BLACKGATE INVESTMENTS (PRIVATE) LIMITED
versus
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
THE MINING COMMISSIONER MASHONALAND CENTRAL PROVINCE N.O
and
RAN MINE (PRIVATE) LIMITED
and
G& P INDUSTRIES (Private Limited)

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 25 March & 17 May 2024

Opposed Matter

Mr *D Mudadirwa,* for applicant
Mr *T Chagudumba*, for third and fourth respondents

MUCHAWA J: This is a court application for a compelling order. The following is the draft order sought:

"IT IS ORDERED THAT:

1. The application for a compelling order be and is hereby granted.
2. The first respondent be and is hereby ordered to restore the applicant's rights, title and interest in its mining claim named Kimberly 18 registration number 37375 BM: by restoring its certificate of registration with a change of name within ten days of the granting of this order.
3. The first and second respondents are hereby ordered to carry out a survey of the disputed mining locations, being applicant's Kimberly 18 registration number 37375 BM, Kimberly 19 under registration number 37353, Kimberly 20 under registration number 37354, Kimberly 21 under registration number 37355 and fourth respondent's Kimberly 18, under registration number 21288 within 30 days of the granting of this order.
4. The first and second respondents be and are hereby ordered to produce a survey diagram indicating the locations beacons and boundaries of the disputed claims and the physical positions of the applicant and the third and fourth respondents on the surface within seven days of carrying out a survey in terms of order 3 above.
5. The respondents be and are hereby ordered to pay costs of suit on a legal practitioner/ client scale."

The Parties

The applicant is a duly incorporated company in terms of the laws of Zimbabwe.

The first respondent is the Minister of Mines and Mining Development who is cited in his official capacity.

The second respondent is the Mining Commissioner – Mashonaland Central Province, who too is cited in his official capacity.

The third respondent is Ran Mine (Private) Limited is a company duly incorporated in terms of the Zimbabwean laws.

The fourth respondent is G& P Industries (Private) Limited another company duly incorporated in terms of the Zimbabwean laws.

Background

The applicant, on the one hand, and the third and fourth respondents, on the other, have had a long-standing dispute spanning all the way from 2009 in relation to their respective mining claim situated in the district of Bindura.

The applicant held mining claims named Kimberly 18, Kimberly 19, Kimberly 20, Kimberly 21 in terms of tendered certificates of registration attached to the application as annexures B1 to B4.

On 11 November 2009, the third and fourth respondent lodged a complaint to the effect that the applicant had over pegged and encroached onto their claims. A report was subsequently compiled by the second respondent in which a recommendation was made to cancel the claims held by the third and fourth respondents.

Disgruntled, the third and fourth respondents filed an appeal against the intended cancellation of their mining claims with the first respondent on 12 February 2010. An opinion was sought from the Attorney General's offices, and it was advised that it was not legally correct to cancel the third and fourth respondent's mining claims. This effectively resulted in the cancellation of the third and fourth respondent's claims not being carried out

In response, the applicant proceeded to file an application for review under case number HC 7 376 /10 which was dismissed. An appeal was lodged to the Supreme Court.

The appeal was upheld and the matter was remitted to the first respondent on the following terms:

> "The matter is remitted to the third respondent for hearing and determination of the question whether or not the claims in dispute had been forfeited at the time the applicant was registered as the holder of the claims."

It is alleged that the dispute giving rise to this order emanated from the third and fourth respondent' allegation that the applicant had pegged and obtained title over claims belonging to them yet on the contrary, it was averred that such claims had been forfeited.

A Dispute Resolution Committee was constituted to implement the Supreme Court Order. A report was compiled by the Committee and their conclusion was that the third

respondent was not the holder of Kimberly 20 and 21 which were found to belong to the applicant.

Another finding by the Committee was that third and fourth respondent's Kimberly 18 forfeiture had been revoked and thus a repeg could not have legally occurred over their Kimberly 18 only. It was also found that the purported repeg of Kimberly 18 belonging to third respondent was not even within the area that was pegged by the applicant as Kimberly 18.

The applicant believes that the confusion over Kimberly 18 is arising from the same name given to differently located claims. The certificates of registration of the two claims in issue are said to clearly describe major differences in term of direction and description of the claims. It is for this reason that the applicant believes that a simple renaming of one of the claims and a survey diagram would resolve the issue between the parties in respect of the Kimberly 18 claim.

The Dispute Resolution Committee concluded its report by upholding the decision earlier on made by the second respondent to cancel applicant's certificates of registration. Thereafter the first respondent made a determination in which it found that Kimberly 18 and 19 Registration number 36375 and 37353 were ground that was not open for prospecting and pegging according to s 31 of the Mines and minerals Act [*Chapter 21:05*] at the time the applicant purported to have repegged and subsequently registered the claim. It was found that the claim belonged to third and fourth respondents.

Arising out of hose findings the certificates issued to the applicant were found to have been issued in error and were cancelled, that is registration numbers 36375 and 37353 being Kimberly 18 and 19 belonging to the applicant.

After the ministerial decision, the applicant filed an application for review of such decision under case HC 6425/21.

Justice KATIYO Disposed of that matter in an *ex-tempore* ruling on 28 July 2022 and dismissed it with no order as to costs.

Points *in limine*

The third and fourth respondents raised points *in limine* as follows:

(1) That no cause of action for a mandamus has been established on the papers.
(2) That the mining claims dispute is *res judicata*

(3) That the survey sought has already been conducted and there is no need for an additional one

(4) That the answering affidavit having BEEN filed outside the provisions of the Rules should be expunged from the record.

I heard the parties on these points and reserved my ruling. This is it, not necessarily in the order in which they are listed

Whether the answering affidavit should be expunged from the record

Mr *Chagudumba* submitted that the respondents filed their heads of argument on 16 February 2024 and served same on the applicant on the same date. The applicant is alleged to have only then filed its own heads of argument and answering affidavit on 19 February 2024.

It is averred that the answering affidavit was improperly filed after the respondents heads of argument without any leave of the court being sought. On the strength of the case of *Turner and Sons (Pvt) Limited V Master of the High Court* HH 498/15 it was contended that there is a sequence in the filing of affidavits which must be followed. Heads of argument, it was stated, should be filed after the factual issues are set out in the affidavits. It was prayed that the answering affidavit be expunged from the record.

Mr *Mudadirwa* pointed out that the Turner and Sons Supra case is distinguishable as in that matter the offending issue was the attachment of annexures and raising new issues which is not the case herein.

Rule 59(15) pointed to as giving someone in third respondent ‘s shoes a choice either to apply for set down if no answering affidavit is filed within a month or apply for dismissal of the application itself.

It was conceded that the answering affidavit and heads of argument were filed as alleged by the respondents. This was however blamed on the challenges with the Integrated Electronic Case Management System which failed to reflect the filing timeously on the system. Mr *Chagudumba* objected to the leading of evidence from the bar and Mr *Mudadirwa* indicated he would not persist with this.

A perusal of the case of *Turner and sons (Pvt) Limited supra* shows that MAKONI J (as she then was) was faced with this exact same scenario. Though she had to determine a condonation for late filling of an answering affidavit, she decided to first decide whether the leave of the court is required where an answering affidavit is filed after heads of

argument have been filed. She cited with approval the sentiments by NDOU J in the case of *Magurenje v Maphosa & ORS* 2005 (2) ZLR 44(HC) AT 47. He said:

"In my view the filling of an answering affidavit after the parties have filed heads of argument can only be done in exceptional cases and only with the leave of the judge. The applicant did not seek such leave. Instead, he submitted that he was entitled to do so in terms of the rules. He is mistaken as such a procedure would defeat the whole purpose of filing heads of argument as set out in Order 32 r 238 (1)(a). For departure from the proper sequence, the indulgence from court or judge is necessary. In this record I refer to *James Brown & Hamer (Pty) Ltd* v S*immons* N.O 1963 (4) SA 656 (A where at 660 D-F Ogilvie THOMPSON JA said:

> "It is the interest of the administration of justice that the well known and well – established general rules regarding the number of sets and proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied some flexibility controlled by the presiding judge exercising his discretion in relation to the facts of the case before him must necessarily also be permitted."

Though the above sentiments were said in relation to the High Court Rules 1971, the provisions are mirrored in the new High Court Rules 2021. Rule 59 (1) provides for the founding affidavit, rule 59(7) provides for the opposing affidavit whilst r 59(10) provides for an answering affidavit Rules 59 (19) and (20) provide for the founding affidavit, rule 59(7) provides for the opposing affidavit whilst r 59 (10) provides for an answering affidavit Rules 59(19 and (20) provide for the filing of heads of argument by both the applicant and respondent.

MAKONI J Then concludes this in a manner I totally agree with

> "The thinking of the drafters of the rules was that heads of argument, in which legal arguments are presented, are filed after parties have, presented their factual positions, in affidavits, before the court."

It does not affect this position that r 59 (14) allows the respondent, where the applicant has not filed an answering affidavit, to apply for set down in terms of r 65 or r 59 (15) or apply for dismissal of the matter. These are just other options open to the respondent.

I therefore find that the answering affidavit is improperly before the court having been filed without the leave of the court and I accordingly expunge it from the record.

Whether the mining dispute is *res judicata*

Mr *Chagudumba* submitted that the application for review under HC 6425/21 was determined by KATIYO J, who found in favour of the third and fourth respondent. Such judgment is said to be extant as it was neither appealed not rescinded and is therefore binding. That matter and this one are alleged to be between the same parties and on the same cause of

action as the real issue in dispute is about ownership of the mining claim Kimberly 18. A comparison is made to the averments in the founding affidavit herein on p 6 para 8 and on p 77 para 2 and 3 of the previous application. In both matters, the applicant is said to be taking issue with the ministerial decision. (See p 94 of review application and para 26 p 9 current application and p 10 para 28.)

The relief sought in the application for review which appears on p 61 para 10b -c is also said to be similar to that on p 77 in the current application.

Para 1 of the draft order on p 42 is said to basically seek that the applicant declared as owner of Kimberly 18.

The danger of the court coming up with two conflicting judgments on the same parties and same issue was pointed to.

Mr *Mudadirwa* conceded that indeed the parties are the same save for the second respondent. He however argued that the cause of action is different in the two cases. It is averred that in the application for review the complaint was that the first respondent had failed to comply with the Supreme Court order whereas herein, the issue is primarily about the performance of a survey by second respondent in the presence of all parties and the production of a survey diagram which relief is not sought in the earlier application.

Whereas the parties are agreed on the principles to be considered where *res judicata* is raised as that the matters must be between the same parties the same cause of action and same relief sought there is one point of departure.

Mr *Mudadirwa* argued that *res judicata* only applies to an earlier decision made on the merits of the matter. The case of *Chimponda & Anor v Muvami* 2007(2) ZLR) 326 @ 32GG 330 C was referred to.

I am in agreement with the sentiments expressed by MAKARAU JP (as she then was). She started:

> "For the plea to be upheld, the matter must have been finally and definitely dealt with in the prior proceedings. In other words, the judgment raised in the plea as having determined the matter must put to rest the dispute between the parties, by making a finding in law and / or in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment. A judgment founded purely in adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter does not, in my view constitute a final and definitive judgment in the matter. It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have that dispute resolved."

The operative part of judgment by KATIYO J was to the following effect:

> "In the result, this court is of the view that this application could have been misdirected where it was supposed to be. What applicant is complaining of could be a ground of appeal and this is a misdirection on the part of the applicant. In that regard to this application cannot succeed and therefore it is dismissed."

The above judgment cannot be said to be a final and definitive judgment. It is a judgment founded purely on adjectival law which is regulating how the court should have been approached for determination of the merits of the matter. It is saying it should have been approached by way of appeal rather that by way of an application for review.

It is for the above reason that the plea/ point *in limine* of *res judicata* cannot succeed. I accordingly dismiss it.

Whether the legal requirements of a *mandamus* have been satisfied in the founding affidavit

Mr *Chagudumba* submitted that though this is a court application for a compelling order, or a mandamus nowhere in the founding affidavit are the requirements for a *mandamus* established. The case of *Setlogelo v Setlogelo* 1914 AD 221 is cited as setting out such requirement's to be;

(i) A clear right,

(ii) An injury actually committed or reasonably apprehended, and

(iii) The absence of similar protection by any other ordinary remedy.

Such requirements are alleged not to be clearly laid out or spoken to in the founding affidavit. It argued that there can be no clear right as the applicant is relying on cancelled certificates of registration.

On the alleged injury it is averred that the applicant says the cancellation of the certificate is the injury in the heads of argument yet in the founding affidavit the applicant relates to mining activities on p 9 para 24. There is said to be an inconsistency is saying the need to determine boundaries relates to mining activities being prejudicial to the applicant but saying injury is cancellation of the mining certificate.

The founding affidavit is said not to speak to the unavailability of another remedy. It is only in the heads of argument that the applicant is said to first state that the first respondent cannot now reverse a decision already made.

On the contrary, Mr *Mudadirwa* said it is incorrect to say that no cause of action has been established in the founding affidavit. On a clear right, it is averred that the applicant stated that

cancellation of the registration was erroneous. Para 26 on p 9 of the founding affidavit is referred to.

Regarding the injury, the applicant refers to the many annexures to its application and the narration that the registration was cancelled without a survey diagram being availed to it to show that it is encroaching on the third and fourth respondent's claims.

It is alleged that the only remedy available is for the court to order that a survey be conducted and a survey diagram be produced. The question of a survey diagram is alleged to have been a sticky issue since 2010 and it is averred that none has been produced to date. It is said that a survey diagram was something craved for by the third and fourth respondents in 2010.

The case of *Joel Simon Silonda (substituted by Executor Vusumuzi Thomas Silonda) v Vusumuzi Nkomo* SC 6-22 which defines a cause of action as the entire set of facts upon which the relief sought stands is adverted to argue that a proper reading of the founding affidavit together with the annexures shows that the applicant has established a clear right, an injury suffered and the absence of an alternative remedy.

The applicant's case is alleged to be simply that at the time of pegging of its Kimberly 18 claim, maps in the offices of the first and second respondents indicated that the ground was open for prospecting and pegging as required to be kept in a record by s177(8) of the Mines and Minerals Act. It is argued that as at 15 January 2010 such maps illustrated that the applicant did not over peg. It is insisted that the applicant is entitled to the production of a survey diagram following a current survey.

In respect to an injury, caselaw is clear that this must be an injury actually committed or reasonably apprehended. The applicant does point out the cancellation of its rights, title, and interest in its Kimberly 18 as the injury actually committed on an erroneous basis. It appears that the prejudice arising from this is alleged to be financial prejudice as the third and fourth respondents are alleged to be mining on the Kimberly 18 claim which belonged to the applicant.

The clear right is alleged to arise from the applicant's registration certificate for Kimberly 18 which according to the Dispute Resolution Committee findings was separate and in a different location from that of the third and fourth respondents.

On the absence of any other similar protection by any other remedy, the applicant does say in para 26 of the founding affidavit that if the court does not order a survey, the confusion pertaining to Kimberly 18 and its ownership will remain.

It does appear to me that the applicant has somehow canvassed the requirements of a *mandamus* albeit in not so clearly laid out a fashion. The form in which it is done does not even refer to the usual terms; clear right, injury actually committed, and absence of an alternative remedy. It was left to the court to glean through the founding affidavit and deduce whether the requirements have been canvassed. That is not desirable. I am however averse to disposing of the matter on the form of the language used when its substance reveals that somehow the requirements have been covered.

I therefore find no merit in this point *in limine* particularly as, if the matter proceeds to be heard on the merits, the court will still have an opportunity to assess whether the application has successfully met the requirements of a *mandamus*.

Whether the survey sought has already been conducted and there is no need for an additional one

The third and fourth respondent submitted that a survey was already carried out and there is no need for a second survey to be conducted. Such survey is said to have been carried out on 5 May 2021.

The report of the Dispute Resolution Committee is said to then proceed to set out the precise coordinates of the disputed claims. It is pointed out that the applicant has not challenged such report which it in fact, relies on. The case of *Alliance Insurance* v *Imperial Plastics (Pvt) Ltd & Anor* SC 30/17 is relied on to argue that the applicant cannot be allowed to approbate and reprobate a step taken in the proceedings and can only do one or other and not both.

It was averred that by insisting on another survey, the applicant is abusing court process.

In response Mr *Mudadirwa* said that there is no survey diagram that was produced contrary to s 177 (8) of the Mines and Minerals Act which provides that a sketch map or survey diagram should be kept and same has not been produced.

It appears that the parties are agreed that a survey was conducted with the consent of both parties on 5 May 2021. The only thing the applicant considers missing is a survey diagram.

Below I present the finds made as preserved in the repot.

BLACK GATE INVESTMENTS BEACONS

BEACON	**PEG**	**COORDINATES**		**REMARKS**
		X	Y	
Kimberly 18	B	0325149	8085738	No beacon
Kimberly 18	C	0325263	8085664	No beacon

Kimberly 18	D	0325354	8085804	Beacon damaged
Kimberly 18	E	0325163	8086332	No beacon
Kimberly 18	F	0324805	8086280	Beacon damaged
Kimberly 18	G	0324364	8086520	No beacon
Kimberly 18	H	0324320	8086480	-
Kimberly 19	A	0324567	8085598	No beacon. Sharing boundary with K 21 Peg D and K20 Peg C
Kimberly 19	C	0324824	8085401	No beacon
Kimberly 19	D	0324351	808 5499	No beacon
Kimberly 20	A	0324364	8085794	No beacon
Kimberly 20	D	0324301	8085618	No beacon
Kimberly 21	B	0325104	8085781	No beacon

RAN MINE, G&I INDUSTRIES BEACONS

Beacon	Peg	Reg No	Coordinates		Remarks
			X	Y	
Kimberly 18	A	21288	0325079	8086673	Sharing with K 14 Peg B
Kimberly	E	21288	0325122	8086567	Sharing boundary with K14 Peg C
Kimberly 18	F	21288	0325133	8086546	Sharing boundary with K 15

					peg A & K 14
Kimberly 18	G	21288	0325359	8086668	
Kimberly 18	H	21288	0325201	80867	Sharing boundary with K 17 peg C

One of the conclusions reached from that information from the survey was that Kimberly 18 of Blackgate which was pegged as a copper base block over pegs RAN Reg No 4957, Kimberly A Reg No M1165, Kimberly DBIE Reg No M1168, Kimberly IE Reg No M1167, Kimberly D Reg No 10400 of RAN Mine.

Section 177 (8) sought to be relied on by the applicant relates to a sketch plan or survey lodged with the mining commissioner by the holder of a mining location. It is not directly relevant in this case.

The presence of coordinates in the committee's report is proof that a survey was done. These coordinates are a unique identifier of a precise geographic location and are the primary data to be used in mapping or producing diagrams. There would not be much added value arising from ordering another survey in such circumstance. It would be just a waste of time and resources.

The survey was done to establish the question whether or not the claims in dispute had been forfeited at the time the applicant was registered as the holder of the claims. This was duly done. It is not for this court to direct an administrative authority on the nitty gritty of the reports, maps and diagrams to be produced from the survey. The data is sufficient and it enabled important conclusions to be reached. What remains is for the applicant to merely interpret that data. That is what The Dispute Resolution Committee did.

I have no option but to uphold this point *in limine*

Costs

The third and fourth respondents have prayed for costs on a legal practitioner and client scale on the basis that this matter is an abuse of court process as the applicant seeks what was already done, a second bite at the cherry.

The applicant is opposed to such an award.

The case of *N. Svova & ORS* v *National Social Security Authority* SC10/16 is instructive. MAVANGIRA AJA (as she then was) held as follows:

"An award of costs is within the discretion of the court. In the exercise of its discretion the court is guided by certain principles and guidelines…… *In casu* the court will also be guided by the principle that an award of costs at the legal practitioner and client scale is a drastic measure, and one which should not be lightly resorted to except where the court is satisfied there has been an attempt to abuse the process of the court or for some other good reason."

In casu, the very history of this matter spanning all the way from 2009 wherein the applicant was accused of over- pegging and encroaching on the respondents' claims is telling. The matter had been before the second respondent, the first respondent and the Attorney General's offices. Thereafter the applicant lodged a review under case number HC 7376/10. The matter went all the way to the Supreme Court which then remitted the matter to the first respondent and what was to be decided was still the initial issue in dispute-: whether the applicant had over – pegged and encroached on third and fourth respondent's claims. A Dispute Resolution Committee was established, a survey conducted and it was concluded that the applicant had indeed over pegged and encroached onto Kimberly 18

the respondent's claims.

Acting on those findings, the first respondent cancelled the applicant's certificates of registration for claims for Kimberly 18 and 19. Still unsatisfied the applicant proceeded to file yet another applicant for review which was dismissed.

It is clear that the further filing of this matter is an abuse of court process as the applicant continues obstinately to issue court process which is not justified by the underlying legal action. This is so because a survey was conducted and the dispute between the parties was resolved.

My considered view is that costs on a higher scale are justified.

Disposition

In the circumstances t is fitting that this matter be dismissed as it should never have been enrolled.

Accordingly, the matter be and is hereby dismissed with costs on a higher scale.

Gurira & Associates, applicant's legal practitioners
Atherstone & Cook, third and fourth respondent's legal practitioners