ZIMASCO (PVT) LTD

versus

TARIRO NDLOVU

and

DAVID STODDART
And

MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 21 November 2023 & 26 JANUARY 2024

For Applicant; P. Takaendesa
For Respondent; M. Jaravaza

OPPOSED APPLICATION

ZISENGWE J: This is an application for condonation for the late filing of an application for review. Should this application succeed, the application intends to seek a review of the decision of the 1st respondent rendered on the 1st of September 2022. In that decision 1st respondent declined to entertain the dispute between the applicant and the 2nd respondent on the basis that a determination over the same dispute had already been rendered in March 2014 (which case was captioned as Dispute/Falcon Gold 1 D Stoddart/2014) hence there was no need to re-open it.

The matter has its roots in what can be loosely described as a boundary dispute between the applicant and the 2nd respondent who have rights in two adjacent mines in the Shurugwi District of the Midlands province. The two mining blocks are Umcima 6 (Registration No. 7854 BM) and Lulu West 22 (Registration No. 29003) respectively.

The applicant initially made an application for the review of that decision under case No. HC (CAPP 173/23) with the High Court sitting at Bulawayo but later withdrew it on 30 May 2023. The withdrawal came in the wake of legal opinion obtained from an advocate following preliminary points raised by the 2nd respondent in opposing that application. Needless to say, by the time the applicant sought to mount the "second" review application it was out of time hence the present application for condonation

The main dispute, as earlier stated essentially relates to the parties mining rights within a territory adjacent to their common boundary. Things came to a head when applicant deployed security personnel to man what is now known to be the disputed territory and the 2nd respondent demanded their removal. According to applicant efforts to engage the 2nd respondent to ascertain the basis of the demand to remove his security personnel were fruitless prompting him to register a complaint with the 1st respondent.

Thereafter applicant and 2nd respondent exchanged correspondences over the issue, the culmination of which was that they signed consent forms submitting themselves to the jurisdiction of the 1st respondent to resolve the impasse. According to the applicant, however, it was surprised to receive a letter dated 1 September 2022 informing the 1st and the 2nd respondent of the determination referred to earlier. It was that letter which birthed the application for review and as an adjunct to it, the present application. The letter main part of the letter reads:

> *After a thorough investigation of the dispute, we have noted that this matter was dealt with and concluded with a determination by this office in March 2014 ref* ***Dispute/Falcon Gold v D Stoddart/2014****. A determination was made at the time in which both parties were given shown and given ground verified coordinates for their respective claims after noting that both parties claim positions were at variance with registration positions.*
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> *We also note that the matter was communicated to the Permanent Secretary on 01 July 2015 with a recommendation on the decisions made and taken at the time. The essence of the determination was to* ***instruct disputing parties to erect and maintain permanent beacons*** *on terms of section 51 read with section 375 of the Mines and Minerals Act, [Chapter 21:05]. We further note that on the 23rd of October 2019, Mr David Stoddart wrote you (ZIMASCO) informing you of his intention to resume his operations at his Lulu 22 West. This letter, which we would*

*like to believe is not misleading, shows that Mr Stoddart and yourselves conducted field inspection in presence of each other, which inspections were further verified by Mr.S Kalenjeka. The letter goes further as to provide the Lulu 22 West coordinates which are claimed to have been further verified by **field inspections** by both parties' teams in 2018. A diagram attached shows the relationship then between Lulu 22 West and Umcima 6 mines.*

In view of the above, we find no reason to re-open the matter or alternatively review and change the location of Lulu West after both parties were given specific location for the disputed claims.

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The letter was authored by the 1st respondent who gave his designation therein as the Provincial Mining Director for the Midlands province.

According to applicant, subsequent efforts through a series of meetings to address the situation and to have the matter heard did not bear fruit for one reason or the other. This left it with no option save to approach the court with a review application to have the 1st September 2022 determination set aside.

On account of the importance of the formulation of the grounds of review and the relief sought thereto to this application they will be reproduced here verbatim. They were are couched as follows:

GROUNDS OF REVIEW

Review is sought on the following grounds:-

1. That the first respondent had no jurisdiction to entertain the dispute hence the determination is a nullity
2. It was grossly irregular and grossly unreasonable for the1st respondent to make a finding that the dispute between applicant and 2nd respondent has been concluded by his office in 2014.
3. It was grossly irregular and grossly unreasonable for the 1st respondent to conclude that he could not reopen the case when he was dealing with a fresh dispute.
4. It was grossly irregular for the 1st respondent to make a determination without giving the applicant an opportunity to make representations and be heard before making the decision.

5. 1st respondent misdirected himself by making a conclusion based on a letter by 2nd respondent without any input from applicant and treating the contents of the letter as if they were binding on the office of 1st respondent.

RELIEF SOUGHT

6. 1st Respondent's decision of 1st September 2022 be and is hereby set aside.
7. That the dispute between applicant and 2nd respondent In respect of whether or not Lulu 22 West over-pegs Umcina 6 mine be referred back for a re-hearing by an administrative authority appointed by the 3rd respondent or his assigned delegates within thirty days of the order of this court.
8. That there be no order as to costs unless the respondents oppose the application.

The draft order mirrors the relief sought.

In this application the application avers that it meets all the requirements for the granting of an application for condonation which generally are:

a) That the delay involved is not inordinate, having regard to the circumstances of the case;
b) That there is a reasonable explanation for the delay;
c) That the prospects of success should the application be granted are good; and
d) The possible prejudice to the other party should the application be granted.
e) The importance of the case and the need for finality to litigation

See *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S); *Marick Trading Ltd v Mutual Life Assurance Co. (Pvt) Ltd & Anor* HH 667/15; *Dzvairo v Kango Products* SC35/2017.

It is contended on behalf of the applicant that the delay in filing the review was not inordinate in light of the steps it pursued to reverse the impugned determination. These steps i*nter alia* include a series of meetings held or intended to be held with the 1st and 2nd respondents (which meetings he recounts in some detail) well as the abortive application under cover HC APP 173/23 with the Bulawayo High Court.

The applicant also avers that it enjoys bright prospects of success in the review application primarily on the following grounds captured in the review application

1. That the 1st respondent had no jurisdiction to entertain the dispute hence the determination is a nullity.
2. That it was grossly irregular and grossly unreasonable for the 1st respondent to make a finding that the dispute between application and 2nd respondent had been concluded by his office in 2016 yet the applicant was not a party to those proceedings.
3. That it was grossly irregular and grossly unreasonable for the 1st respondent to conclude that it could not reopen the case when he was dealing with a fresh (i.e. new) dispute.
4. That it was grossly irregular for the 1st respondent to make a determination without giving the applicant an opportunity to make representations and be heard before making the decision.
5. That the 1st respondent misdirected himself by making a conclusion based on a letter by 2nd respondent without any input from Applicant and treating the contents of the letter as if they were binding on the office of the 1st respondent.

The relief that the applicant will purse, should it surmount the present condonation hurdle is the setting aside of the 1st respondent's determination of the 1st of September 2022 and a referral of the dispute between itself and the 2nd respondent (over whether or not Lulu 22 west over pegs Umcina 6 mine) for a re-hearing by an administrative authority appointed by the 3rd Respondent or his assigned delegates within 30 days of the granting of the review application.

As for the fourth requirement in an application for condonation, the applicant avers that no prejudice would be occasioned to the respondents should the application be granted; yet it (i.e. applicant) stands to suffer huge financial losses and a significant portion of its claim should the application be dismissed.

It further avers that the determination of the review application is of jurisprudential importance and may very well set a precedent on how such matters should be tackled in future.

Finally, it avers that although the principle that there be finality to litigation is important, the court should find that it has not mounted several cases and therefore it should be afforded the platform to have the review application heard.

The application stands opposed by the 2nd respondent. Apart from raising several points *in limine* which according to him are potentially dispositive of the matter in his favour, the 2nd respondent avers that the application should be dismissed for lack of merit. It is however to the points *in limine* so raised that I now turn.

Initially the 2nd respondent raised 4 points *in limine* namely:

a) That the court should decline jurisdiction on account of applicants' alleged forum shopping.
b) That the application for condonation is fatally defective on account of an improperly commissioned founding affidavit the rendering the application a nullity.
c) That the grounds of review are self -contradictory rendering the application for review fatally defective.
d) That the draft order in the review application in that it is wrongly framed and incompetent.

The first preliminary objection was soon abandoned and counsel for the 1st respondent ultimately conceded during the hearing of this application that the 3rd and 4th points *in limine* in effect relate to prospects of success in the main application for condonation and should not feature as points *in limine per se.*

This therefore left the sole remaining preliminary point being that of the alleged defectiveness of the applicant's founding affidavit.

It is averred by the 2nd respondent in this regard that the applicant's founding affidavit bears a computer-generated date depicting the date of the 7th of June 2023 as the date it was deposed to. According to the 2nd respondent that there being no indication of the date on which the deponent signed the affidavit and there being no indication of the date on which the Commissioner of Oaths administered the oath and appended his signature thereto, the affidavit is fatally defective.

The applicant reacted by attaching to its answering affidavit, an affidavit by the Legal Practitioner who administered the oath namely Bridget Mahuni a legal practitioner with Muvingi and Mugadza legal practitioners. In it, she confirms having administered the oath on the 7th of June 2023 at the behest of the applicants' company & secretary/ legal advisor. She also explains that her firm's offices and the applicant's offices are housed within the same building.

The 2nd respondent nonetheless did not relent in its attack on the founding affidavit. In heads of argument reliance was placed *inter alia* on the case of *Bruce Ndoro & Anor v Congugal Enterprises (Pvt) Ltd & Anor* HH 814/22 where the following was said by DEME J:

> *"I will now turn my attention to the issue for the validity of the opposing affidavit which is before the court. In the case of Twin Castle Resources (Pvt) Ltd v Paari Mining Syndicate and Ors the Court made the following remarks:*
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> *"The main notice of opposition itself was equally said to be defective. Whilst the main notice of opposition bore a stamp by the Commissioner of Oaths, it was silent as to when Luxton Mawanga who swore to the affidavit, had appeared before the Commissioner of Oaths. It merely had one computer generated date as to when the deponent had signed. It was therefore argued that effectively there was no notice of opposition before me. Applicant's lawyer Mr. Chiuta, drew on the case of Mike Mandishayika v Maria Sithole HH 798/15 to bolster this point wherein it was stated that:*
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> *"An affidavit is a written statement made on oath before a commissioner of oaths or other person authorised to administer oaths. The deponent to the statement must take the oath in the presence of the commissioner of oaths and must append his or her signature to the document in the presence of such commissioner. Equally the commissioner must administer the oath in accordance with the law and thereafter must append his or her signature onto the statement in the presence of the deponent. The commissioner must also endorse the date on which the oath was so administered. These acts must occur contemporaneously."*

See also State v Hurle & Others (2) 1998(2) ZLR 42 and Firstel Cellular (Pvt) Ltd v NetOne Cellular (Pvt) Ltd S-1-15.

In countering the 2nd respondent's argument on the alleged defectiveness of the founding affidavit, it was submitted on behalf of the applicant that there is in fact no law in this jurisdiction which prescribes that the dates on an affidavit ought to be handwritten as a computer generated one in appropriate circumstances may suffice. It was further pointed out in this regard that the Justice of the Peace and Commissioner of Oaths Act, [*Chapter 7:09*] being silent on the precise manner of the administration of oaths, the subject is primarily regulated by practice. Reliance was placed on *Firstel Cellular (Pvt) Ltd v Net One Cellular (Pvt) Ltd* SC 01-15 where PATEL JA had this to say in albeit different set of circumstances.

> *"It is common cause that there is no specific legislation regulating the issue on this jurisdiction and that the matter is one that is governed by practice. In that regard, what is required is that any stamp that is used to designate a commissioner of oaths should clearly identity the person whom an affidavit is deposed and the office or capacity in which he or she acts as a commissioner"*

The main contention by the 2nd respondent appears to be that since the founding bears a computer-generated date, it is not clear when exactly when the deponent took oath before the commissioner of oaths and signed the affidavit, neither is there an indication of when the Commissioner of Oaths administered the oath and when he signed the affidavit.

He also urged the court to disregard the contents of the Commissioner of Oaths who purportedly administered the oath on the basis that an application stands or falls on the founding affidavit.

While the observations made in the *Ndoro* case (*supra*) and the cases referred therein are apt, what sets this matter apart is the fact that the commissioner of oaths who administered the oath has since cleared the air regarding the date and circumstances under which the oath was administered. I do not believe the *dicta* in the cases relied upon by the 2nd respondent create a rigid rule of practice on the format of an affidavit. What must be clear *ex facie the* affidavit is that

the administration of the oath and the appending of the signatures by both the deponent and the Commissioner of oaths took place contemporaneously.

I do not believe it is every blemish or imperfection no matter how slight, in the format of an affidavit that serves to invalidate it. Although the *Firstell (Pvt) Ltd v Net One* case (*supra*) grappled with a different scenario, namely the designation or status of a person as a commissioner of oaths, the overarching principle that can discerned therefrom, however, is that a court may take due cognisance of a particular set of facts surrounding the administration of oaths in determining the validity or otherwise of the affidavit.

In that case the alleged flaw in the commissioning of the affidavit in question was that the legal practitioner who commissioned it had used a stamp ordinarily used for certifying original documents as being true and correct. However, that date stamp also denoted that legal practitioners as a commissioner of oaths and notary public. The court was quite prepared to overlook the apparent shortcoming of the "*wrong*" date stamp having been used.

I do not believe the legal practitioner who commissioned the affidavit in question would perjure herself by confirming under oath that she commissioned the affidavit on the date stated on it, *albeit* one that was computer generated.

I believe that the applicant managed to make a good case for the acceptance of the founding affidavit hence the point *in limine* is hereby dismissed.

On the merits

The 2nd respondent took the applicant head on each of the latter's averments. It must be noted that the 2nd respondent incorporated the averments which he initially held out to be preliminary points as substantive arguments on the merits. These relate particularly to the alleged defectiveness of the review application which according to him renders the present application unmeritorious. These will be dealt with under the heading "prospects of success".

The extent of the delay and the explanation therefor.

The impugned determination was made on 1st of September 2023 and the present application was launched on the 9th of June 2023. It is however not in dispute that applicant did not sit on its laurels as time passed by. It pursued both judicial and extra- judicial interventions to have the situation redressed. Extra-judicially, it sought to have audience with the 2nd respondents. Judicially, it made the first application for review which was however subsequently withdrawn.

I believe that although the delay appears to be fairly long, the explanation proffered thereto is satisfactory.

Prospects of success in the main application

It was submitted on behalf of the applicant that it enjoys good prospects of success in the review application. It was averred in this regard that the 1st respondent in his capacity as the Provincial Mining Director lacked jurisdiction to entertain the boundary dispute between the appellant and the 2nd respondent and that therefore his determination was a nullity which stands to be set aside on review. It was further submitted in this regard that the Mines and Minerals Act, [*Chapter 21:05*] (hereinafter referred to as "the Act") does not provide for the position of a Provincial Mining Director, but that of a Provincial Mining Commissioner and that it is only the latter who is empowered by the Act to entertain such disputes. It was further averred on behalf of the applicant in this application that should the reviewing court find that the 1st respondent does have jurisdiction then it will argue that the 1st respondent committed gross irregularity and grossly misdirected himself in several respects.

Chief amongst the bases for the intended review are the following. Firstly, that the 2014 decision pitting Falcon Gold and the 2nd respondent could not be regarded as binding on the applicant as it was not a party thereto. Secondly that the 1st respondent's use of the word "re-open" was erroneous because it presupposes an earlier dispute between the same parties yet there was none. Thirdly, that reliance of the 1st respondent on a letter by the permanent secretary of the third respondent was erroneous because such letter was of no relevance to the dispute at hand. Fourthly, that the 1st respondent grossly erred in failing to afford the parties an opportunity to be heard before pronouncing itself on the matter. Fifth, that the 1st respondent grossly erred in declining to entertain

the dispute ostensibly on the basis that it could not review or change the position of Lulu West, yet that was not the issue before it.

Per contra, the 2nd respondent argues to that the application for review has very dim prospects of success mainly on the basis of the alleged defectiveness of the application. In this regard he attacks the manner in which the grounds of review are pleaded and how these grounds of review relate to the relief sought. He advances four main reasons why he believes the application for review is doomed to fail mon account of the defectiveness, these are:

a) That the 1st ground of review wherein applicant impugns the jurisdiction of the 1st respondent to entertain the boundary dispute between it (i.e. applicant) and the 2nd respondent is inconsistent and irreconcilable with the other 3 grounds of review.
b) That the 1st ground of review (where it is contended that the 1st respondent purported to entertain a dispute over which it had no jurisdiction- is inconsistent are irreconcilable with the order sought as captured on the applicant's draft order.
c) That the draft order is fatally defective as it seeks an incompetent order.
d) That the Draft order is wrongly framed and (therefore) incompetent.

The issues arising from the above will be dealt under three broad heads

The alleged discordance between the grounds of review and the draft order

Here, there was an apparent misapprehension on the part of the 2nd respondent of the import of the ground of review relating to absence of jurisdiction on the part of the 1st respondent. The main thrust of the applicant's contention is that the 1st respondent in his capacity as Regional mining Director (not in his individual capacity) lacks jurisdiction to entertain mining disputes, for two related reasons. Firstly, the position of Regional mining Director is not provided for under the Act. Secondly, only the Mining commissioner enjoys concurrent jurisdiction with the High Court to adjudicate over such disputes. There is therefore no merit in the contention that the intended review application lacks prospects of success on account of the perceived inconsistency between the grounds of review vis a vis the order sought.

Attack on the grounds of review

Here, the main thrust of the 2nd respondent's contention is that the applicant cannot in one breath assert that the 1st respondent lacked jurisdiction to entertain the boundary dispute and was therefore a nullity yet in the next breath proceed to attack the reasonableness of the decision arrived at. According to the 2nd respondent grounds 2-5 needed to be pleaded in the alternative to ground 1 and that not being the case, the application was fatally defective.

A perusal of the draft application review indeed reveals an abysmal failure in drafting. At no point are grounds 2-5 pleaded as an alternative to the first ground of review. The only allusion to former grounds being in the alternative to the latter is only captured in paragraph 29.2 of the applicant's founding affidavit in the present application. That is too late in the day to rectify the error because what falls for scrutiny in determining the prospects of success is the draft application for review. I will only refer to two of the *dicta* from the several cases cited by the 2nd respondent.

In *Susan Mutangadura v Alban Dhladhla Chirume* HH669/19, the following was said by MUREMBA J, at page 12 of the cyclostyled judgment:

> *"2 causes of action cannot be pleaded in one claim even if both are applicable. They have to be pleaded in the alternative of each other. In casu, the two causes of action which the plaintiff pleaded together cannot even be used in the alternative of each other"*

In *ZIMRA v Stanbic Bank Zimbabwe Ltd* SC 13/19 at page 14 where the following was said:

> *"With this as its pronounced stance, the respondent, could not, without abandoning its argument, move for relief which was predicated on the exact antithesis of its given position. In the words of De Villiers JP in Hlatswayo v Mare & Deas 1912 AD 242 at 259, dealing with a similar principle of pre-emption:*
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> *"At the bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate."*

The question that begs is whether the failure to plead the grounds 2-5 of review as an alternative to ground 1 renders the current application for condonation fatally defective ostensibly on the basis of lack of prospects of success. This requires a revisit to the question of what is meant by prospects of success.

In *Doves Funeral Assurance (Private) Limited v Harare Motorway (Private) Limited and 4 Others* SC14/2023, *Makoni JA* referred to *ESSOP v S*, 2016 *ZASCA* 114 on the applicable test of prospects of success where the following was said.

> *"What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other word, be a sound rational basis for the conclusion that there are prospects of success on appeal."*

Although these sentiments were expressed in the context of application for condonation for late noting of an appeal, the principle stated applies with equal force in an application for condonation for late noting of review. What is key is that the prospects of success in the intended review application should be realistic rather than remote. The manner in which the grounds of review are structured will be key and pivotal in the review application, so too will be the nature of the relief sought. Therein lies the problem for the applicant. The drafting of the grounds of review was rather slipshod and cavalier. It is not immediately apparent why grounds 2-5 of review were not pleaded in the alternative.

In a bid to salvage the situation and indirectly conceding that such a failure to plead the grounds of review in the alternative was bad at law, counsel for the applicant drew the court's attention to a paragraph in the present application wherein it was averred that in the event of the court finding that the 1st respondent had jurisdiction, then the court should consider the other grounds of review. Such an averment only surfacing in the present application amounts to a case

of too little too late, it cannot rescue the defect in the application for review as it is conspicuous by its absence in the draft application for review.

There is merit, therefore in the overall point made by the 2nd respondent that the application for review is unlikely to succeed *inter alia* on account of that glaring defect.

Attack on the order sought on review

As if the defectiveness of the grounds of review is not bad enough the order sought as captured in the draft order is equally problematic. The applicant seeks an order *inter alia* directing a re-hearing of the dispute by an administrative authority appointed by the third respondent or his assigned delegate.

There being no provision empowering the 3rd respondent to appoint an administrative authority to hear the dispute in question the order sought is incompetent.

Section 345 (1) of the Act clearly provides that it is the Mining Commissioner who enjoys concurrent Jurisdiction with the High Court to entertain disputes of this nature. It reads:

> **345 Jurisdiction of High Court and mining commissioners**
>
> (1) Except where otherwise provided in this Act, or except where both the complainant and defendant have agreed in writing that the complaint or dispute shall be investigated and decided by the mining commissioner in the first instance, the High Court shall have and exercise original jurisdiction in every civil matter, complaint or dispute arising under this Act and if in the course of any proceeding and if it appears expedient and necessary to the Court to refer any matter to a mining commissioner for investigation and report, the Court may make an order to that effect.

One cannot therefore bestow upon the 3rd respondent powers which the Act does not grant him. Such an exercise of power will be *ultra vires* the Act and therefore unlawful. The applicant never bothered to explain why it believes the 3rd respondent has the power to do what it seeks. Admittedly part of the problem lies with the fact that whereas the Act does not as yet provide for the position of Provincial Mining Director, the functions of that office are in practice being currently performed by individuals holding that title. To worsen the situation, the position of the Mining Commissioner is in reality defunct. This is however not an excuse for the applicant to seek an order not supported by the Act. What the Act provides, however is that in terms of s341 (2) the

Secretary can assume the functions of the Mining Commissioner, which functions necessarily include adjudication over disputes between miners.

On that basis I find that there is merit in the 2nd respondent's contention that the order sought is not competent. An application wherein is sought an order not provided for by the law is defective. This therefore means that there are dim prospects of the review application succeeding. That being the case this application ought to fail.

I find that the requirement that there be finality to litigation be also accordingly resolved in favour of the 2nd respondent. There would be no need to drag him into a review application which carries minimal prospects of success. Similarly, the question of prejudice stands to be resolved in 2nd respondent's favour. He will be unnecessarily prejudiced by having to expend time and resources to fend off a doomed application.

Costs

The 2nd respondent seeks costs on the attorney and client scale. I do not believe that there is justification for such. The application is neither frivolous nor vexations now was it pursued in a reckless manner or with malicious intent. I believe costs on the ordinary scale will suffice.

Ultimately, therefore, the following order is hereby made:

IT IS HEREBY ORDERED THAT:

a) The application for condonation for late filing of review application is hereby dismissed.
b) The applicant to meet the 2nd respondent's costs on the party and party scale.

ZISENGWE J

Danziger &Partners; Applicants Legal Practitioners

Dzimba, Jaravaza & Associates; 2nd respondents legal Practitioners