SELDO MINING (PVT) LTD
versus
G & W INDUSTRIAL MINERALS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 3 February 2022 and 25 January 2023

Opposed Court Application for Interdict and Eviction

B Magogo, for the applicant
SM Hashiti, for the respondent
T Tembo, for the 2nd respondent

CHITAPI J: The applicant and the first respondent as cited in the heading are duly incorporated companies in terms of the laws of Zimbabwe. The two companies are at logger heads over mining titles and rights to mining claims described as:

a) Rushinga Dolomite 2 Reg No. 37309 BM
b) Rushinga Dolomite 3 Reg No. 37312 BM
c) Rushinga Dolomite 3A Reg No. 37313 BM
d) Rushinga Dolomite 4 Reg No. 37311 BM
e) Rushinga Dolomite 5 Reg No. 37310 BM
f) Rushinga Dolomite 6 Reg No. 37308 BM
g) Rushinga Dolomite 7 Reg No. 37307 BM

The applicant prays for an interdict against the first respondent as well as for an order for the first respondent's eviction. In relation to the interdict the applicant seeks an order that the first respondent should be stopped from carrying out mining and related activities on claims listed above as (a), (b), (c), (d), (f) and (g). In relation to the eviction, the applicant seeks that the first respondent should be evicted from the claim listed as (e). Lastly the applicant prayed for an order of costs on the scale of attorney and client.

On the initial hearing of the application on 11 November 2021, the issue of joinder of the Minister of Mines and Mining Development had to be resolved. In their papers the parties had

joined issue on the issue of the joinder of the Minister. The first respondent in the opposing affidavit had averred that the Minister had a substantial interest in the result of the litigation and ought to have been cited as a party. It also averred that the applicant had in any event made reference to the Minister in the founding affidavit and for that reason the applicant should have cited the Minster so that the Minister would have an opportunity to accept or refute the allegations made by the applicant in so far as they touched on the Minister. The applicant in its answer to the issue of the joinder of the Minister averred that because its application and relief sought did not require the Minister or his subordinates to perform any act in "connection with the performance of any act in the Mines Ministry or in terms of the Act," there was no need to cite the Minster. The applicant also averred that because it was not seeking the registration or revocation of the registered claims which acts would be of interest to the Minister, there was again no necessity to join the Minister.

I did not agree with the applicant's contention that the citation of the Minister was unnecessary. There is little doubt that the Ministry which the Minister leads and therefore the Minister would have an interest to have accurate records of who is in occupation of and mining a particular claim. There are statutory obligations imposed upon claim holders and mining operations generally and it goes without saying that proper records of claims and who works on them should be known to the Minister.

In relation to arguments on joinder, the rule maker in its wisdom provided in the High Court 2021 Rules for the incidence of joinder and misjoinder. Ruler 32 (12) (b) of the High Court Rules 2021 provides *inter-alia* as follows:

> "(12) At any stage of the proceedings in any case or matter the court may on such terms as it thinks just and either on its own initiative or on application.
>
> (a) ……
>
> (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter maybe effectually and completely determined and adjudicated upon to be added as a party.
>
> Provided that no person shall be added as a plaintiff without his or her signed written consent or in such manner as may be authorized."

The rule is progressive and is invaluable to the proper administration and interests of justice by facilitating the effective and complete determination of a case and doing so by granting power

to the court to join a necessary party or a party whose presence is necessary to ensure the effective and final determination of the case in which joinder is ordered.

The above quoted rule provides an exception to the rule that the litigation is for and between the parties and the court should not interfere with the incidence of evidence outside of that which the parties have laid before the court. The court can order the joinder of a party whose evidence will be admitted and dealt with together with the evidence of the parties to the dispute before joinder. It can safely be stated that the rationale for joinder at the instance of the court in any proceedings in any case before the court, is that the judge should not be a passive arbiter in proceedings before it. What is paramount is for the court or judge to effectively and completely adjudicate upon a matter. Where the judge or court considers that the joinder of a party or the presence of a party is necessary to ensure the effective and find determination of the matter before the court, there should be no hesitation in invoking the provisions of r 32 (12) (b) of the Court Rules as quoted (*supra*). The decision to invoke joinder by the court being in the nature of a discretion must be judiciously exercised taking into account all pertinent facts and circumstances of each case and the issues which arise for the court's determination.

The giving of the court or a judge a discretion upon own initiative as aforesaid came in handy in resolving the argument between the parties on whether the Minister concerned ought to have been joined. Where the issue of joinder arises therefore, the court or judge may express its or his or her opinion on the necessity and justiciability of the joinder. *In casu*, the parties abandoned their arguments on joinder opting instead to take the position that they would not have a problem if the court is the one which ordered the joinder if satisfied that the joinder was necessary to effectively and finally dispose of the issues for determination. Since I was persuaded on the necessity of joining the relevant Minister as a party, I ordered the joinder of the Minister as the second respondent.

The second respondent after being served with the documents forming the application appeared by counsel T. *Tembo* on 3 February 2022. Counsel indicated that the second respondent did not oppose the application and would abide the decision of the court. The first respondent therefore stands to fight its battle without being aided by the second respondent who is the giver of the mining claims. In consequence of the second respondent's, stance the issue to be determined

therefore became whether or not the applicant has established a clear right to entitle it to the final interdict sought and an order of eviction.

The applicant's case in brief was this. It is the registered owner of the mining claims in issue herein. It attached copies of the certificates of registration relating to the eight mining claims. They are dated 1 July 2009. I must note that the authenticity of the certificates was not disputed. The first respondent put in issue their validity. The first respondent did not however counter claim for the cancellation of the certificates of registration. It claimed that the issue of the disputed title to the claims was in the hands of the second respondent and that the current proceedings be stayed pending the determination of the disputed rights over the claims between the applicant and the first respondent which was pending before a Dispute Committee set up for the purpose by the second respondent or his officials.

The applicant averred that the claims in question were until 22 April 2009 held by the Agricultural and Rural Development Authority (ARDA). On the said date the claims were forfeited by the second respondent's officials in terms of powers granted in the Mines and Minerals Act. The applicant further averred that the first respondent had a Tribute Agreement No. 15411/16 BM in terms of which the first respondent mined on the claims. This Tribute Agreement according to the applicant expired in 1989. The first respondent as averred by the applicant, continued to exploit the claims notwithstanding the expiry of the Tribute Agreement and forfeiture of the claims by the second respondent by notice number 3/2009. The applicant averred that the main basis of its dispute was that the first respondent had refused to vacate the claim number 37310 BM and to remove to plant. It claimed that the first respondent continued to process ore to date despite being in the know that the applicant acquired the claim on 1 July 2009. In relation to the rest of the remaining seven claims the applicant averred that the first respondent had been mining thereon until the Zimbabwe Republic Police intervened, whereafter the first respondent scaled down to its operations save for effective mining and processing of ore in Block 37310 BM.

The applicant averred that the dispute between it and the first respondent was dealt with by the Mining Commissioner in 2010 who determined that the applicant's title to the claims was good having been issued consequent on the forfeiture of the claims then held by ARDA. The first respondent had complained that the applicant was mining its claim 37310 BM within 200 metres of its claim registered number 25955 BM contrary to the law which forbids it the applicant attached

copy of a determination by the Mining Commissioner dated 26 March 2010. The conclusion of that determination read as follows:

> "CONCLUSION
>
> Seldo Mining followed the proper procedures in registering the forfeited ARDA claims. The parties should conform to the terms of section 267 of the Mines and Minerals Act, [*Chapter 21:05*]."

The same dispute was according to the applicant again referred to the Mining Commissioner who made a determination that the first respondent's claim, Block 25955 BM over pegged into the applicants Block 37310 BM. The applicant claimed that as the registered holder of the mining claims, it was as provided for in s 172 of the Mines and Minerals Act, entitled to exercise exclusive mining rights thereon.

The applicant averred that it had established a case for the grant of an interdict and eviction order because the first respondent was hampering the applicant's mining activities rendering it impossible for the applicant to exercise exclusive mining rights to which it was entitled. It averred that the Zimbabwe Republic Police have had to intervene and that the applicant was losing business on account of being deprived of enjoying undisturbed mining activities to which it is entitled. The applicant averred that the first respondent had refused to remove its plant from the applicant's mining claim despite a directive or request by the second respondent to do so. The applicant averred that the first respondent had left it with no other choice except to seek the court's intervention.

The first respondent's case in its defence was this. It averred that it had a Tribute Agreement with ARDA alleged by the applicant. The Tribute Agreement was entered into in 1969 and expired on 7 September 2000. It averred that it continued to pay inspection fees despite the expiry of the Tribute Agreement. It averred that in September 2008 the second respondent's officials refused to accept the inspection fees on the grounds that ARDA cards were missing from the system. The first respondent averred that it was told that it could only re-peg the claims after they were forfeited. The respondent averred that it was in January 2010 that it learnt of the forfeiture of the ARDA claims and became aware of details of the forfeiture notice. The respondent averred that it also became aware at the same time that the claims had been re-pegged by the applicant.

The first respondent averred that the acquisition of the claims by the applicant was irregular and gave three reasons for its contention. It stated as follows in para 18 of the opposing affidavit:

> "18. With respect, the acquisition of the ARDA claims by the applicant is fraught with suspicion and irregularities for the following reasons:
> 18.1 the pegging of the claims were done at night after the cards for ARDA claims went missing from the Ministry of Mines offices;
> 18.2 at the time of the re-pegging of the claims Mr Timothy Matangi who was a former board member of the respondent left the respondent and was also the owner/shareholder of the applicant;
> 18.3 no notice of the forfeiture of the ARDA claims was posted on the Government Notice Boards nor were prospecting notices placed in the area prior to pegging as is required in terms of the Mines and Minerals Act; and
> 18.4 The applicant was authorized to peg and register claims which had already existing infrastructure with active operations.

On reading the listed grounds as detailed, one noted that the grounds listed would provide arguable grounds of review. However, the first respondent did not counter apply for a review nor was the court advised of any pending review or a contemplated one. Under the circumstances, the court cannot declare nor deem the applicant's certificates of registration to be unlawful or invalid.

The issue of law that really arises here is what the response of the court ought to be where serious maladministration or irregular exercise of power is alleged or established but there is no request for review of the offensive administrative act. Where a statute reposes a duty upon a public official to exercise, the official must discharge the function in accordance with the provisions of the enabling instrument or according to the applicable law and the Constitution. Neither the law nor the Constitution require that the public official must act without erring. Without advocating that the public officials or authorities should err, it is accepted that as it is in the ordinary course of human experience, they may err even grossly. Their wrong actions are not nullities unless set aside on review. The Constitution recognizes the fallibility of administrative conduct and in s 68 provides as follows:

> "68. **Right to Administrative Justice**
> 1. Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate impartial and both substantively and procedurally fair.
> 2. Any person whose right, freedom, interest or legitimate expectation has been adversely effected by administrative conduct has the right to be given promptly and in wanting the reasons for the conduct.
> 3. An Act of Parliament must give effect to these rights and must –
> (a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;

(b) impose a duty on the State to give effect to the rights subs (1) and (2); and
(c) promote an efficient administration."

The legislative enacted the Administrative Justice Act, [*Chapter: 10:28*] to cater for the promotion of rights of persons to administrative justice. The High Court Act provides for powers of that court to review decisions of administrative tribunals and the court rules provide for the procedure for review. The procedure for review therefore assumes that wrong decisions may be made by an administrative authority. The wrong decision remains a decision susceptible to review for correction or setting aside. *In casu*, the forfeiture of ARDA requested claims and issuance of registration certificates over the same claims in the name of the applicant constituted an administrative decision which remains extant as the decision was not set aside on review.

The respondent averred that there was a process under way in the second respondent's ministry whereby a Dispute Committee was set up. The mandate of that committee was to consider or review the finding made by the Acting Provincial Mining Director on 31 August 2015 to the effect that the co-ordinates of the respondent's claim registration number 25955 BM was wrongly positioned on the ground and should be correctly positioned as it intruded on the applicant's registered claim (s) 37310 BM. The respondent averred that the Disputes Committee determination was still pending. The first respondent averred that it believed that the Committee's findings would be in its favour and that for that reason it needed to have its rights protected and they would be prejudiced were the applicant's application subsequently granted by the court. It further averred without suggesting any that there were alternative remedies available to the applicant than the order sought. It averred that this application was intended to 'side step' the Dispute Committee decision proceedings which were still pending. The first respondent concluded in paragraph 39 of the opposing affidavit as follows:

"39. The applicant cannot prove its right, title and interest to the claims and therefore cannot evict the respondent therefore or interdict the respondent from using them"

During the hearing, the minutes of the Disputes Committee held on 20 July 2017 were produced. It was clear therefrom that the mandate of the Committee was to review the determination of the Provincial Mining Director on the disputed positioning on the ground of the applicant's claim number 37310 *vis-a-vis* the respondent's claim number 25955. The minutes clearly show the findings of the Dispute Committee which was to concur with the decision of the Provincial Mining Director's that the first respondent's claim 25955 BM was wrongly positioned

on the ground and should be relocated to its original position because it intruded on the applicant's claim 33710 BM.

Therefore contrary to the assertions of the applicant that there was an undetermined pending process before the Disputes Committee and that its findings impacted on the issues for determination of this application, the correct position was that the Committee aforesaid had made its determination on 18 September 2017 as discussed (*supra*). Further the Committee did not and was not required to determine the validity of the forfeiture of the claims in question nor of their registration in the applicant's name. There being no challenge to the forfeiture nor the subsequent registration of the claims into the applicant's name, the inevitable conclusion is that the claims subject of this application are validly registered in the name of the applicant.

The contentions of the first respondent that the forfeiture of the claims from ARDA was invalid is not an issue that the court can determine outside of the review process and no review process is before the court. Even if invalid, the administrative act of forfeiture and issue of registration certificates to the same claims to the applicant is to be considered valid and effectual until set aside. In the case of *Oudekraal Estates (Pty) Ltd* v *The City of Cape Town & Ors* 2004 (6) SA 22 (S), the principle of administrative law now called the Oudekraal principle was espoused in para 101 of that judgment as that an "invalid administrative decision may not simply be ignored, but may continue to have legal consequences until set aside by proper process."

The minority view in that case was that courts do not have power to make valid unconstitutional administrative conduct. The courts need not debate the issue save to note that forfeitures of registered claims as well as how they can be challenged are a procedure provided for in the Mines and Minerals Act. The challenges can escalate to this court on review. Such review was not made by the first respondent who clearly seeks to inappropriately nicodemously sneak in a review of the forfeiture and registration of the claims as noted by a raising grounds if review in the opposing affidavit.

Turning to the relief sought of eviction and interdict s 172 of the Mines and Minerals Act, provides as follows:

> ".....Every holder of a registered block of claim other than precious metal reef claims shall possess the following rights –
> (a) the exclusive right of mining any ore or deposit of the mineral in respect of which the block is registered which occurs bothers the vertical limits of his block."

By virtue of being the holder of the registered blocks involved in this application the applicant enjoys exclusive rights of mining the claims without hindrance from third parties. The applicant has a clear right to the registered blocks. The applicant is entitled to seek the eviction of the first respondent from block 37310 BM. It was not disputed that the first respondent has equipment within block 37310. It must be ejected together with the equipment from the said block.

In relation to the prayer for a final interdict, the requirements for such an order are well set out by ZIYAMBA JA in the case *Zesa Pension Fund* v *Clifford Mushambada* SC 57/02 where the learned judge stated:

> "……it is rite that the requirements for a final interdict are:
> (a) a clear right which must be established on a balance of probabilities;
> (b) irreparable injury actively committed or reasonably apprehended; and
> (c) the absence of a similar protection by any other remedy.
>
> See *Sethogelo* v *Sethogelo* 1914 AD 221 at 227; *Flame Lily Investment Company (Private) Limited* v *Zimbabwe Salvage (Private) Limited & Anor* 1980 ZLR 378; *Janachen (Pty) Ltd* v *Farmers Agricare (Pty) Ltd* 1995 (2) SA 781A at 789 (B)"

In casu the applicant by virtue of the certificate of registration to the claims in issue being in its name has a clear rights and s 172 of the Mines and Minerals Act gives it excusive mining rights without hindrance. The first respondent does not recognize the validity of the applicant's titles and aver that the title was irregularly obtained. Such attitude is sufficient to raise on the applicant a reasonable apprehension of irreparable injury to the applicant's interests considered widely or broadly as the applicant is a mining business entity. In relation to the absence of a similar protection by other remedy, it is clear that there could be effective alternative no similar remedy other than granting the interdict which ensures that the applicant enjoys and exercises peaceful possession and exploitation of its mining rights over the registered mining claims in question.

In relation to costs, the applicant seeks costs *de bonis propriis* on the higher scale. Such punitive costs constitute a special or exceptional costs order. Special or exceptional reasons must be pleaded and established by the party which claims costs on such a scale. The applicant averred in the founding affidavit that the costs were justified in the event that the first respondent opposed the application because the facts on which the application was based were clear and uncontroverted. Further the applicant averred that it was forced to incur unnecessary legal expense

in circumstances wherein the first respondent was aware of the determination of the second respondent's officials on the dispute.

In resisting the claim for costs the first respondent averred in the opposing affidavit that the prayer for costs on the punitive scale should be dismissed because it was the applicant which was attempting to 'side step the Dispute Committees determination." It stated that the applicant filed the application notwithstanding that the matter was pending before the Dispute Committee. The correct position however is that the Dispute Committee discharged its function on 20 July 2017 when it determined the dispute. The dispute referred to only related to one claim required registered 33710 B 17.

The starting point is to note that an award of costs is reposed in the discretion of the court. The discretion like any other judicial discretion is exercised judicially upon a consideration of all the facts of the case. As regards costs *de bonis* they are awarded against the party's legal practitioner. In the case of *SA Liquor Traders Association and Ors* v *Chairperson, Gauteng Liqour Board & Ors* it is stated:

> "an order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professional courtesy"

In the case of *Multi-Links Telecommunications Limited* v *Africa Prepaid Services Nigeria Limited*, the following appears:

> "costs are ordinarily ordered on a party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. The obvious policy consideration and underlying the court's reluctance to order costs against the legal representative personally, is that attorneys are expected to pursue their client's rights and interest fearlessly and vigorously without due regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously but always within the context of set ethical rules, that pertain to them and which are aimed at preventing practitioners from becoming party to deception of the court. It is in this context that society and the costs are professions deemed absolute personal integrity and scrupulous honesty of each practitioner."

The applicant did not set out exactly the details of what conduct of the applicant's legal practitioner deserved censure. The opposing affidavit was largely based upon the allegation that it was not proper to seek an interdict in circumstances where a parallel process was also running,

namely the outstanding determination by the Dispute Committee. The defence may not have had merit but it was not an act of dishonesty to plead it. As it turned out the outcome of the determination was availed to the court and the applicant and first respondent after the joinder of the second respondent whose legal practitioners provided the same. Neither the applicant nor the respondent pleaded it and both parties appeared not to be aware of its existence.

The court took note that the issue of the eviction of the first respondent was a subject which was previously deferred as parties litigated on other issues in this court and Supreme Court. This is the first time that the issue of an interdict and eviction was heard by the court. I am not persuaded to grant costs on a higher scale although I am persuaded that costs should follow the result. I must however state that I formed the impression that the first respondent tried every trick in the book to delay the inevitable result. The court had to entertain postponements at the first respondent's instance. A request was made for parties to agree facts and the so called agreed facts needed no agreeing as they were always common cause. There was filed supplementary heads of argument and the court was referred to the Supreme Court decision in *Fidelity Printers & Refiners (Pvt) Ltd* v *Minister of Mines and Mining Development & 2 Ors* SC 107/22 which case had no direct relevance to this matter. It is important that only facts and law relevant to the issues to be determined are presented to the court and not whatever information and documentation, the parties feel like presenting. The courts have their hands full with cases to dispose of and litigants who present cases should not worsen the situation by increasing the time that the judicial officer spends on a case by making him or her to read irrelevant matter. It is important that legal practitioners should always take time to research on evidence necessary to prove a case or defence as the case maybe and to only present relevant evidence. The key to winning a case or defence is to look for and present material and relevant evidence. Grandstanding in court by counsel does not prove a case or defence as the case maybe. A properly prepared case or defence is one based on relevant admissible evidence.

Reverting to the disposal of this application considered all the relevant evidence and law arising in this matter the conclusion which I have reached is that the application succeeds.

IT IS ORDERED THAT:

1. An interdict be and is hereby granted against the first respondent prohibiting the first respondent from carrying out any mining activities including processing its ore from the applicant's mining blocks namely:
    a) Rushinga Dolomite 2, Reg No. 37309 BM
    b) Rushinga Dolomite 3, Reg No. 37312 BM
    c) Rushinga Dolomite 3A, Reg No. 37313 BM
    d) Rushinga Dolomite 4, Reg No. 37311 BM
    e) Rushing Dolomite 5, Reg No. 37310 BM
    f) Rushnga Dolomite 6, Reg No. 37308 BM
    g) Rushinga Dolomite 7, Reg No. 37307 BM
2. The first respondent and all those occupying applicant's claim through it be and are hereby evicted from occupation of the applicant's block Registration No. 37310 BM of Rushinga Dolomite 5.
3. The first respondent be and is hereby ordered to pay costs of suit.

Mahuni Gidiri applicant's legal practitioners
Hussein Ranchod, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners