SPARE SITHOLE

Versus

NOMUHLE MCLAREN

And

NEW BARRIER MINES ORIVATE LIMITED

And

THE PROVINCIAL MINING DIRECTOR
MATEBELELAND SOUTH

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 22 FEBRUARY 2024 AND 16 MAY 2024

Opposed Application

S. T Farai, for the applicant
Advocate L Nkomo, for the 1st and 2nd respondents
S. Jukwa, for the 3rd respondent

MANGOTA J:- The applicant and the first respondent ("the respondent") are each a holder of a mining claim. The applicant's claim is known as Eric 9. The respondent's claim is known as Annedale 12. Both claims share a common boundary between them. They are situated in the District of Filabusi which is in Matebeleland South Province.

Because of the position of their claims, the applicant and the respondent ("the parties") have been involved in a long-standing dispute between them. The same dates back to year 2020. It saw them appear before the Provincial Mining Director ("the PMD") for Matebeleland South Province. Their aim and object were to have him resolve the same. The PMD, who is the third respondent *in casu*, determined the dispute in favour of the respondent. The determination was made on 15 June, 2020. This was after a preliminary hearing which his office made on 17 March, 2020.

The decision of the PMD did not go down well with the applicant. He appealed the same to this court. He did so on 9 July, 2020 and under case number HCA 28/20. The court

struck the appeal off the roll with costs. It did so on account of fatal defects which were inherent in the appeal. It delivered its decision on 30 September, 2021.

Dis-satisfied with the judgment of the court, the applicant appealed the same to the Supreme Court. He filed his notice and grounds of appeal on 4 October. 2021 and under case number SCB 49/21. This was also struck off the roll with costs. It was struck off the roll on 28 March, 2022. It was struck off on account of the fact that he did not seek leave of the court *a quo* to appeal its decision as he did.

The record shows that, whilst SCB 49/21 remained pending hearing and determination, the applicant applied to this court for a declarator. He filed his application on 19 January, 2022 and under case number HC 101/22. He withdrew the same on 4 July, 2022. He did so, he states, after it emerged, during the hearing, that the founding affidavit which he filed of record had not been commissioned. He sought, in the same, nullification of the PMD's determination of 15 June, 2020.

On 19 September, 2022 the applicant applied under HC 1854/21 for condonation and extension of time within which he would apply for review of the PMD's determination of 15 June, 2020. The court dismissed the applicant's preliminary point and directed the Registrar to set the main case down for continuation of hearing. HC 1854/21, therefore, remains work in progress for the parties.

The current is yet another application which the applicant filed. He filed it on 22 July, 2022 and under HCB 1341/22. He intends to run it concurrently with HC 1854/21 which is yet to be heard and determined. He, *in casu*, is moving me to declare the proceedings which the PMD conducted and finalised on 15 June, 2020 to be null and void. His reasons for the motion which he is advancing in the application are many and varied. They range from the allegation that the PMD was biased against him in the manner that he determined his case to casting aspersions on the PMD who determined his dispute with the respondent on 15 June, 2020.

The respondents oppose the application for a declarator which the applicant filed. The first respondent, in particular, premises its opposition on a number of *in limine* matters which, in its view, are dispositive of the application. The preliminary issues it raises are that:

i) the applicant's challenge to the determination of the PMD was deemed abandoned in terms of Practice Directive 3 of 2023;

ii) the court is precluded from hearing the application at first instance when, according to it, the parties consented to the jurisdiction of the PMD;
iii) the current is a disguised application for review filed out of time without condonation having been sought by, or granted to, the applicant-and
iv) citation of the second respondent as a party remains contrary to the findings which the court made in HCA 28/20.

It, on the merits, unfolds the journey which the applicant traversed in his effort to undo the determination of the PMD. It moves me to dismiss the application with costs which are at attorney and client scale.

Before I proceed to give a brief narration of the third respondent's opposing papers, I make some observations which pertain to the office of the PMD as at the time that the parties' dispute was determined and the period thereafter. I observe that:

a) one T. Makuza was the Provincial Mining Director for Matebeleland South Province when the parties' dispute was enlisted with his office;
b) one K. Mlangeni was the Deputy Provincial Mining Director in the PMD's office;
c) Mr Mlangeni became the substantive PMD in place of Mr Makuza as at 21 December, 2021;
d) Mr. Makuza had, as at the mentioned date, assumed the position of Director, Mining Research, Value Addition and Beneficiation and was based at the Ministry of Mines and Mining Development's Head Office in Harare as at the stated date- and
e) Mr Mlangeni deposed to the third respondent's opposing affidavit in respect of this application.

He filed his notice of opposition on 5 August, 2022. He states, in the same, that the applicant's son, one Dumezweni Sithole who was in attendance at the preliminary hearing of 17 March, 2020 in place of the applicant, consented to the hearing being conducted by him. He alleges that, following the preliminary hearing of 17 March, 2020 the applicant and the respondent went with Ministry officials, the Mining Surveyor included, on a ground visit at the place of the parties' dispute. The visit, according to him, enabled the parties to indicate to the Mining Surveyor what they deemed to be their boundary mining demarcations. He asserts that the records which are in his office were used in the determination of the dispute. He denies that the record of appeal which relates to HCA 28/20 was ever tempered with by him or by anyone

else. He insists that what his office only did was to correct some minor typographical errors leaving the substance of the proceedings in an intact form. He avers that the applicant avoids the issue which relates to whether or not his claim encroaches onto the respondent's claim as his office found following the ground visit of the two claims as supported by the recommendations of the Mine Surveyor. He insists that Mr. Makuza made the determination of 15 June, 2020 for, and on behalf of, the Secretary for Mines and Mining Development. He maintains the view that Mr Makuza's dissociation from the determination which he made remains a cause for concern. He insists that Mr. Makuza could not have had all the facts which related to the case given the fact that he made the denial one year after he had left the office of PMD and when he had not had the opportunity to examine the records which are in the mentioned office. He moves me to dismiss the application with costs.

The applicant gives me the distinct impression of a litigant who cannot accept a '*no*' for an answer. He will do all what it takes him not only to disagree with, but also to challenge, the decision of the court of whatever level. He will do so in an effort to undo whatever the court has, through due process, decided. This is a *fortiori* the case when the decision which the court makes is contrary to his expectation. The example of the observed matter is evident from a reading of all the cases which I shall table in the later part of this judgment and in which the court ruled against him.

He has, for instance, appeared before this court on two separate occasions. He appeared before it under case numbers HCA 28/20 when it sat as a court of appeal and also when it sat to determine the application which he filed under HC 101/22. He is still in this court in respect of two separate applications which relate to one and the same subject-matter. These are HC 1854/21 and HC 1341/22. He was in and out of the Supreme Court on one occasion. He did so under case number SCB 49/21. In all these cases, his concern is one and the same. He moved, and still moves, the court to undo the PMD's determination of 15 June, 2020.

The applicant is reminded of this simple fact. The fact is that it is not the persistence by him towards the attainment of what he wants to achieve which matters. The quality of his pleadings do matter at the end of the day. The record, for instance, shows that, in each of the cases where he failed to make a case for himself, he, and not his adversary, was at fault. He, it would appear, refuses to take note and/or acknowledge the shortcomings of his work. He, in short, chooses to lay blame on his adversary for the errors which he stands convicted of by the

court(s). His disposition is not only unfortunate. It is also regrettable in the extreme sense of the word.

It is, in my view, pertinent for the applicant to take stock of his work, correct the same in the manner which is in accordance with the rules of court as read with the law of procedure before he engages counsel to put pen to paper in order for him to file meaningful papers with the court.

Whilst the blame for the observed conduct of the applicant remains lumped on him, counsel for him cannot be allowed to escape the blame. Poor advice from him does, in my view, account for the shoddy manner in which the applicant conducted, and still conducts, himself at court. Counsel's cavalier way in which he dealt, and still deals, with the work of the applicant leaves a lot to be desired. Being well-schooled in the discipline of law as he successfully completed his law studies including substantive law, the law of evidence, the law of procedure and the rules of court, he would have known that no two cases which relate to one and the same subject-matter can run concurrently in the same court or in different courts as he attempts to do for the benefit of the applicant with regard to case numbers HC 1854/21 and HC 1341/22. He should have assisted the applicant to take one course of action at a time and not to confuse him in the manner that he is doing. Counsel cannot therefore escape censure for misleading the applicant as he is doing. He knows as much as any legally-trained mind does that the principle of finality to litigation holds true. He should, in earnest, have advised the applicant that the principle cannot be taken lightly by litigants especially by such litigants as the applicant whom he has represented from as far back as 2020 to date.

The assertion of the respondent which is to the effect that HC 1341/22 is a disguised application for review which has been filed as a declarator without the applicant seeking condonation is not misplaced. A reading of paragraphs 6.7, 7.1, 7.2 and 7.4 of the founding affidavit as read with paragraphs 8.3, 8.4 and 8.5 of the same confirms the view which I hold of the case. A review, as is known, thrives on allegations of bias on the part of the judicial officer who hears a case of the applicant as well as on procedural irregularities which manifest themselves in the case. These constitute the thrust of the case of the applicant in the papers which he placed before me in the form of an application for a declarator.

That the applicant's intention is to review the decision of the PMD and not to have a declarator pronounced in his favour is apparent from the contents of the abovementioned paragraphs as read with his insistence on having HC 1854/21 being heard concurrently with

the present application. Whilst the procedure which he adopted for the two cases is unprecedented, his intention is as clear as night follows day. The relief which he is moving me to grant to him in this application betrays his intention to review and not to have a declarator pronounced in his favour. The name by which he chooses to call his application is not the issue. The substance of the application determines the relief which the applicant is seeking. The relief which he is moving me to grant to him *in casu* has all the ingredients of an application for review, and not one for a declarator. It reads, in part, as follows:

"1 …….;

2. The proceedings by the 3rd Respondent between the Applicant and the 1st and 2nd Respondent (sic) be and are hereby declared null and void;

3 ……."

The applicant does not state whether or not it is within his right to declare the proceedings and/or decision of the PMD to be null and void. Section 14 of the High Court Act (Chapter 7:06) ("the Act") in terms of which he filed this application has clear and unambiguous provisions. These confer upon me the discretion to declare rights and/or obligations as between parties. It does not confer upon me the power or discretion to nullify proceedings or decisions of subordinate courts or quasi-subordinate courts in a manner that he is moving me to do.

Whilst there are some similarities between a review and a declarator, the procedures which are employed in the attainment of the one or the other of the two remedies are totally dis-similar. A review is premised on such matters as bias on the part of the judicial officer whose decision the applicant seeks to impugn and/or on such matters as relate to procedural irregularities in the proceedings which are being complained of. A declarator, on the other hand, relates to a party's rights and/or obligations. In a declarator, therefore, a party whose right has been trampled upon by the respondent has every reason to move the court, in an application, to assert his right. He (includes she) in the mentioned set of circumstances, moves the court to exercise its discretion and confer upon him the right which he claims to have. He alleges and proves his claim of right on a preponderance of probabilities. He files his application in terms of Section 14 of the Act.

The difference of the two remedies becomes apparent when one has regard to Sections 14 and 26 of the Act. The former refers to an application for a declarator. The latter refers to an application for review. Section 26 of the Act, for instance, confers upon me the power and

authority to set proceedings and/or decisions of subordinate courts aside when the party who is adversely affected by the same places a review application before me moving me to do so. The two sections should not, therefore, be confused. They are different the one from the other. They do not achieve the same end-in-view for the applicant whose case is before the court.

The relief which the applicant is moving me to grant to him in this application is therefore incompetent. It is incompetent for the simple reason that his pleadings and the relief which he seeks both fall into the realms of a review which he chose, wittingly or unwittingly, to call a declarator.

It has become fashionable, particularly of late, for litigants who realize that they failed to act within the *dies* which is stipulated in the rules of court for a particular remedy to avoid the rules and file their cases in terms of some inapplicable rule of court or law. The current application is a case in point. The applicant should have reviewed the PMD's proceedings and/or decision within the *dies*. He wasted a lot of time appealing the same and, when he failed in the stated endeavour, he decided to return to the drawing board. He persuades me to have this application heard concurrently with HC 1854/21. That is wasted effort on his part.

Perhaps, time is now ripe for the drafters of the rules of court to put a cap on applications which litigants file under section 14 of the Act. The open-ended arrangement in which the section appears opens the same to serious abuse by such litigants as the applicant. He proffers no reason for abandoning the appeal which he filed with the Supreme Court. He had thirty (30) days within which he should have applied for leave to appeal. He did not. His failure to act rendered his appeal to be deemed abandoned in terms of Practice Directive 3 of 2023. He remained unconcerned by that fact. Unconcerned because he remained alive to the alternative avenue of Section 14 of the Act which was/is available to him. Such abuse of court process cannot be condoned let alone accepted.

Having abandoned the appeal which he unsuccessfully filed, the net effect of the stated matter is that HCA 28/20 which he unsuccessfully prosecuted remains an extant judgment of the court and so does the PMD's determination of 15 June, 2020. It is for the mentioned reason, if for no other, in my view, that he insists on prosecuting HC 1854/21 which the court has heard in part. Whether or not he will succeed in the stated endeavour remains a matter for another day.

The applicant displays a very disquieting inclination of blaming everyone else but himself for the mistakes which he makes. He, for instance, states in his notice and grounds of appeal under HCA 28/20, that Mr Mlangeni determined his dispute with the respondent. He knows that, according to papers which are filed of record, Mr Mlangeni dealt with the preliminary hearing of the dispute and not the substantive part of the same. He knows also that Mr. Makuza who was the PMD at the time of the dispute, as the record shows, rendered the final or substantive determination of the dispute. Reference is made in the mentioned regard to annexures which appear respectively at pages 14 and 24 of the record. He, for reasons which are known to no one else but himself, states in his notice of appeal, page 35 of the record, that Mr Mlangeni delivered the final determination on 3 July, 2020. The statement as read with the date of the final determination of the dispute which is palpably incorrect . Its effect was to cost him dearly when the court heard his appeal under HCA 28/20.

Because of the manner in which he chose to mislead the court, HCA 28/20 was decided against him. Amongst the reasons which the court gave for its decision was the fact that Mr Makuza, and not Mr. Mlangeni, delivered the substantive determination of the dispute. He premises this application on the letter which Mr. Makuza wrote to him on 28 December, 2021 in terms of which letter Mr Makuza dissociates himself from having had a hand in his dispute with the respondent. He insists that the position which Mr Makuza took leaves the proceedings without any authority who/which dealt with them.

However, as the third respondent correctly asserts, Mr Makuza might not have had a correct recollection of events which took place more than a year after he left the office of PMD for Matebeleland South Province. This is a *fortiori* the case, in my view, given that Mr Makuza did not take the trouble to examine the record of the case as he was, at the time of writing the letter, at Head Office of the Ministry of Mines and Mining Development. The probabilities are that Mr Makuza responded to the letter without having applied his mind properly to the circumstances of the case which the applicant called upon him to comment on. It follows from the stated set of circumstances that his statement, as contained in the letter, may not be a correct reflection of the events of the parties to the dispute.

The above notwithstanding, however, the record shows that Mr Makuza, and no one else, delivered the final determination of the dispute. The observed matter is conclusively settled to a point where no further debate of it remains warranted. The court was, therefore, correct when

it ruled, as it did, that Mr Makuza, and not Mr Mlangeni, determined the parties' dispute. There is, on a proper conspectus of the record, no reason for the applicant to continue to insist that the PMD's determination is faulty on allegations that the PMD dissociates himself from having dealt with his dispute with the respondent.

When the record of appeal was prepared in anticipation of the hearing of the appeal under case number HCA 28/20, the parties, it is evident from a reading of the certificate of confirmation, inspected the same. Both of them were satisfied that the record contained a true and correct reflection of the proceedings which the PMD conducted on 17 March, 2020 and on 15 June, 2020. The certificate which the parties signed in confirmation of the stated position appears at page 93 of the record. The record states, at page 15, that the parties were in agreement with the position that the PMD should deal with their dispute. Both of them signed the certificate as confirmation of the correctness of the record. The court's finding under HCA 28/20 was to an equal effect.

Given that the PMD dealt with the parties' dispute with the latter's consent, the respondent's assertion which is to the effect that this application cannot be heard at first instance remains unassailable. It is unassailable on account of Section 345 (1) of the Mines and Minerals Act. The section proscribes the court from hearing a matter which the Mining Commissioner heard and determined in a substantive manner. The applicant's statement which is to the effect that the PMD does not have the power to hear and/or determine the dispute as he did is of no moment. A mere reading of the determination shows, in a clear and categorical language, that the PMD's decision is not a stand-alone matter. It is signed by him for, and on behalf, of the Secretary for Mines and Mining Development. That the Secretary for the Ministry of Mines and Mining Development retains with him the functions of the Mining Commissioner requires little, if any, debate. The decision of the PMD is in accordance with the law and is, therefore, valid. Reference is made to page 24 of the record.

It is a misconstruction of the law for the applicant to become argumentative in respect of the respondent's last *in limine* matter. He states, in paragraph 5 of his answering affidavit page 107, that the second respondent was found to have been improperly cited as a respondent in that appeal whatever the statement is meant to convey. He, no doubt, misconstrues the finding of the court on the point. The court's position was/is that the dispute which was before the PMD and subsequently before it was that of the applicant and the first respondent and that

the second respondent should not have been in the equation. The second respondent, the court opined, should not have been cited as a party to the proceedings which the parties placed before the PMD or before it. Perhaps, a re-statement of the position of the court on the point which is in issue would assist the applicant to appreciate what the court was conveying to him. It remarked as follows:

> "The record filed by the parties gives the other party's name as New Barrier Mines P/L c/o Nobuhle Mclaren, Annedale 12 Mine. The notice of appeal is directed at Nobuhle Mclaren in her personal capacity. It follows, therefore, that the notice falls foul of the provisions of rule 4".

The long and short of the above-stated *dictum* of the court is simply that the applicant should have confined himself to the record of proceedings which was before it. It noted the mismatch which existed between the contents of the record and the notice of appeal which the applicant filed. It properly advised him to stick to what the record reflected and not what he entertained in his mind. It, in short, advised him to cite only New Barrier Mine P/L in all the proceedings which he would file in furtherance of his interest in respect of the determination of the PMD of 15 June, 2020.

It becomes a frightening exercise of the mind for the applicant who was, and is, ably legally represented to fail to understand the guidance which the court was giving to him. The English adage which states that a stitch in time saves nine holds true in respect of all the matters which the applicant filed at this court and at the Supreme Court. It is pertinent for him not to remain obdurate when advice is freely accorded to him as it occurred in all the cases which were ruled against him.

The applicant took the court and the respondents on an endless garden path which leads to nowhere. His unbridled appetite to litigate without any end-in-sight is very unamusing. He repeated himself in such a monotonous manner like a broken record. He failed to desist when he should have realized that he had to. All this is not of his own making. All this is the making of the legal practitioner who advised him at each turn of the events.

The legal practitioner failed to relent even in circumstances where he was clear in his own mind that he was pursuing hopeless cases. He moved me and those who are in my line of duty to accommodate the cases of the applicant to the exclusion of other deserving cases which should have been heard and determined. Even when he had the occasion to read and appreciate the substance of the preliminary points which had been raised in this application, all of which

were clear, unambiguous and valid, he persisted with a case which he knew was/is dead in the waters. He failed to adhere to his duty as counsel and an officer of the court. He cannot, in the circumstances of this case, escape censure. The censure which he will suffer will, in my view, serve as a lesson not only to his law firm but also to other like-minded members of the legal fraternity. As learned people, all of them owe a duty not to waste the time of the court pursuing matters which they know will not achieve the intended result. They should learn to advise those whom they represent to desist where such circumstances warrant. They are, after all, advisors of those whom they represent. The latter know nothing about the law or the rules of court. They place their faith and trust in those who represent them and, where they are told that they have a case, they blindly follow wrong advice from persons whom they know are conversant with the law. They cannot, on their own, tell if they have or have no case. They place their reliance and dependence on the legal practitioner who should know, all too well, that the advice which he is giving to the one whom he represents is not only dishonest but is also out of order.

The conduct of counsel in pursuing all the cases which are listed in the foregoing paragraphs of this judgement when he knew that the applicant had no case at all, in each of the six cases, amounts to frivolous and vexatious litigation. Such conduct cannot be condoned let alone accepted by the court. It, unfortunately for him, earns him nothing else but punitive costs.

On a careful consideration of this application, I am satisfied that the applicant failed to prove his case on a preponderance of probabilities. The application is, accordingly, dismissed with costs being borne by Messrs Farai & Associates Law Chambers at attorney and client scale.

Farai & Associates Law Chambers, applicant's legal practitioners
Malinga & Mpofu, 1st and 2nd respondents' legal practitioners
Civil Division of The At
torney-General's Office, 3rd respondent's legal practitioners