GIDEON RUSHINGA
And
JOHN RUSHINGA
And
MILLION RUSHINGA
And
PRIDE GARAUZIVE
v
BAILZONE MINING (PVT) LTD
And
THE MINISTER OF MINES & MINING DEVELOPMENT
And
THE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 21 January 2025
Ex-tempore Judgment given on 21 January 2025
Written reasons provided in 23 May 2025

L. Matapura; for the applicants
T.T.G Musarurwa; for the respondent

Opposed application

ZISENGWE J: On 21 January 2025, I granted an order for a declaratur and consequential relief in the following terms:

> "1. It is hereby declared that the first respondent's certificates of registration issued by the Provincial Mining Director, Masvingo, as they relate to each of the Applicants' individual homesteads and fields situate in the Chiromo village, Zaka are invalid and are hereby set aside.

2. The Environmental Impact Assessment Report issued by the Environment Management Agency to the 1st Respondent as it relates to the mining location covered by the Applicants' individual homesteads and fields, described in paragraph 1) above is declared invalid and is accordingly set aside.

3. The 1st Respondent and any other persons acting under it as its agent, employee or partner are interdicted from conducting any mining activities on any location within the area defined in paragraph 1) above.

4. The 1st Respondent is ordered to remove all the infrastructure it had erected and remove all the employees it had placed within mining location defined in the invalid Certificates of Registration.

5. All authorization to prospect for and mine any minerals issued to 1st Respondent by the Provincial Mining Director of Masvingo Province in the mining location defined in paragraph 1) above is declared invalid and set aside.

6. The 1st Respondent is ordered to pay costs of suit"

I now provide written reasons for that decision the behest of the first respondent who has a for request for the same.

The background

The five applicants are residents of the Chiromo village, Zaka occupy individual homesteads on land they characterize as "ancestral lands". They do so under the Communal lands Act, [*Chapter 20:04*].

The first respondent, on the other hand was up until the granting of the order above, the holder of 60 certificates of registration issued to it by the Ministry of Mines and Mining development in respect of parts of the same village. Pursuant to the issuance of those certificates, the first respondent commenced to conduct mining operations. However, its operations were not without incident as it (i.e., the first respondent) clashed with the villagers on whose land some of those mining operations were located. Frustrated by what it characterised as incessant disruptions or interference by the villagers, among them the five applicants, with its operations, the first respondent approached the court for relief. It sought an interdict barring the villagers from conducting themselves in any manner amounting to such interference. It did so initially on an interim basis via an urgent chamber application which was granted. However, the provisional

order was subsequently discharged in a decision rendered by this court under Case No. UCA 05-23 through a judgment HMA-11-23.

The main reason for the dismissal of that application was that the first respondent, then as applicant, had failed to established a clear right it being one of the prerequisites for the granting of a final order. The court found in this respect that the first respondent had failed to produce proof that it obtained the consent of the Zaka Rural District Council, under whose administrative jurisdiction the Chiromo communal lands fall to conduct prospecting activities in that area as required by s 31(1) (h) of the Act of the Mines and Minerals Act, [*chapter 21:05*], ("the Act").

That decision is extant. It was not appealed against despite some tentative suggestions that it would be so appealed. Be that it may, in one sense the present application was the obverse of the one disposed of under HMA-11-23. Perhaps buoyed or otherwise emboldened by their success in that decision, the applicants then sought to have the first respondent's certificates of registration declared invalid and set aside.

In addition the applicants sought to have the Environmental Impact assessment reports also set aside. They alleged that those reports were only sought for and obtained on the basis of the certificates of registration. They argued that the certificates of registration being invalid, the environmental impact assessment reports were equally invalid.

The applicants averred that being residents of Chiromo Village, they had direct and substantial interest in the matter to approach the court for a declaratory. They further averred that the mining operations of the first respondent disrupted their livelihood as they were being conducted on their homesteads, fields, grazing land as well as on graveyards and other traditional sites. Consequent to the granting of the declaratory order they sought an order interdicting the 1st respondent (among other relief) from conducting any mining operations in the affected areas.

The application was opposed by the first respondent. Initially it raised a number of preliminary points challenging the propriety of the application. These were abandoned on the day oral submissions were made in court.

Regarding the merits of the application it was the first respondent's position as articulated in paragraph 5 of its opposing affidavit that the application could not conceivably succeed given that its mining licences had not been revoked by the Provincial Mining director and as such were

still extant. It averred that there was nothing that the applicants could do to reverse that unless such reversal was at the behest of the Ministry of Mines and Mining Development.

As far as the Environmental Impact assessment reports were concerned, it was the first respondent's position that these could not be set aside for the very reason that its mining certificates were valid.

The first respondent further asserted that the consequential relief sought, namely an interdict barring it from mining in the area for the same reason as above, namely that its licences were extant. It reasoned that its failure to obtain an interdict under HMA 11/23 did not necessarily translate to the applicants being the legitimate owners of the mining claims.

The first respondent while acknowledging that its application for an interdict had failed primarily on account of its failure to obtain prior consent of the Rural District Council in question, pointed out that as matter of fact the Rural District Council had furnished such consent.

It also reiterated the same position it articulated in case No. UCA5/23 that there is a practice which has since developed that the silence of the RDC to a request made via registered mail to the pegging in its area of jurisdiction implies tacit consent. It also submitted that subsequent to its abortive pursuant to obtain an interdict under case No. UCA 5-23, it then sought to establish the true position with the Zaka Rural District Council. That is when it learnt that as a matter of fact, the letter of consent had been written but had simply not been sent to them. It attached a letter dated 17 November 2017 marked as exhibit B of record ostensibly as proof of confirmation of such consent.

The first respondent further sought to take refuge under s 58 of the Act, contending as it did that no one could impeach its title given that more than two years have expired after the acquisition of its certificates of registration. In a word, the first respondent urged the court to dismiss that application because in its view everything it did was above board.

In their answering affidavit, the applicants characterized the first respondent as "a combination of falsehood and dishonesty" all calculated at misleading the court as to true nature of the proceedings and persisted with its application. They pointed out that their application for a *declaratur* and consequential relief was well grounded both at law and in fact. They reiterated that the certificates of registration in question were tainted - fatally so, from want of compliance with

peremptory provisions of s 31 of the Act. Concomitantly, the Environmental Impact assessment reports granted against the backdrop of those certificates of registration had to be vacated.

They pointed put that the entire edifice of the first respondent's opposition to the application was predicated on a misapprehension of the true nature of the application. It was further pointed out that the supposed written consent relied upon by the first respondent could not salvage its untenable position as it was obtained *ex post facto* the granting of the defective certificates of registration, yet in terms of the law it was a condition precedent to such granting.

As far as the provisions of s 58 of the Mines and Minerals Act *are* concerned, the applicants averred that these could not confer legal validity to a process done in direct violation of the law. They accused the first respondent of being contemptuous of the court in that it continued to carry out mining operations in direct conflict of the decision under HMA-11-23.

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

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

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

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

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

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

b) There is a right or obligation which becomes the object of the inquiry;
c) The applicant must not be approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
d) There must be interested parties upon which the declaration will be binding; and
e) Considerations of public policy favour the issuance of the *declaratur*.

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

Whether the applicants have a direct and substantial interest in the matter.

In the ex tempore judgment, I pointed out that as residents of the Chiromo Village, located on portions of land upon which some of the mining locations to which the impugned certificates of registration relate, the interest of the applicants could not be subject to any doubt. They averred that they are lawfully settled on the respective pieces of land, an averment which was neither questioned not disputed by the first respondent.

The founding affidavit was disposed to by the first applicant with each of the remaining four applicants submitting supporting affidavits. Each of the five of them indicated that occupy defined pieces of land in the area. It is a notorious fact that communal lands hardly have proper sequential numbering system to delineate each individual homestead. More pertinently, the first respondent did not dispute this factual averment not only that the applicants are resident in the Chiromo Village but also that the mining claims to which the certificates of registration relate are on their individual homesteads.

Whether there is a dispute which constitutes the subject of an inquiry

The overarching inquiry was whether the certificates of registration were granted in compliance with requirements of the Mines and Minerals Act. If they were *cadit quaestio*. It would have meant the application was without merit and that would have spelled the end of the inquiry. If however the certificates were issued in violation of the provisions of section 31 of the Mines and Minerals Act, the question was then whether the first respondent's position was rescued by section 58 of the same Act.

The relevant part of section 31 of the Mines and Minerals Act provides as follows:

31. Ground not open to prospecting

> (1) Save as provided in Parts V and VII, no person shall be entitled to exercise any of his rights under any prospecting licence or any special grant to carry out prospecting operations or any exclusive prospecting order—
>
> (a) upon any holding of private land except with the consent in writing of the owner or of some person duly authorized thereto by the owner or, in the case of a portion of Communal Land, by the occupier of such portion, or upon any State land except with the consent in writing of the President or of some per son duly authorized thereto by the President—
>
> …
>
> (b) – (f) – not relevant
>
> (g) except with the consent in writing—
>
> (iii) in the case of *a portion of Communal Land* which does not exceed one hundred hectares in extent, of the occupier of such portion; where any consent in terms of this paragraph is unreasonably withheld, the Minister may authorize any person to exercise his rights under any prospecting licence or any special grant to carry, out prospecting operations or any exclusive prospecting order on such land, subject to such conditions as the Minister may impose;
>
> *(h) upon any Communal Land occupied as a village without the written consent of the rural district council established for the area concerned.*
>
> (italics for emphasis)

Paragraph g, above is not relevant given that there was no proof of the land being held by the applicants under separate title. I found the applicable provision to be s 31 (1) (h) of the Act which requires the consent of the rural district council of the area concerned. The main issue was therefore whether there was consent of the Zaka Rural District Council before the certificates of registration were granted. In this regard the first respondent was clearly at sixes and sevens. It sought to articulate several contradictory and irreconcilable positions. In one breath it sought to convey the position that the consent was tacitly or impliedly granted by virtue of the posting of a registered letter to Zaka Rural District Council. This position was rejected by this court in HMA 11-23. It was reckless and foolhardy of the first respondent to rely on exactly the same argument which the court rejected in earlier proceedings. That decision was not appealed against and remains extant. The court pointed out in HMA 11-23, that what was required was prior written consent by Zaka Rural District Council not some ill-conceived notion of implied or tacit consent. That position did not avail the first respondent then, it could not avail it in *casu*.

Whether there was retrospective written consent

I pointed out in the *ex-tempore* judgment as I reiterate here that consent could not have been granted after the fact. It meant when the Mining Commissioner did not have the consent before him/her at the time of the granting of the certificates of registration. How could he then *ex post facto* sanitize or otherwise rectify that blatant irregularity. He plainly could not.

More particularly however, the letter of consent to which the first respondent sought to rely on was not a response to the application conveyed *via* registered mail which the first respondent referred to. It was merely a response to an inquiry, the species of which remains unknown, by the Environmental Management Agency (EMA). It is dated 17 November 2017 and reads:

> *"Re: Bvuma Gold Mine Project Response*
> *The above subject refers.*
> *The Bvuma Gold Mine Project by Bailzone Mining P/L located in Zaka Rural District can go ahead since we have no objection"*

This letter of consent was clearly not the one upon which Provincial Mining Director acted upon. Here is why, firstly it post-dates the granting of the certificates of registration. Second, it is directed to neither the first respondent nor the Provincial Mining Director but to a third party – EMA. Third, it relates to a query by the latter entity and does not in the least allude either expressly or impliedly to section 31 of the Act. Fourth, the letter does not make the slightest allusion to the Chiromo Village to which this application relates.

Ultimately, therefore, this letter was manifestly a desperate attempt by the first respondent to not only to salvage its untenable position but also to mislead the court in the process.

Whether the first respondent's situation is rescued by s 58 of the Act.

Section 58 of the Act reads:

> **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.

This provision does not serve as an impregnable fortress to protect irregularly obtained certificates. The case of *Barrington Resources (Pvt) Ltd* v *Pulserate Investments (Pvt) Ltd* HH 446-23 underscores this position. MUTEVEDZI J in that case pointed that the bar in section 58

of the Act is not absolute or all embracing, but is circumscribed by the acts by which title may not be impeached. The following was said in this regard.

The requirement that there be prior written consent of the relevant Rural District Council was inserted into the legislation for purpose. It is neither superfluous nor redundant. It is meant to ensure transparency and that the application is properly considered by the Council before consent is granted among others. The obtainment of written consent is therefore an indispensable condition precedent to the granting of a certificate of registration.

Much reliance was placed by the first respondent on the case of *Mupfuti v Kamanga & Anor* HH 124-23 where following dictum was extracted in relation to section 31 of the Mines and Minerals Act:

> "From reading of this provision, while it prohibits the carrying out or mining activities without first getting an occupier's consent, such failure does not *ipso facto* result in the nullification of the mining registration.

This argument, of course, overlooks two important considerations. Generally speaking, an administrative action taken against a statutory imperative is susceptible to being challenged by those affected by it. Several cases serve to underscore the fact that an administrative action taken in direct contravention or outside the enabling legislation can be declared invalid. For example in *Debshan (Pvt) Ltd v The Provincial Mining Director Matabeleland South Province & 2 Ors* HB 11-17, the court, per Mathonsi J (as he then was) granted an order against the mining authorities' declaring that any mining licenses, permit or certificates issued to prospective miners targeting the applicant's farm without prior EIA certificates were null and void and of no force at effect. This in my view applies to certificates such as the one at hand.

More specifically, however the provisions of section 50 of Mines and Minerals Act which empower the Provincial Mining Director, (whether *mero motu* or upon application) to cancel certificates of registration granted *inter alia* contrary to the provisions of section 31 of the Act. It reads:

> **50. Cancellation of certificates of registration**
>
> 1) Subject to submission (2), the Mining Commissioner may, notwithstanding subsection (1) of section 58, at any time cancel a certificate of registration issued in respect of a block as site if he is satisfied that-

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

This provision admits of ambiguity. Section 58 of the Act is a provision of general application. It precludes the impeachment of a certificate of registration generally. It is broad in its ambit. However, its application is limited by s 50 which creates two exceptions. Firstly, it cannot avail one where such block or site was pegged it was situated on ground reserved against prospecting and pegging under section thirty-one. Secondly it will not come to the aid of one where the certificate of registration was granted in respect of ground not open to pegging in terms of subsection 3 of section two hundred and fifty-eight. See *Nyika Nhundu v Africa Lithium Resources (Pvt) Ltd & Ors* HMA 10-23. The first respondent could therefore not rely on a provision of general application and turn a blind eye and another provision which specifically limits the scope or ambit of that general provision. The interplay between ss 31,50 and 58 appears to have completely eluded the first respondent.

In casu, the first respondent's certificates of registration were patently blighted by the absence of the requisite consent of the Rural District Council in question with the result that the areas in question remained 'ground not open to prospecting' as envisaged in s31 of the Act. It was the main basis upon which I found that the applicants had established the requirements for the granting of the first of the two declaratory orders in question.

However, I pointed out to Mr Matapura, counsel for the applicants, that in the absence of an instrument (such as an order for leave to institute a class action) granting the five applicants to approach the court on behalf of all the residents of Chiromo, they lacked the requisite *locus standi*. He readily conceded that the order should be confirmed to each of their respective residences, fields and grave yards.

Mr Musarurwa on behalf of the first respondent tentatively conceded that an order be granted barring the first respondent from carrying out any mining activities within 450m radius of their principal residences. He therefore appeared in principle in agreement that the certificates of registration were in a way defective. Be that as it may, when that proposal was rejected by his counterpart he soldiered on with the main argument before including by submitting that the order

to be granted was to be restricted to the applicant respective homesteads. Similarly, he submitted that the cancellation of the EMA certificates should equally be confined to the applicants' respective homesteads.

The EMA certificates

It is common cause that the Environmental Impact Assessment reports granted in favour of the first respondent over the mining claims in question were so granted on the presumption of the validity of the certificates of registration. Once the latter are cancelled, the former naturally have to be vacated. There was no meaningful counter argument presented by the first respondent apart from stating on in paragraph 14.1 of its opposing affidavit that –"the report by the Environmental Impact assessment report by the Environmental Management Agency did its work and gave its certificate on the extant registration and thus they cannot be invalidated for the reason". The first respondent however conveniently overlooked to state the corollary of argument namely that if the vacation of the certificate of registration necessarily implies setting aside of the said reports.

It was on the basis of the foregoing that I gave the order referred to in the opening paragraph of this judgment.

Mafongoya & Matapura Law Practice, applicants' legal practitioners
Mapepa & Associates, 1st respondent's legal practitioners