PAIDAMOYO PATIENCE KURUNERI N.O.
(In her capacity as Executor of the Estate Late Christopher Tichaona Kuruneri)
versus
SIPHO MLALAZI
and
THABANI NDLOVU

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE 23 November 2024 & 27 November 2024

W Musikadi for the applicant
I Chikaka for the respondent

DUBE-BANDA J:

[1] In this application, the applicant seeks the eviction of the first and second respondents from mining claims situate at Ascotvale Farm, Mazowe District, Mashonaland Central. The order sought is couched in the following terms, that:

i. The first respondent (equipment, goods, property and other chattels) and all those occupying through them, be and are hereby directed and ordered to forthwith vacate from a mining claim namely Rosary 101 (Certificate of Registration Number 39061 named Rosary 101) registered in the name of the 1st respondent situate on Ascotvale Farm, Mazowe District, Mashonaland Central.
ii. The second respondent (equipment, goods, property and other chattels) and all those occupying through them, be and are hereby directed and ordered to forthwith vacate from a mining claim namely Rosary 47 (Certificate of Registration Number 29945 named Rosary 47) registered in the name of the second respondent situate on Ascotvale Farm, Mazowe District, Mashonaland Central.
iii. If the first and second respondent does (*sic*) not comply with paragraph 1 above, the Sheriff of the High Court (together with such officers of the Zimbabwe Republic Police he may require) be and is hereby authorized to eject the first and second respondents

aforesaid together with all persons acting on its (*sic*) instructions from the place (*sic*) referred to in para 1 and 2.

iv. The first and second respondents shall pay the applicant's costs of suit on a legal practitioner and client scale.

[2] The application is opposed by the first respondent, and the second respondent neither filed opposing papers nor sought to participate in any way in these proceedings. In the circumstances, the second respondent is in default.

FACTUAL BACKGROUND

[3] This application will be better understood against the background that follows. In her founding affidavit the applicant avers that she is the executrix of the Estate Late Christopher Tichaona Kuruneri ("late Kuruneri") by virtue of Letters of Administration issued in DRB No. 2669/22. It is averred that sometime in 1997 the late Kuruneri purchased Ascotvale Farm measuring 984.6446 ha ("Farm"), and it was transferred into his name and he obtained a deed of transfer number 6802/97. The first and second respondents are holders of mining claims known as Rosary 101 and Rosary 47 respectively. These mining claims are located at Ascotvale Farm.

[4] On 22 September 2020 the late Kuruneri sued out a court application in case number HC 8577/19 citing the respondents as Mining Commissioner Mashonaland Central; Provincial Mining Director Mashonaland Central; Minister of Mines and Mining Development and Secretary for Mining Development. It was averred that the officials at the Ministry of Mines were issuing prospecting licenses, mining licenses, and permits to prospective miners at the Farm in the absence of an Environmental Impact Assessment Certificate required in terms of the Environmental Management Act [*Chapter* 20:27]. On 25 March 2021 this court (*per* CHINAMORA J) acceded to the application and granted an order couched as follows:

i. The first and second respondents (the Mining Commissioner Mashonaland Central and Provincial Mining Director Mashonaland Central), their agents, appointees or any persons acting in their place and stead shall not issue any mining licence, permit or certificate in terms of the Mines and Minerals Act [*Chapter* 21:05] relating to any mining claim situate on Ascotvale Farm, Mazowe District, Mashonaland Central Province, unless an Environmental Impact Assessment Certificate in respect of such has first been issued by the Environmental Management Agency in terms of s 97 of the Environmental Management Act [*Chapter* 20:27].

ii. Any mining licenses, permits or certificates which were issued in respect of such claims by the first and second respondents without an Environmental Impact Assessment Certificate having first been issued shall be null and void and of no force and effect.

iii. The respondents to pay costs of suit.

[5] In case number HCH 106/24 the respondents (as applicants) filed a court application seeking rescission of the order in HCH 8577/19. In *Mlalazi & Another v Kuruneri N.O.* HH 152/24 (per MUCHAWA J) the court struck the rescission application off the roll with costs on a legal practitioner and client scale. In this application the applicant is anchoring her cause of action on paragraph 2 of order in HC 8577/19 to seek the eviction of the respondents from the mining claims situate at the Farm. It is against this background that applicant has launched this application seeking the relief mentioned above.

SUBMISSIONS BY THE PARTIES

[6] The applicant submitted that the court in HCH 8577/19 declared null and void any mining license, permit or certificate obtained or registered on the Farm in the absence of an Environmental Impact Assessment Certificate. Mr *Musikadi* counsel for the applicant submitted that the first respondent's mining claim was registered in the absence of an Environmental Impact Assessment Certificate, in that he has failed to produce a certificate that predates the registration. Counsel submitted further that the first respondent has failed to show that his mining claim was not affected by paragraph 2 of the court order under HCH 8577/19.

[7] Mr *Musikadi* submitted further that the order in HCH 8577/19 is extant, is binding and could not be ignored. Counsel submitted further that the application for rescission of judgment in HCH 106/24 was struck off the roll, and the respondents have not done anything to prosecute it further. Counsel emphasised that the first respondent is in illegal occupation of the Farm and in particular the mining claim.

[8] Per *contra*, the first respondent submitted that he is not in illegal occupation of the mining claim, in that he has a certificate of registration and a valid Environmental Impact Assessment Certificate. The first respondent submitted further that in *Mlalazi & Another v Kuruneri N.O.* HH 152/24 the court said he was not bound by the order in HCH8577/19, and the applicant accepted this position, she cannot make a turn and anchor her cause of action on that order. It was argued that there is no need for the first respondent to comply with the order in HCH 8577/19 as he was found not to be bound by it. It was submitted further that the order anchoring the cause of action was obtained after the two-year period available to challenge a

mining license has lapsed in terms of the Mines and Minerals Act. The first respondent is said to have registered the mining claim in 2007, and the order in HCH 8577/19 was obtained twelve years after registration. Further it was submitted that the first respondent was not party to HCH 8577/19. On the basis of the above submissions, the first respondent sought that the application be dismissed.

THE LAW AND THE FACTS

[9] The applicant's cause of action is primarily located in paragraph 2 of the order in HCH 8577/19; which states thus:

> "Any mining licenses, permits or certificates which were issued in respect of such claims by the 1st and 2nd respondents without an Environmental Impact Assessment Certificate having first been issued shall be null and void and of no force and effect."

[10] The resolution of this matter turns on the interpretation of this paragraph of the order, which interpretation must be located in the context of the cause of action in HCH 8577/19. In HCH 8577/19 the late Kuruneri averred that the officials in the Ministry of Mines have been issuing mining licenses, permits or certificates to prospective miners on his Farm without prior issuance of Environmental Impact Assessment Certificate. He averred further that he was seeking a declarator against the mining authorities that any mining licenses, permits or certificates that they issue or have issued to prospective miners on the Farm without Environmental Impact Assessment Certificate be declared null and void and of no force and effect. It is in this context that the court granted paragraph 2 of the order in HCH 8577/19.

[11] The late Kuruneri sought the order to be retrospective, i.e., to declare null and void and of no force and effect any mining licenses, permits or certificates already issued without an Environmental Impact Assessment Certificate. The court acceded to the request and issued the order sought, whose paragraph 2 has a retrospective effect. For completeness, the Environmental Management Act [Chapter 20:27] was enacted in 2002, and s 97 as read with the First Schedule to the Act prohibits the implementation of any project in respect of mining; mineral prospecting; mineral mining; and ore processing and concentrating without a certificate having been issued in terms of the Act. My understanding of paragraph 2 of the order in HCH 8577/19 is that it targeted any mining licenses, permits or certificates issued after the commencement of the Act in respect of any mining claim at the Farm. The registration certificate for the first respondent in respect of Rosary 101 was issued in 2007, therefore it is within reach of paragraph 2 of the order.

[12] The order in HCH 8577/19 is extant and binding. In the absence of a challenge against the order through an appeal, review or procedure for rescission, an order of a court of unlimited

jurisdiction remains extant and binding. See *Heuer v Two Flags Trading (Private) Limited and Others* (45 Of 2024) [2024] ZWSC 45 (30 May 2024); *Manning* v *Manning* 1986(2) ZLR 1 (SC); *Mkize v Swemmer & Anor* 1967 (1) SA 186 (D) at 197 C-D). This is so even if the late Kuruneri side-stepped the respondents and sued the Ministry of Mines officials. It is clear that the late Kuruneri knew of the registration certificate of the first respondent. I say so because in HCH 8577/19 he attached a letter dated 16 April 2019, a letter he caused to be addressed to the Mining Commissioner wherein he indicated that five miners were issued with certificates of registration and were mining on Ascotvale Farm. He mentioned Sipho Mlalazi the first respondent by name. Therefore, it is clear that he side-stepped the respondents in HC 8577/19, and obtained an order nonetheless. Notwithstanding this side-stepping, the order remains extant and biding.

[13] The submission that the first respondent has a certificate of registration and a valid Environmental Impact Assessment Certificate for Rosary 101 cannot assist him in this application. I say so because the Environmental Impact Assessment Certificate that can rescue him is the one issued prior to the issuance of his registration certificate in 2007. It is clear that he has no such certificate issued before 2007, otherwise he would have easily produced it. In addition, the argument that in *Mlalazi & Another v Kuruneri N.O.* HH 152/24 the court said the first respondent was not bound by the order in HCH8577/19 is of no consequence. It is of no moment. It is so because paragraph 2 of the order nullifies any mining licenses, permits or certificates already issued at the Farm without an Environmental Impact Assessment Certificate. Rosary 101 is situated at the Farm and was first registered in 2007 without an Environmental Impact Assessment Certificate. The fact that he now has an Environmental Impact Assessment Certificate obtained post 2007 cannot rescue him from the dilemma he finds himself in. Therefore, the first respondent cannot escape the binding effect of the order in HCH 8577/19, and the submission that he was not party to HCH 8577/19 is of no consequence. The order is binding on the parties therein as well as the first respondent. See *Heuer v Two Flags Trading (Private) Limited and Others* (45 Of 2024) [2024] ZWSC 45 (30 May 2024).

[14] In addition, the first respondent seeks refuge under s 58 of the Mines and Minerals Act [Chapter 21:05]. It was argued that Rosary 101 was registered in 2007, the order in HCH 8577/19 was obtained twelve years after registration, therefore it has no effect on the first respondent's mining claim. I do not agree. The sections provides thus:

58 Impeachment of title, when barred

> "When a mining location or a secondary reef in a mining location has been registered for a period of two years it shall not be competent for any person to dispute the title in respect of such location or reef on the ground that the pegging of such location or reef was invalid or illegal or that provisions of this Act were not complied with prior to the issue of the certificate of registration."

[15] In *casu*, there is a court order which declares any mining licenses, permits or certificates which were issued without an Environmental Impact Assessment Certificate having first been obtained null and void and of no force and effect. This is the elephant in the room, and this is what the first respondent has to contend with. Section 58 cannot avail the first respondent in this application, because the court has already pronounced itself that the certificate he is holding is null and void. This court cannot ignore the extant and binding order in HC 8577/19.

[16] Furthermore, the application for rescission in HCH 106/24 was struck off the roll. My thinking is that it is to that case that the first respondent must turn. His remedy falls squarely in terms of the law and it is upon him to explore his option as provided for in the law. Trying to challenge the order in HC 8577/19 through this case i.e., through the back-door as it were would not serve any useful purpose. He must confront the order head on. That is what the first respondent has to contend with.

[17] The applicant is holding onto the order in HC 8577/19 and it gives her a right to seek the eviction of any miner having a mining claim at Ascotvale Farm with a registration certificate obtained without an Environmental Impact Assessment Certificate having first been issued, this includes the first respondent. It is for these reasons that this application must succeed.

[18] For completeness, this judgment primarily deals with the first respondent. The second respondent did not oppose this application, therefore in respect of him I intend to grant a default judgment.

COSTS

[19] The applicant has succeeded to obtain the relief she sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. The applicant is entitled to her costs. She sought costs on a legal practitioner and client scale. On a closer scrutiny of the facts of this case, the applicant is not entitled to costs on such a scale. Such costs are not for the mere asking. Something more underlies the practice of awarding costs on a legal practitioner and client scale, than the mere punishment of the losing party. See *Kangai v Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660. No case has been made for costs on such a scale. Costs on a party and party scale will meet the justice of this case.

In The Circumstances, I Order As Follows:

i. The first respondent and all those occupying through him, be and are hereby directed and ordered to forthwith vacate from a mining claim namely Rosary 101 situate on Ascotvale Farm, Mazowe District, Mashonaland Central.

ii. The second respondent and all those occupying through them, be and are hereby directed and ordered to forthwith vacate from a mining claim namely Rosary 47 situate on Ascotvale Farm, Mazowe District, Mashonaland Central.

iii. Failure of the respondents to comply with paragraph 1 and 2 above, the Sheriff of the High Court be and is hereby authorized to evict the said respondents together with all persons claiming the right of occupation through them.

iv. The first and second respondents shall pay the costs of suit.

ChimukaMafunga Commercial Attorneys, applicant's legal practitioners
Chivandire Mavhaire & Zinto Law Chambers, 2nd respondent's legal practitioners