SANDAWANA MINES (PRIVATE) LIMITED
versus
THE MINING COMMISSIONER – MIDLANDS PROVINCE N.O
and
THE SECRETARY FOR MINES AND MINING
DEVELOPMENT N.O
and
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
THE ENVIRONMENTAL MANAGEMENT AGENCY
and
AVOSEH INVESTMENT (PRIVATE) LIMITED

HIGH COURT OF ZIMBABAWE
MUNGWARI J
HARARE, 5 & 29 September 2023

Opposed Application

L Uriri, for the applicant
No appearance for the 1st, 2nd, 3rd & 4th respondent
L Madhuku, for the 5th respondent

MUNGWARI J: This is a court application for a declaratory order and consequential relief in terms of s 14 of the High Court Act [*Chapter 7:06*] in which the applicant seeks an order couched in the following terms:

"1. The application for a declaratory order and consequential relief be and is hereby granted.
2. The certificate of Registration Number 17332BM consisting of twenty – four (24) blocks of Lithium Claims named Sandawana AV8 registered in the name of the 5th respondent granted by the 1st Respondent on the 16th of November 2022 be and is hereby declared null and void and of no force and effect.
3. The 1st Respondent be and is hereby ordered to forthwith cancel and remove from his register the Certificate of Registration Number 17332BM consisting of twenty-four (24) blocks of Lithium Claims named Sandawana AV8 registered in the name of the 5th Respondent.
4. Respondents shall pay costs of suit."

The applicant is a limited liability mining concern duly registered in terms of the company laws of Zimbabwe. The first respondent is the Mining Commissioner for the Midlands Province. He is a public officer and government bureaucrat cited in his official capacity as the authority responsible for issuing mining licences and permits among other responsibilities. The second respondent is the Secretary for Mines and Mining Development. He equally holds public office and is a government functionary. The third respondent is the Minister of Mines and Mining Development. He is cited in his official capacity as the authority responsible charged with the administration of the Mines and Minerals Act [*Chapter 21:05*] (hereinafter referred to as the Act). The fourth respondent is the Environmental Management Agency, a body corporate created in terms of s 9 of the Environmental Management Act [*Chapter 20.27*]. Its responsibilities entail among others, the protection of the environment. The fifth respondent is Avoseh investments also a company with limited liability and duly incorporated in terms of the laws of Zimbabwe.

To put the matter into proper perspective a brief background is pertinent.

Factual Background

The applicant owns Sandawana Mines located in Mberengwa District where it is engaged in the business of extracting lithium ore. Inclusive of its mining concerns is a claim known as Lith 15 in the same district. It encompasses vast swathes of land which measure approximately 3882 hectares in extent. There is no contestation that the applicant's mining interest over the entire Sandawana Mines was registered in May 1964. That title gave the applicant exclusive mining rights. To add weight to its exclusivity, in October 1986 that whole land covered by Sandawana Mines as well as its neighbouring areas were reserved against prospecting and pegging. However, on 30 September 2022 the 1986 reservation against prospecting notice was revoked by the third respondent. Not long after that, in fact barely two months later on 16 November 2022 it was restored. The fifth respondent's claim was prospected for, pegged and registered during that brief moratorium. Remarkably, the fifth respondent's claim was registered on 16 November 2022 which whether coincidentally or by design, is the date when the reservation against prospecting notice was reinstated. Soon thereafter, the fifth respondent commenced mining operations but given the above circumstances the applicant and the fifth respondent had clearly been set on a collision course.

Applicant's case

In its founding affidavit, deposed to by its general manager Godwin Gambiza, the applicant stated that following a boundary dispute between the applicant and the fifth respondent, a ground survey was conducted on 9 March 2023 by the Ministry of Mines officials. The findings of the survey placed the fifth respondent's claim called Sandawana AV8 with registration number 17332BM (hereinafter referred to as Avoseh claim) within the applicant's mining area. The applicant submitted a copy of that ground survey report which was attached to the Provincial Mining Director's determination as evidence of its averments. Despite that, so the applicant argued, the Provincial Mining Director made a determination based on unverified coordinates which purported to validate the prospecting, pegging and registration of fifth respondent's Avoseh claim. Godwin Gambiza contended that the applicant's mining area was established in 1964, long before the coming into existence of the fifth respondent and its mining claim. He avers that the fifth respondent's mining claim was prospected, pegged and registered within the applicant's mining area in clear violation of the prior pegger principle which states that in case of a clash of mining interests the prior pegger has superior rights. The applicant argued that for that reason, the fifth respondent's mining claim cannot exist within the applicant's mining area. It can only be liable for cancellation.

In addition, the applicant averred that the fifth respondent's mining claim was registered within the disputed area on 16 November 2022, the very day that the notice of reservation was published and became effective. The fifth respondent's mining claim was therefore established on ground not open to prospecting given that the rights by the holder of any prospecting licence cease and may not be exercised within the target area as from the date and hour of posting such notice of reservation. The fifth respondent's claim was purportedly registered when the registration had been restored and resultantly the fifth respondent is carrying out mining activities on the strength of the licences irregularly sought and obtained. The applicant thus urged the court to declare the prospecting, pegging and registration of the fifth respondent's mining claim null and void because it was issued on reserved ground. A further argument was that the fifth respondent had registered its claim in the absence of an environmental impact assessment certificate (hereinafter referred to as the EIAC) issued in accordance with the law. The applicant contends that it was never consulted by the fourth respondent meaning that the fifth respondent's Avoseh claim was registered in the absence of the EIAC. To date, it does not possess one. The EIAC issued by the fourth respondent is a condition precedent for any mineral

prospecting, mineral mining, ore processing and concentrating. As such, the fifth respondent could not have registered the claim and commenced mining without that certificate. It is resultantly, conducting operations within the mining area without having sought and obtained the requisite approvals issued by the fourth respondent.

The first, second and third respondents opposed the application. So too did the fifth respondent. The fourth respondent however did not file any papers in response to the application.

First, Second and Third respondents' cases.

All the three respondent's opposing affidavit was deposed to by a Tariro Ndhlovu, the Provincial Mining Director for Midlands Province who claimed that the Permanent Secretary of the Ministry of Mines and Mining Development had delegated to him in terms of s 341 of the Act the power to act as the Mining Commissioner for Midlands Province. He claimed to represent the second and third respondents because in his own words "they are merely cited for information purposes" He stated that all due processes were followed and that the claim was registered on ground which was open for pegging. The reservation was lifted at the time when the application was launched, processed and deemed successful. He claimed that an application submitted on the same day that a notice against reservation is reinstated is a valid application which must be processed like any other which falls within the cut-off date.

Further Tariro Ndhlovu contended that the prior pegger principle was not violated because the applicant had failed to prove through maintenance of beacons that the mining area it claimed was indeed its own. Because the ground did not have the applicant's beacons it was open for prospecting and the applicant cannot claim to be the prior pegger. Lastly, he argued that the EIAC is not a prerequisite for the issuance of a mining certificate but rather is needed for carrying out mining and extraction of minerals. Curiously the respondents neither refuted the applicant's assertion that they disregarded the ground survey report compiled by their Ministry, nor did they contest the applicant's claim that the survey proved that the fifth respondent's claim fell within the applicant's mining area. Instead, they relied on the issue of the unverified coordinates as the basis for the first respondent's determination.

Fifth respondent's case

In a terse and bald response devoid of the necessary detail the fifth respondent claimed that the application was in essence a review of the determination by the Provincial Mining Director dated 24 April 2023 which is disguised as an application for a declaratur. It denied

without providing any substance, that its claim was pegged on ground not open for prospecting and that the prior pegger principle had been violated. It then elected to state that the issues raised by the applicant had already been traversed in the review application HC 3125/23 in which there is an extant determination. It opted not to elaborate.

In its answering affidavit the applicant raised issue with the affidavit of Tariro Ndhlovu. It asserted that he did not have the authority to depose to the opposing affidavit for and on behalf of the first, second and third respondent because he is a Provincial Mining Director. That office, so the applicant alleged, is non-existent at law. Further, it pointed out that Tariro Ndhlovu had failed to prove that the Mining Commissioner had delegated his power to him and that the Secretary had expressly consented to such delegation.

I will proceed to deal with and dispose that objection at this stage.

Tariro Ndhlovu the Provincial Mining Director for Midlands is a belligerent and recalcitrant individual. It appears he is ready to defy whatever decision comes from this court which he does not like. His intransigency leaves his arguments without a modicum of decency. I hold this view of him because in the cases of *Chanakira Masuku* v *Tariro Ndhlovu N.O. & Ors* HH 299-23; *Barrington Resources (Pvt) Ltd* v *Pulserate Investments (Pvt) Ltd* HH 446-23 and *Sandawana Mines (Pvt) Ltd* v *Tariro Ndhlovu and Anor* HH 537-23 this court spoke directly against the conduct exhibited by Mr *Ndhlovu* in this application. The remonstrance against provincial mining directors who masquerade as mining commissioners had actually begun much earlier in the cases of *Gombe Resources (Private) Limited* v *The Provincial Mining Director-Mashonaland Central & Ors* HH 405-2018 and *Pahasha Somalia Mining Syndicate* v *Earthrow Investments (Private) Limited & 2 Ors* HH 450-21. The courts have been emphatic that the office of provincial mining director is not provided for in the Act and that holders of that office are not mining commissioners. What is particularly disconcerting is that Mr *Ndhlovu* was a respondent in some of those cases. Regardless, his unfounded arguments and obstinacy appear to continue unabated. His argument is that the Secretary of Mines delegated to him his powers as a mining commissioner. In examining that argument, the starting point is s 341 of the Act which provides as follows:

> **"341 Administration of Ministry**
>
> (1) The Secretary shall be and is hereby vested with authority generally to supervise and regulate the proper and effectual carrying out of this Act by mining commissioners (my underlining) or other officers of the Public Service duly appointed thereto, and to give all such orders, directions or instructions as may be necessary.
>
> (2) The Secretary may at his discretion assume all or any of the powers, duties and functions by this Act vested in any mining commissioner, and may lawfully perform all such acts and

> do all such things as a mining commissioner may perform or do, (my underlining) and is further empowered in his discretion to authorize the correction of any error in the administration or in the carrying out of the provisions of this Act, or to perform any other lawful act which may be necessary to give due effect to its provisions."

What the section does is simply to allow the Secretary of Mines, in particular instances, to assume the functions and authority of the mining commissioner. It does not say the Secretary is generally a mining commissioner. It must follow therefore that where a provincial mining director seeks to base his actions on the argument that he had been delegated to act as a mining commissioner by the Secretary he or she is required to first show that the Secretary had decided to assume the responsibilities of a mining commissioner and that indeed he was the mining commissioner for that particular province. I arrive at that conclusion on the strength of the provisions of s 344 of the Act. It states that:

> "**344 Mining commissioner's powers to take oaths**
> (1) Any such mining commissioner, acting mining commissioner or assistant mining commissioner may, with the consent of the Secretary, delegate to any other officer any of the powers or duties by this Act vested in him."

In *Sandawana Mines* v *Tariro Ndhlovu and Ors* (supra) I stated at p. 10 of the cyclostyled judgment in relation to s 344 that:

> "As is apparent, it would be absurd to require a mining commissioner to seek the consent of the Secretary where he/she wishes to delegate his/her powers if the Secretary and the mining commissioner were one and the same person. S 341 of the Act further vindicates my argument that the legislature did not intend that absurdity. It confirms the fallacy of the argument that the Secretary is a mining commissioner. He/she is not. The Secretary is a supervisor of the mining commissioners."

In this case, Tariro Ndhlovu, deposed to the opposing affidavit on behalf of the first, second and third respondents without illustrating where he got that authority from. He states in the affidavit that he is the provincial mining director for Midlands Province. It would have been better if he had argued that he is the mining commissioner. He made no such averment. He had the responsibility to prove that he was authorised to oppose the application on behalf of the three respondents but did not even begin to do so. His contention that he was appointed by the second respondent who assumed the function of the first respondent is without any legal basis. He fell into the same trap that this court dealt with in *Gombe Resources (Private) Limited* v *The Provincial Mining Director-Mashonaland Central & Or* (supra) where this court held that where power is delegated, there must be an explanation of how and when the powers were

delegated. The claim of delegated power must be accompanied by proof of such delegation. The court reasoned as follows at p 12 of the cyclostyled judgment.

> "The problem, however, is that the first respondent did not care to explain how and when the powers were delegated to him. He tendered no proof of such delegation. There was not even a supporting affidavit from the Secretary whom he says delegated the powers to him. In the absence of proof of such appointment and delegation, the first respondent was not sanctioned to hear and grant the injunction he granted in terms of s354 of the Act. He lacked jurisdiction to deal with the injunction and he indeed acted *ultra vires* the provisions of the Act."

After his authority had been challenged in the answering affidavit, it must have dawned on *Tariro Ndhlovu* that the only way he could escape an adverse finding against his status was by providing proof of his claims. He could have easily obtained a supporting affidavit from the Secretary to that effect. Being a representative of the Secretary, it would obviously have been in every official in the Ministry's interests to show that what he did was with the blessing of the Ministry. His negligence or rather his failure to acquire such support is clear testimony that his actions must have been motivated by his personal idiosyncrasies. They had nothing to do with his official responsibilities. He was clearly on a frolic of his own. He had no authority to act on behalf of the first respondent because he is not a mining commissioner. He had no business deposing to affidavits on behalf of the second and third respondents. In essence he is a usurper who arrogated to himself the powers of statutory officials in the Ministry of Mines. In light of my foregoing observations, I am satisfied that the objection raised by the applicant is meritorious. The opposing affidavit deposed to by *Tariro Ndhlovu* was made without authority from the respondents. There is therefore no valid opposition that has been filed on behalf of the first, second and third respondents. As a result, the application was essentially unopposed.

On the date that the application was set down for hearing counsel for the fifth respondent advised that he intended to serve the applicant with a counter application for a declaratur. Both counsels then agreed that service be effected immediately and a consolidation of the two matters be done given that the parties cited were the same and the matter revolved around the same cause of action. Counsel for the first, second and third respondents indicated their unwillingness to file any opposing papers to the counter application and stated that they would abide by the court's decision. The fourth respondent likewise communicated in writing its desire to abide by the court's decision.

Counter application-Applicant's case

In the counter application the applicant, (Avoseh Investments) sought a declaratur against the authorities and the fourth respondent (Sandawana Mines) that it cited. The application hinged on the fifth respondent's failure to procure an EIA C. Song Zhuolin was the deponent to the founding affidavit. He alleged that the fifth respondent had from January 1994 been carrying out mining operations and had not since the enactment of the Environmental Management Act [*Chapter 20:27*] hereinafter referred to as the EMA Act in 2003 made any effort to acquire the EIAC. Curiously, the applicant's allegations were a departure from its earlier position in the main application. Its position was now that the EIAC issued by the fourth respondent is a pre-requisite for any and all mining operations carried out within Zimbabwe. The applicant further alleged that the provisions of the Act must now be read together with the requirements set out in the EMA Act. The effect is that all mining operations must commence and be carried out after obtaining and maintaining a valid EIAC. The applicant contended that, the fifth respondent was to its prejudice, mining lithium and dumping its waste on its claim. The fifth respondent's entire operations therefore ought to be stopped and the validity of its licence nullified. The applicant prayed for an order in the following terms:

1. The application for a declaratory order and consequential relief be and is hereby granted
2. The certificate of registration Number G8172BM registered in the name of the 5th respondent be declared null and void and of no force and effect.
3. The 1st respondent be and is hereby ordered to forthwith cancel and remove from his register the certificate of registration Number G8172BM registered in the name of the 5th respondent.
4. 5th respondent to pay costs of suit on a higher scale

Godwin Gambiza the deponent to the fifth respondent's opposing affidavit raised a point *in limine* regarding the form of the application. He alleged that it was fatally defective. Rule 59(1) of the rules provides that a court application should be in Form No. 23. In this case, so the argument went, the form used by the applicant to initiate the application appeared foreign as it is not provided for anywhere in the rules. As a result, it is curably bad and ought to be struck off the roll. He further argued that the EMA act was enacted in 2002, almost forty years after the fifth respondent's claim and title had been registered. The EMA act does not have retrospective effect and cannot therefore be used as a basis to nullify the fifth respondent's title. He added that obtaining the EIAC is a condition precedent to all mining claims registered after the enactment of the EMA act and not before. On the other hand, the applicant's claim was registered on 16 November 2022 before obtaining the EIAC. The application is therefore

frivolous and vexatious and only meant to buy time to enable the applicant to loot and move lithium ore from the disputed claim

I must admit that the state of the papers filed by the applicant in its counter application is indeed a cause for concern. The form is outlandish. It is alien to this jurisdiction's rules of court. The application does not advise the respondents of their procedural rights. The fifth respondent's address is incorrect. The applicant simply copied its own address and put it as the fifth respondent's. It illustrates that the application was for reasons best known to itself rushed and was not well thought out.

The applicant's declaratur

At the hearing, Mr *Uriri* who appeared for the Sandawana Mines submitted that the applicant had shown that it had a direct and substantial interest in the subject matter of the suit. He claimed that the applicant's mining title and operations were affected by the fifth respondent, Avoseh Investments' conduct. He added that the applicant had satisfied the requirements for the grant of a declaratur and urged the court to exercise its discretion in its favour. Counsel also highlighted that one of the key requirements for title to be issued for a mine is that it must have an EIAC. The point of departure, so Mr *Uriri* argued, was how that affected the applicant's and the fifth respondent's titles. Regarding the fifth respondent's Avoseh claim, it was common cause that such title was obtained in very curious if not suspicious circumstances on 16 November 2022. At the time the fifth respondent's title was procured the requirement for the EIAC had come into effect way back in 2003. He added that the effect of the fifth respondent's counter claim was to make a concession that its title was irregularly obtained. He argued further that para. 8 of Song Zhuolin's founding affidavit suggested that because both parties did not have the EIAC it followed that both their title must be vacated. That argument is self-defeating. It shoots the fifth respondent in the foot. While the fifth respondent accepted that its title was invalid the same couldn't be said of the applicant's because it was obtained prior to 2003 when the EMA Act which the fifth respondent based its argument on became law. The EMA Act cannot be used retrospectively to impugn the applicant's title which was obtained in 1964. The only effect the EIAC can have on the applicant's operations is that it will be precluded from undertaking actual mining operations without until it procures one. The applicant's title remains unscathed. Mr *Uriri* then gave the analogy where one secured title deeds to a property but was precluded from constructing until

full compliance with the bylaws. What that would entail is that any construction carried out without such compliance would be unlawful but that would not impugn the title. He summed his argument by stating that the applicant *in casu* remained with title. On that basis he prayed that the counter application must fail and the application in the main must succeed.

Not surprisingly, Mr *Madhuku* who appeared for the applicant in the counter claim on the date of hearing advised the court that the applicant was no longer pursuing the counter application for a declaratur. I understood that to mean that the applicant was abandoning the counter claim. He stated that Avoseh Investments intended to make out its case by opposing the main application for the declarator. Mr *Madhuku* believed that it would not be competent to make an order either way. The effect of his concession was that there remained for consideration only the main application for a declaratur. In a way the concession lent credence to the applicant's assertion that the counter application had been lodged as a means to delay the hearing of the main matter. Without mentioning the inexcusable form that it appeared and the ill-conceived basis for the application, Mr *Madhuku* was correct to concede that the grounds raised therein could not sustain the application. That was professional.

In opposing the main application, Mr *Madhuku* maintained the argument that the fifth respondent's title was valid. He argued that there is a distinction between implementation and the carrying out of mining operations on one hand and the validity of a title that one has on the other. He further contended that a mining title is valid without reference to the EIAC. It is the carrying out of the operations that ought to be held in abeyance until the EIAC is acquired.

With regards the establishment of the requirements for a declaratur by the applicant, Mr *Madhuku* took a different view. He stated that the declaratory order which the applicant was praying for could not be granted by this court because the grant of a declaratory order had to be dependent on a number of factors which had not been established in this case. For instance, there was a resolution of a dispute relating to the boundaries of the mining claims and for the applicant to simply get an order that invalidates the fifth respondent's mining claim on the papers before the court would be an improper exercise of discretion. He claimed that the papers before the court did not warrant the making of the order that the applicant sought.

The issues for determination

The only issue for determination in this matter is:

Whether the applicant has satisfied the requirements for the grant of declaratory relief.

Below I deal with the issue.

The remedy of declaratory relief is provided for in terms of s 14 of the High court Act [*Chapter 7:06*]. The section states that:

> **"14 High Court may determine future or contingent rights**
> The High Court may, in 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 explaining the meaning of the above provision, this court in the case of *Debshan (Private) limited* v *The Provincial Mining Director, Matabeleland South Province* & O*rs* HB 11/17 at p 4 of the cyclostyled judgment, citing the Supreme Court case of *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S) 343G; 344 A –E; put it as follows:

> "It has been stated, in interpreting that provision, that it is a condition precedent to the grant of a declaratory order that the applicant must have a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. As the court will not decide abstract, academic or hypothetical questions unrelated to such an interest, the interest must relate to an existing, future or contingent right. The other requirement for a declaratory order is that the court must decide whether or not the case in question is one in which it should properly exercise its discretion as provided for in s14. The court's discretion will be exercised where, despite the fact that no consequential relief is sought, justice or convenience demands that a declaration be made as to the existence of or the nature of a legal right claimed by the applicant or the existence of a legal obligation due by the respondent. See *Adbro Investment Co Ltd* v *Minister of the Interior & Ors* 1961 (3) SA 283 (T) 285 B – C; *Johnsen* v *AFC* 1995 (1) ZLR 65 (H)."

Inherent in the requirements stated above is the need to distil what is meant by direct and substantial interest in the subject matter of the suit. The Supreme Court had occasion to interpret the phrase in the case of *Jameson Zvidzai Timba* v *Chief Elections Officer & Ors* SC 69/15 at p. 8 of the cyclostyled decision where citing with approval a passage in authors Herbstein and Van Winsen's Book "*Civil Practice of the High Courts of South Africa*", 5th ed. at p 217 GWAUNZA JA (as she then was) held that:

> "A direct and substantial interest has been held to be 'an interest in the right which is the subject matter of the litigation and not merely a financial interest….' It is a 'legal interest in the subject matter of the litigation, excluding an indirect commercial interest only.' The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it in fact exists."

It is clear that even after being broken down the principle remains fairly complex. One may actually ask what a legal interest in the subject matter of the litigation which excludes an indirect financial interest only entails. In my view, on one hand, legal interest supposes ownership enforceable at law. In other words, a holder of a legal interest over an asset is

allowed to institute legal action in an instance where someone else attempts to interfere with his/her/its right of ownership. On the other, indirect financial interest may be equated to a situation where a party is entitled to enjoy an asset but does not own it. The holder of a legal interest over an asset enjoys unlimited legal redresses if his/her/its ownership rights are trampled upon or are threatened. Those remedies may not be available to a holder of indirect financial interest. The question of the court's discretion to determine the grant of a declaratur is in my assessment self-explanatory. In other words, the court is at large to decide whether or not to grant a declaratory order using of course, defined principles. It can elect to grant the order even in circumstances where the applicant is not seeking consequential relief. By consequential relief is meant the general result that an applicant seeks to achieve by bringing an application to court. Such course is taken where justice or convenience dictates that the court should grant a 'declaration to the existence of or the nature of a legal right claimed by the applicant or the existence of a legal obligation due by the respondent.' The freedom which the court is reposed with appears sweeping. I hold that view because where a court grants relief for convenience it means it does so for the comfort, ease or benefit of an applicant. Justice of course is a wider notion which I will not attempt to circumscribe in this judgment except to say that it is that elasticity which will enable the court to adopt a robust approach when determining an application for a declaratur.

Application of the law to the facts

The applicant's complaint in this case is fairly straight-forward. It is that one or more of the first to third respondents appear to have acted in an unscrupulous manner when they issued the fifth respondent with a certificate of registration and sanctioned operations at its Avoseh claim whose coordinates run into its existing Lith 15 claim which forms a part of its mining blocks generally called Sandawana Mines. As a result, the fifth respondent is illegally exploiting lithium mineral ore from the applicant's reserves. The applicant's title over the area covered by the Sandawana Mines was obtained on 16 September 1964. It was issued in the name of Rio Tinto Sandawana Ltd, a predecessor entity to the current Sandawana Mines. The applicant attached evidence of that title. It also attached a map showing the geographical extent of the mining area covered by the mining lease as well as the reef card for its Lith 15 claim. In other words that the applicant owns Sandawana Mines is indisputable. As such, if the first to third respondents indeed issued a certificate of registration to the fifth respondent in circumstances where Avoseh Investments was allowed to undertake mining operations within the applicant's mining concern, there can

be little doubt if any that the issuance of such title to the fifth respondent is a matter that will not only excite the interest of the applicant but that the applicant retains a direct and substantial interest in that subject matter. The applicant is therefore entitled to beseech this court to interrogate whether the first to third respondents acted lawfully in the discharge of their duties when they registered Avoseh claim in favour of the fifth respondent. Given those circumstances, the court elects to exercise its discretion in terms of s 14 of the High Court Act, to determine the applicant's rights and obligations and the lawfulness of the first - third respondents' actions.

Following the boundary dispute between the applicant and the fifth respondent described above, a ground survey was conducted on 9 March 2023 by the Ministry of Mines and Mining Development officials. Annexure SM 12 which was supplied by the applicant is a map drawn after the ground survey. It illustrates the results which emerged. An examination of that ground survey report shows that the fifth respondent's Avoseh claim is right inside Lith 15 which the applicant claims is its mining area. The survey report was attested to by officials from the Ministry of Mines who included the Provincial Mining Director *Tariro Ndhlovu*. That attestation signifies that it is an official document. In addition, it bears the Ministry's official date stamp with the date 24 April 2023 on it. Based on its title and the ground survey report, the applicant raised four reasons upon which it grounded its disputation of the registration of the fifth respondent's Avoseh claim. They were that:

a. The 5th respondent did not comply with section 97 of the EMA Act.
b. The 5th respondent's claim was registered on ground not open for prospecting
c. That registration violated the sanctity of the prior pegger principle
d. The 5th respondent's Avoseh claim was registered on the same date when the of publication of the notice of the reservation against prospecting and pegging was reinstated

I will deal with the grounds seriatim.

Non-compliance with Section 97 of the EMA Act

It is not disputed that that the fifth respondent's Avoseh Claim was registered in the absence of the EIAC. The fifth respondent obtained mining title in the absence of the said certificate. As stated in the case of *Fawcett Security Operations (Private) Limited* v *Customs & Exercise & Ors* 1993(2) ZLR 121(S), the Supreme Court held that what is not specifically denied in affidavits ought to be taken as admitted. An EIAC issued by the fourth respondent is a condition precedent to any mineral prospecting, mineral mining, ore processing and

concentrating among other kindred mining operations. That it is so, is obvious from the provisions of s 97 (1) of the EMA Act which states that:

> "The projects listed in the First Schedule are projects which must not be implemented unless in each case, subject to this Part—
> (a) the Director-General has issued a certificate in respect of the project in terms of section one hundred, following the submission of an environmental impact assessment report in terms of section ninety-nine, and;
> (b) the certificate remains valid; and
> (c) any conditions imposed by the Director-General in regard to the issue of the certificate are complied with."

The projects stated above include the ones I enumerated above. As stated in *Debshan (Private) limited* v *The Provincial Mining Director, Matabeleland South Province & Ors* (supra) it is wrong for anyone to assume that the EIAC is not a *sine qua non* for the grant of a prospecting licence or indeed a mining licence. Section 97 puts that beyond doubt. It is not possible for anyone to acquire mining title without first procuring an EIAC from the fourth respondent. It must be clear to all officials charged with the administration of the Act that whether they deem it tedious or not, the law requires the provisions of the Act to be read together with the provisions of the EMA Act which speak to mining operations. Section 3 of the EMA Act is particularly instructive. It states that:

> Section 3 of the EMA Act which provides as follows:
>
> "(1) Except where it is expressly provided to the contrary, this Act shall be construed as being in addition to and not in substitution for any other law which is not in conflict or inconsistent with this Act.
> (2) If any other law is in conflict with this Act, this Act shall prevail."

The first, second and third respondents were obligated by law to observe this requirement before they purportedly issued out a prospecting licence and registration certificate to the fifth respondent. That they did so before the respondent complied with the EMA Act was a complete disregard for the law. The processes which must be followed appear cumbersome to me. That the grant of the prospecting licence and the issuance of title to the fifth respondent were done in barely six weeks appear to vindicate the claim of impropriety on the part of the first, second third and fifth respondent's actions around the entire process. It stinks. Regardless of that stench, the inescapable result is that the law has prescribed that the procedure preceding the issuance of mining certificates, permits or licences which is elaborately laid in s 45(2) of The Act is aided by the provisions of the EMA Act. It is peremptory that the fifth respondent was obliged to obtain the EIAC before prospecting, pegging and registering its Avoseh Claim.

Whatever it then did without following the law cannot be allowed to stand. Whether the first, second and third respondents conspired with the fifth respondent is immaterial. What is important is that their decisions became null and void for want of compliance with mandatory requirements imposed by the law. The decisions to grant a prospecting and pegging licence as well as registering Avoseh Claim were all illegal.

That the fifth respondent's claim was pegged on ground not open for prospecting

The argument that the fifth respondent's Avoseh claim was registered on ground not open to prospecting may be untrue unless certain allegations are proven. The prohibition against prospecting was lifted in September 2016 after subsisting for over half a century. The liftment of the ban was brief because it was reinstated about six weeks later. Although the process resulting in the removal of the ban, the rushed applications for and the grant of licences to the fifth respondent reeked impropriety, it has not been proven that anything was untoward. The applicant cannot simply rely on conjecture that the moratorium was intended to benefit the fifth respondent without providing proof of how the process was flawed. It becomes more so when regard is had to the fact that there are no set timelines within which the process ought to have been done. As a result, I am compelled to find as I hereby do that this particular allegation is hot air. It is without a basis.

That the pegging and registration of fifth respondent's claim violated the prior pegger principle

The respondents are bound by the findings of the Survey report which is signed by three officials under the first to third respondents who curiously included the deponent to the irregular opposing affidavit. As already held the survey report confirms that the fifth respondent's Avoseh 8 claim encroaches onto the applicant's mining lease and claim. The resolution of the boundaries dispute must therefore necessarily be grounded on s 177 of the Act which governs the priority of mining rights. It provides as follows:

> "177 Priority of mining rights
> (1) For the purposes of this section—
> "pegger" means the person in whose name or on whose behalf a mining location, reef or deposit was registered and each and every successor in title to the rights acquired by such person.
> (2) For the purposes of subsection (3)—
> "acquisition of title" shall be taken to mean the due performance of the first physical act required to be done under this Act, or any previous law governing mining rights at the time

> when the act was performed, in order to acquire any exclusive rights in respect of any mining location, reef or deposit.
> (3) Priority of acquisition of title to any mining location, reef or deposit, if such title has been duly maintained, shall in every case determine the rights as between the various peggers of mining locations, reefs or deposits as aforesaid and in all cases of dispute the rule shall be followed that, in the event of the rights of any subsequent pegger conflicting with the rights of a prior pegger, then, to the extent to which such rights conflict, the rights of any subsequent pegger shall be subordinated to those of the prior pegger, and all certificates of registration shall be deemed to be issued subject to the above conditions."

The first noteworthy point from the provision is the definition of a pegger. Anyone, natural or juristic, who holds a registration certificate in relation to a mining location, reef or deposit is considered a pegger. That person's successor in title to such registration is equally deemed a pegger. The law here was crafted, with in mind, the possibility that two peggers could claim the same mining location and that both could hold title to that same location. It provides then that where such conflict arises, the rights of any subsequent pegger shall be subordinated to those of a prior pegger. It follows that the first consideration is the dates of registration of the conflicting titles. That principle was used by this court in the case of *Munamato Mining Syndicate* v *Mining Commissioner & Ors* 1999 (2) ZLR 136 (H) and more recently in the case of *Jin Yang Africa* v *Estate Late George Makurira (represented by Angela Chandaengerwa) & Ors* HB 18/22 at p 7 where MAKONESE J held that:

> "The legal position is clear. A prior pegger has superior rights and section 177 (3) of the Act protects the applicant. I am not persuaded that section 58 of the Act can be applied to protect the rights of a claim that was pegged in an area not open for pegging. Once it is established that Applicant has prior rights, the court cannot and should not resort to section 58 of the Act. Olympia 7 Mine was registered encroaching into Bonsor South Mine. It was not supposed to be registered in the first place. It is liable for cancellation in terms of section 50 of the Act. This is because the rights of 1st and 2nd respondents are subordinate to the rights of the Applicant who is the first pegger. See the case of *K & G Mining Syndicate* v *Mugangavari & Ors* HB 131/17. In this instance Bonsor South and Olympia 7 cannot co-exist. This is what has led to the physical and at times violent confrontation between the disputing parties."

Needless to repeat, in this instance, both the applicant and the fifth respondent hold certificates of registration to the mining location in dispute. As such they are both peggers in that regard. But that appears unimportant. What certainly is, for the determination of this application, is who the prior pegger is between the two of them. I have already stated that the applicant's title was registered in 1964 whilst that of the fifth respondent was registered in 2022 under a cloud of controversy. In fact, I have found as a fact that the fifth respondent's acquisition of that title was illegal because it violated absolute provisions of the EMA Act. It therefore needs no emphasis that by any standard, the applicant was the prior pegger to the

location in dispute and its rights take precedence over whatever claim the fifth respondent may have to the same location. For the avoidance of doubt, I am obliged to find as I hereby do that the applicant is the prior pegger of the mining area under disputation.

In my view, to the extent that the applicant complains that the fifth respondent's Avoseh claim was prospected pegged and registered within its mining area and that the fifth respondent is currently extracting lithium ore from therein there can be no doubt that the applicant has an interest in that exercise. It is therefore a matter affecting the applicant's rights and interests.

I am satisfied that this is an appropriate matter for the exercise of the court's discretion as provided for in s 14 of the Act.

DISPOSITION

Given the findings I made above the applicant clearly has a direct and substantial interest in the subject matter under litigation. I also concluded that this was an instance where I was entitled to appropriately exercise my discretion to determine the obligations and rights of the applicant and the lawfulness of the first to third respondents as well as those of the fifth respondent in terms of s 14 of the High Court Act. The grant of the prospecting and pegging licences to the fifth respondent and the registration of its Avoseh claim were illegal. In any case, I find that the applicant is the prior pegger of the disputed mining location. It therefore becomes inescapable to hold as I hereby do that the applicant has successfully established the requirements for the grant of the declaratur which it prayed for. Resultantly**, IT IS ORDERED THAT:**

1. The application for a declaratory order and consequential relief be and is hereby granted.
2. The application for the counter claim be and is hereby dismissed.
3. The certificate of registration number 17332BM consisting of twenty-four (24) blocks of lithium claims named Sandawana AV8 registered in the name of the fifth respondent and granted by the first respondent on the 16 November 2022 be and is hereby declared null and void and of no force or effect.
4. The first respondent be and is hereby ordered to forthwith cancel and remove from his register the certificate of registration number 17332BM consisting of twenty-four (24) blocks of Lithium claims named Sandawana AV8 registered in the name of the fifth respondent.

5. The respondents shall pay the applicant's costs.

Chimuka mafunga Law chambers, applicant's legal practitioners
Civil Division, Attorney General's Office, first-third respondents' legal practitioners
Enviromental Management Agency, fourth respondent's legal practitioners
B Chipadza Law Chambers, fifth respondent's legal practitioners