it curious that the file concerning the applicant's registration as a company is missing from the registrar's offices. On one hand, what was however obtained is conclusive evidence, so the first respondent continued, that the applicant's registration number is **6095/13** betraying the fact that it was registered as an entity in the year 2013. On the other hand, the applicant alleges throughout its papers that it acquired the mining blocks from Andrew Zuze in 2012. Logically, it follows that the acquisition was made before the applicant was incorporated. There is no pre-incorporation contract to make that acquisition legal as required by law. If there isn't then the applicant's claim to be the owner of the mining blocks in question can only be a fraudulent transaction.

In addition, the respondent denied any wrong doing regarding the registration of its own claims. The claims were acquired two years after they had been pegged by the fifth respondent. It added that it relied on official records which were kept at second respondent's offices. Those records have remained unaltered since 2018. It further denied any shady dealings with the fifth respondent in the transaction. It further denied over pegging the applicant's claims and the falsification of documents by the second respondent. Rather, it said it had carried out the necessary due diligence before the acquisition of the mining blocks. Those investigations included obtaining information from the second respondent who confirmed to it that at the time the fifth respondent pegged the blocks the mining location was open for pegging. That allegation so it said, was supported by annexure MM1 attached to the application by the applicant. The first respondent soon after acquisition of the claims, caused their transfer and registration in its name. It then attached the initial certificate of registration and the subsequent one issued after it had duly applied for and obtained approval for the amendment of the certificates in relation to the minerals which appeared thereon.

The first respondent further argued that the fifth respondent had followed due process before selling its rights to the first respondent as manifested through the official documents held by second respondent's offices. In summary, it alleged that the fifth respondent had

obtained a special prospecting licence on 16 September 2016; it sought permission from the local authority to carry out the prospecting; issued prospecting and discovery notices; caused the verification of coordinates and the relevant ground to be pegged. The ground was open for pegging. The applicant was not at the scene to challenge the pegging in 2016. Further the fifth respondent issued a pre-registration notice and the relevant map. As such given that due process was followed, the applicant has not submitted any evidence in its application to support its allegation that it was the prior pegger. It never objected to the process outlined above. It was required to take the objection if it had any. Further, the first respondent alleged no evidence has been placed before the court to show that the applicant's predecessor Andrew Zuze followed due processes and maintained them until 2017 when the rights were allegedly transferred to the applicant. The first respondent attached to its opposing papers all the above referenced documents as annexures. The coordinates which are indicated on the preregistration papers are the same which appear on the registration notice and they did not change after the acquisition of the rights by the first respondent.

On the allegation that the first respondent had at some time send its emissary one Manyere with a proposal to purchase the same blocks from the applicant, the first respondent argued that the allegation was preposterous. While it admitted that it had approached many people in the Mutoko area with proposals to purchase mining blocks it could not have approached the applicant to buy mining blocks which it had already taken control of after acquiring them from the fifth respondent.

Regarding the averment that it ignored the invitation to resolve the dispute the first respondent admitted that it refused to attend the hearings presided over by the second respondent who took instructions from the third respondent. As already alleged, the applicant is the third respondent's alter ego. For that reason, the second respondent could not therefore preside over a matter in which he had interest. Once more the first respondent laid into the third respondent by alleging that his overbearing influence is evident throughout as betrayed by the illegal procurement of the first respondent's documents kept at second respondent's office and the attachment of a highly confidential letter written to the country's Presidium.

The first respondent further rebutted the applicant's allegations by pointing out that no reliance could be placed on the utterances attributed to A. Pazvakavambwa because it was all hearsay. In any case, that individual was unceremoniously dismissed from the Ministry of Mines; he had not undertaken a one man visit to the mining location in dispute but had done so with others who included a geologist, a mines inspector and the second respondent. Coordinates

remain the only approved scientific and geographic method of determining the location of a mine and transposing the same on to a map. In that regard the firstrespondent believed that its maps, coordinates and all other documents are genuine. The first respondent further contended that the applicant's registration certificates apart from being somewhat illegible showed clear alterations as the hand writings relating to the entries thereon are different.

In further denials of the allegations by the applicant, the first respondent further stated that it is the applicant itself which is seeking to fraudulently take over Good Days K, ME130BM. The applicant seeks to do so with the support of the third respondent who is the Minister responsible for mining because the third respondent is a beneficial owner of the applicant. This setup is illegal. In fact the first respondent claimed it is criminal. It further alleged that a request had been made to the registrar of companies to disclose the directorship and shareholding of the applicant. It referred to press reports which it said the third respondent has not denied, that the applicant is indeed third respondent's company.

In another angle of attack, the first respondent alleges that the certificates of registration attached by applicant are barely legible. The dates on which the certificates were issued are not clear. The word lithium on the certificate seems to have been superimposed by a person with a dissimilar handwriting from the one who initially authored the document in an effort to aid the fraud by the applicant.

As stated in earlier paragraphs the first respondent disputed the authenticity of the applicant's coordinates arguing that their correctness cannot be proved without showing the court that due process was followed in their pegging. The matter can only be resolved by the production of the original certificates of registration. The first respondent argued further that by the time applicant got registration of transfer in 2017 the fifth respondent had already pegged and registered the blocks in question in 2016 and acquired real rights. The curiosity is heightened when one notes that the applicant purports to have bought the claims from Zuze in 2012 but only transferred them to its name five years later in 2017. It did not challenge the fifth respondent's pegging of the mining location in 2016 and did not challenge the first respondent's title for six years. In addition it was alleged that prior to the registration of the fifth respondent's claims, an official answering to the name P. Mungate undertook a verification exercise by visiting the location and thereafter recommended the registration of the mining blocks. The respondent attached the report as an annexure.

I will turn straight to the first ground of opposition. It appears to me that it may be dispositive of the dispute.

1. That the applicant's case is a fraudulent transaction

At the hearing both the applicant and the first respondent indicated that they were largely abiding by their pleadings and heads of argument. Mr *Mutero* for the applicant submitted that the applicant had furnished proof that the claims were registered in its favour in the form of certificates of registration. Those various documents were found on pp 31-38 of the application. I have set out above the attack which the first respondent directed at the applicant's claim that the mining location in dispute is properly registered in its name.

In this case, the allegation regarding the incorporation status of the applicant company was made right from the start by the first respondent. Using bare knuckles, the first respondent did not only accuse the applicant of approaching the court with dirty hands but that it literally dripped raw sewage. It alleged that the applicant is a company owned by the third respondent who is the Minister responsible for Mines and Mining Development in the country. Those allegations are replete in the first respondent's opposing affidavit particularly in para(s) 48, 52, 60 and 93. In its answering affidavit, in relation to paragraph 48 the applicant simply makes a bare denial without more. In regards to the allegation in para 52 all that the applicant said was that the allegation that the Minister of Mines owns the applicant could not assist the 1st respondent to defend the case. A similarly bald denial was made in response to the averments in para(s) 60 and 93. What is curious is that whilst it went into overdrive in controverting most of the assertions contained in the first respondent's opposing affidavit, the applicant simply provided the tepid responses indicated above yet the allegations against not only the third respondent but against itself were literally a matter of life or death. The accusations are profound because if true they directly contravene the provisions of s 364 of the Act which states as follows:

> "**364 Disabilities of officials**
> (1) Except on behalf of the State without personal reward or gain, no official in the Ministry responsible for mines shall directly or indirectly acquire or hold any mining location or any interest in such location, or carry on any trade or undertake any agency of any sort whatsoever, or have any share in any mining company or any mining partnership carrying on business in Zimbabwe, or in any partnership in any mining business, or be connected with any mining company as director, adviser, manager or official.
> (2) Any official who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level eight, in addition to any penalty to which he may be liable under any law relating to the Public Service."

To me the provisions of the Act are unequivocal. A Minister responsible for mines and mining operations in Zimbabwe cannot directly or indirectly be involved in any mining business. At the hearing Mr *Mutero* attempted to downplay the issue by arguing that

shareholding in a mining business could be something different from acquisition or having interest in a mining entity. There is simply nothing like that in view of the wide language deliberately employed in s 364. It appears to me that the prohibition covers every conceivable scenario of interest in mining business. It mentions direct or indirect acquisition of any mining location or interest in such location. It prohibits the carrying on of any trade or undertaking any agency in mining. It further proscribes the holding of shares in any mining company of whatever description which carries on business in Zimbabwe or to be simply connected with a mining company whether as a director, adviser or manager or any other kindred relationship. I indicated in the introductory passages of this judgment that the applicant was at pains to describe who it is and that it appeared to me that it was deliberately withholding its incorporation status. My apprehension is vindicated by the applicant's failure to say anything in rebuttal of the brutal impeachment directed at it by the first respondent. For the applicant to suppose that the condemnation cannot assist the first respondent in defending the application is to be short-sighted in view of its not so transparent acquisition of the mining rights in the location in dispute. I discuss these issues because they have a direct bearing on the critical question in this case. The situation is compounded by the fact that the third respondent himself chose to completely ignore the application. He said nothing even in the face of a personal attack on him. The rule in our procedure regarding such allegations in affidavits is trite. That which is not denied must be taken as admitted. The applicant ought to have come clean on this once improprieties regarding its incorporation had been made. The third respondent must have equally realised that the allegations are in essence criminal accusations.

What I also discern from the applicant's certificates of registration is that the mining blocks were registered in its name some time in 2017. It purports to have acquired the claims in 2012. The applicant's successor alleges that he had acquired the claims in 2008. The first respondent's successor pegged and registered the blocks in 2016 before transferring them to the first respondent in 2018. The curiosity wrought by the failure to transfer and register the claims by the applicant after acquisition is not inane. The first respondent alleges that if it happened, it was not lawful for the applicant to have acquired the mining location in 2012 before its incorporation in 2013 without a pre-incorporation contract. The issue is regulated by the provisions of the s 47 repealed Companies Act [*Chapter 24:03*] given that it was the law in 2012. That section provided that:

> "Any contract made in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or

> otherwise made binding upon and enforceable by such company after it has been duly registered as if it had been duly formed, incorporated and registered at the time when the contract was made if-
>
> (a) the memorandum on its registration contains as one of the objects of such company the adoption or ratification or the acquisition of rights and obligations in respect of such contract; and
>
> (b) the contract or a certified copy thereof is delivered to the Registrar simultaneously with the delivery of the memorandum in terms of section twenty-one."

My reading of the above provision is that a contract made by any person purporting to be an agent or trustee of a yet to be incorporated entity is invalid unless certain conditions have been complied with. It must be shown that the corporate's memorandum of association at the time the company was registered set out as one of its objectives the assumption and approval of the acquisition of the rights and obligations imposed by the contract. The pre- incorporation contract itself must have been concurrently submitted with the company's memorandum to the registrar.

Counsel for the applicant referred me to the case of *Triomf Kumsmis* v *AE and CI BEK* 1984(2) SA 261 (W) among others on the subject of pre-incorporation contracts. The case doesn't address any of the issues at hand. Mr *Mutero* did so in the face of local precedents which speak directly to s 47 of the Old Companies Act which coincidentally, was imported wholesale into s 32 of the new Companies and Other Business Entities Act [*Chapter 24:31*]. For instance, in the case of *Ian Spencer Gray and Another v Registrar of Deeds* 2010 (1) ZLR 471 GOWORA J (now JCC) quoted with approval the remarks of authors Nkala and Nyapadi in the work titled *Company Law in Zimbabwe* 1995 Edition at pp 55-59 that:

> "A company can adopt contracts made on its behalf before incorporation provided that it (the company) meets the following five conditions- viz; that the contract is in writing; the person making the contract on behalf of the company to be formed, irrespective of how he describes himself must at least profess to act as agent for the company; the memorandum and articles of association must contain at the time of incorporation the contract as one of its objects; the contract must be delivered to the registrar simultaneously with the memorandum and articles of association and the contract must be legally enforceable."

Further requirements for the validity of a pre-incorporation acquisition by a yet to be incorporated entity appear from the above. One of them is that the contract must have been in writing. Another is that it does not matter what the individual who represented the company in concluding the contract held himself/herself to be. He/she must profess at the very least to have acted as an agent of the company. In addition the contract must be legally enforceable.

In the case of *African Consolidated Resources Plc & Ors* v *The Minister of Mines and Mining Development & Ors* HH 205/10 HUNGWE J (as he then was) had the following to say on the subject:

> "Serious consequences follow failure to comply with the legal requirements set out in the Companies Act [Cap 24:03]. As an example, where a company was not duly incorporated, it could not lawfully carry out any juristic act unless there existed a pre-incorporation contract by virtue of which mandated natural persons could lawfully carry out such acts for subsequent ratification by the company. Without incorporation such a company could not pass any resolution to authorize anyone, even its own promoters, to act for it in any lawful transaction.
>
> The answer to that is to be found in the wise words of MOSENEKE J writing for the majority decision in South African Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC) at p 322 where he says: "It is trite that a company, prior to incorporation, has no corporate personality."

The court's remarks in the above authority could not have been clearer. A yet to be incorporated company cannot perform any juristic acts. It can only do so if the various listed conditions are met. Prior to its formation, the company carries no corporate personality.

In this case, the applicant, despite the challenge regarding its incorporation, remained mute about the issue. It did not refute the allegation that it was incorporated in 2013 as shown by its registration number **6095/13**. It equally did not disown that registration number. The court finds it as a fact therefore that the applicant was only incorporated in 2013. That the acquisition of the mining rights was done in 2012 is made common cause by the applicant's own admission in its papers. In fact it is what the applicant uses to allege that it was a prior pegger of the disputed location. If the applicant had not been incorporated in 2012, its purported acquisition of the mining rights from Andrew Zuze was a nullity at law.

Mr *Mutero* in an audacious attempt to wriggle the applicant out of the tight spot it found itself in argued that it was the first respondent who was required to adduce evidence to prove that the applicant did not comply with the law in its acquisition of the mining rights over the claims in question. That argument in my view, was intriguing because it defies the purpose of filing an answering affidavit. In ordinary motion court proceedings, the primary purpose of a replying affidavit is to put up facts that refute the respondents' case. As authors Herbstein and Van Winsen in their work titled *The Civil Procedure of the High Courts of South Africa,* Vol. 1, 5th Edition put it at p 429 in the answering affidavit, the applicant is required to put up **evidence** to refute the case made by the respondent in his/ her/its opposing affidavit. I hold that those facts or evidence cannot be in the form of a bare statement like the applicant did in

this case, that the allegation is denied. See also the South African case of *Maes* v *Hancox* (A219/02) [2003] ZAWCHC 43 for that proposition.

To illustrate that the applicant was aware that facts/evidence were required to refute the contentions made by the respondent in its opposing affidavit, in this same application, the firstrespondent questioned the deponent to the applicant's founding affidavit regarding his authority from the applicant to litigate on its behalf. In response the deponent did not challenge the first respondent to produce evidence that he was not authorized to file the application on behalf of the applicant. Instead, he produced evidence that indeed he was so authorized. He definitively answered the allegations raised by respondent. In my opinion, the applicant's failure to answer the allegations made by the first respondent and its attempt to shift the onus of proof of the issues to the first respondent is a futile attempt to hide in the open. In reality it is nothing more than an admission that indeed there was no pre-incorporation contract when it purportedly acquired the mining rights from Zuze in 2012 well before its incorporation 2013. The applicant also tacitly admits a failure to comply with all the other requirements that would have validated its transaction with Zuze. The only reasonable inference that can be drawn from that failure and the mute admissions is that the applicant did not comply with s 47 of the Companies Act [*Chapter 24:03*]. Its acquisition of the mining rights was therefore defective at the very best and a nullity at worst.

As earlier indicated, the applicant seeks the relief indicated on the basis that it was the prior pegger of the claims. Priority of mining rights is regulated by s 177 of the Act. It provides as follows:

> "**177 Priority of mining rights**
> (1) For the purposes of this section—
> "pegger" means the person in whose name or on whose behalf a mining location, reef or deposit was registered and each and every successor in title to the rights acquired by such person.
> (2) For the purposes of subsection (3)—
> "acquisition of title" shall be taken to mean the due performance of the first physical act required to be done under this Act, or any previous law governing mining rights at the time when the act was performed, in order to acquire any exclusive rights in respect of any mining location, reef or deposit.
> (3) Priority of acquisition of title to any mining location, reef or deposit, **if such title has been duly maintained,** shall in every case determine the rights as between the various peggers of mining locations, reefs or deposits as aforesaid and in all cases of dispute the rule shall be followed that, in the event of the rights of any subsequent pegger conflicting with the rights of a prior pegger, then, to the extent to which such rights conflict, the rights of any subsequent pegger shall be subordinated to those of the prior pegger, and all certificates of registration shall be deemed to be issued subject to the above conditions." (Bolding is for emphasis)

The first noteworthy point from the provision is what it means to be a pegger. Anyone who holds a registration certificate in relation to a mining location is a pegger. Any successor in title to such registered holder is equally considered a pegger. My reading of the law where it provides for a prior and subsequent pegger is that it envisaged scenarios where two peggers could claim the same mining location and both could hold certificates of registration. In this instance, both the applicant and the first respondent hold certificates of registration to the mining location in dispute. As such they are both peggers in that regard. But that appears unimportant. What certainly is, for the determination of this application, is subs (3). It deals with what constitutes a prior pegger. If analysed, it becomes clear that the plain interpretation that the applicant sought to place on the provision may not be accurate. The applicant says by virtue of Zuze having acquired title to the location in 2008, it automatically becomes the prior pegger. That interpretation either misses or deliberately ignores the rider in subsection (3) that priority of acquisition of mining title determines the rights of the peggers *if such title has been duly maintained.* To me, due maintenance of title means abiding by all conditions which are required for the title not to be revoked. In mining law it may include aspects such as compliance with the periodic inspection of the mining location and the payment of the prescribed fees. More importantly in my view, it must include the proper transfer of title from one holder to another. A defective transfer of title cannot be relied upon by a person or entity to claim priority rights in acquisition. In the instant case, I have already said the applicant could not have properly acquired the mining rights from Zuze in 2012 before its incorporation which only occurred in 2013. It had no capacity to perform such juristic acts. It must logically follow therefore that title of the mining location did not properly pass from Zuze to the applicant. That also possibly explains why transfer was not done from Zuze to the applicant for five years after the acquisition. If the connection between Zuze and the applicant is broken by that failure to comply with the law, then the applicant must be deemed to have independently acquired the mining location in 2017. In turn, if the acquisition was in 2107, the applicant cannot be considered a prior pegger because the fifth respondent which was the first respondent's predecessor in title had already acquired the location in 2016. Either way, there appears to be no respite for the applicant.

Disposition

Once more I must point out that the opaque manner in which the applicant seems to have acquired title to the disputed mining location is the very reason why officials in the Ministry of Mines and Mining Development are prohibited from having any direct or indirect

interest in mining businesses in Zimbabwe. If they do or are suspected to have done so like in this case, it breeds connotations of serious impropriety. I am constrained to find as I hereby do that the applicant, much as it may have a claim to the disputed mining blocks by some other reason not before this court, is not the prior pegger of the mining location under contention. I indicated earlier and gave reasons why the relief to set aside the so-called decisions of the second respondent are illogical. The applicant's application to have the first respondent's registration of Block ME130BM of Good Days K declared fraudulent and that the second respondent be directed to cancel it cannot succeed. Equally the other remedies which it sought that the court confirms its coordinates and that the first respondent be directed to revert to what applicant called its original position must also fail.

On the question of costs, as already said the inclusion of irrelevant legal issues in the applicant's answering affidavit could have possibly swayed me to, in some way award costs against the applicant even if its application had succeeded in order to cure the prejudice occasioned to the first respondent in dealing with those issues. Needless to say, the application failed and I do not see any reason why I should depart from the rule that costs follow the cause.

In the circumstances it is ordered that:

1. The application be and is hereby dismissed in its entirety.
2. The applicant shall pay the first respondent's costs.

Mafongoya & Matapura, applicant's legal practitioners
Thompson Stevenson & Associates, first respondent's legal practitioners
Attorney General's Office, second & third respondent's legal practitioners