HB 61/20
HC 1707/18

TILFURY ZIMBABWE (PVT) LTD

And

FUNGAI BANGIDZA

Versus

DAMOFALLS INVESTMENTS (PVT) LTD

And

MINISTER OF MINES & MINING DEVELOPMENT (N.O.)

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 27 JUNE 2018, 6 JUNE 2019, 25 OCTOBER 2019,
11 NOVEMBER & 21 MAY 2020

Opposed Application

Advocate L. Nkomo for the applicants
M. Matshiya for the 1st respondent

TAKUVA J: The applicants approached this court by urgent chamber application filed on 18 June 2018 seeking urgent interim relief in the form of a temporary interdict couched as follows:

> **"Interim Relief**
>
> Pending the confirmation or discharge of the order, applicants are granted the following interim relief.
>
> 1. That the 1st respondent, its agents, employees or assignees be and are hereby interdicted from interfering with the mining operations of the applicants at Glen Arroch 80, 81, 82 and 83 registered under 29584, 29585, 29805 and 29806 respectively.
>
> The terms of the final relief sought are as follows:

2.1 That the registration papers of the applicants in respect of Glen Arrcoch 80, 81, 82 and 83 under registration number 29584, 29585, 29805 and 29806 respectively be and are hereby declared valid.
2.2 That 1st respondent, its agents, employees, assignees be and are hereby permanently interdicted from interfering with the mining operations of the applicants at Glen Arroch 80, 81, 82 and 83.
2.3 That the 1st respondent pays costs of suit on attorney and client scale."

The 1st respondent filed opposing papers to the urgent chamber application on the 25th of June 2018. The application was set down for hearing on the 27 of June 2018. After hearing the parties, I proceeded in terms of Rule 246 of the High Court Rules 1971 and made the following order;

"1. The matter be postponed *sine die*.
2. Both parties, their lawyers, the Acting Provincial Mining Director, Midlands Province carry out an inspection of the precise location of the disputed claims ion Glen Arroch Plot of the main belt within ten (10) days of receipt of this order.
3. The Acting Provincial Mining Director Midlands Province be and is hereby ordered to file a report on the team's findings with the Registrar of this Court within ten (10) days of receipt of this order.
4. The Acting Provincial Mining Director Midlands Province be and is hereby ordered to provide the Registrar of this court with relevant maps of the mining claims and the land in dispute.
5. Bothe legal practitioners to file supplementary heads of argument or affidavits.
6. The Sheriff be and is hereby ordered to serve a copy of this order on the Acting Provincial Mining Director Midlands Province."

Unfortunately this order was not fully complied with amid accusations of applicant's obstruction. Notwithstanding the alleged obstructive conduct, the 2nd respondent filed his report on 7 August 2018. The applicants continued to carry out their mining activities. It was only after another lengthy delay that the matter was subsequently set down for the 6th of June 2019. The parties appeared in my chambers and it turned out that the order issued on 27 June 2018 had not been compiled with. I issued another order in the following terms;

"1. The matter be postponed *sine die*.
2. Both parties comply with the court's order granted on 27 July 2018 within the period of 30 days and the 2nd respondent file its report within that period.
3. Both parties to file heads of argument relating to the final relief sought before the hearing.

4. Thereafter the Registrar be and is hereby directed to set the matter down for hearing as soon as possible."

This order was granted by consent. This time the parties complied with the two orders and the Provincial Mining Director Midlands Province filed a survey report dated 24 June 2019. The matter was then set down for hearing on 22nd October 2019 and finally on 11 November 2019. On that day both counsel agreed that they were not making any further submissions and requested the court to deliver its judgment on the information on record.

Background facts

The 1st respondent owns land in Kwekwe along the Kwekwe – Gweru road on which the applicants own certain mining rights. These rights arise from 2nd applicant's application to the 1st respondent for a partial withdrawal which was duly granted on 9 May 2012. After pegging 2nd applicant proceeded to register mining claims under Glen Arroch 80 and 81 under registration numbers 29584 and 29585 respectively. Later in 2013, 1st applicant also registered Glen Arroch 82 and 83 under registration numbers 29806 and 29805 respectively. The applicants then commenced mining operations on these claims. They continue to mine.

Sometime in June 2018 a dispute arose between the applicants and 1st respondent leading to this application. According to the applicants, the 1st respondent threatened to bring security personnel to interfere with their mining operations. Second applicant in his founding affidavit stated that he and 1st applicant will suffer irreparable harm if their mining activities are stopped. He further claimed that there is no alternative remedy and that the balance of convenience favours the granting of the relief: The 1st respondent opposed the application on the following grounds:

In limine

(a) The application is not properly before this court in that the matter was already pending before the 2nd respondent when the applicants decided to bring the present application.

(b) The applicants have not complied with 2nd respondent's order to stop mining activities pending the resolution of the dispute. In other words, applicants should not be granted audience since their hands are dirty.
(c) The application is fatally defective in that it does not comply with Rule 241 of the High Court Rules 1971. In other words, applicants used the wrong form.
(d) A declaratur cannot be granted in favour of the 1st applicant because it has no interest in the matter.

These points need not detain my mind because the parties agreed that I consider whether or not the final relief should be granted. This inevitably means I should consider the merits of the matter. In any event any consideration of the above points *in limine* will not dispose of this matter as they are all interwoven with the merits. Accordingly, I proceed to deal with the merits where it was contented as follows:

(a) In respect of Glen Arroch 80 and 81 the co-ordinates were changed resulting in applicants mining in the wrong area.
(b) As regards Glen Arroch 82 and 83 their registration was done unlawfully in that the procedure outlined in section 31 of the Mines and Minerals Act was not complied with. These were registered by the 1st applicant and are clearly outside the EPO.
(c) Section 58 of the Mines and Minerals Act has no application in this case in that it is not absolute.
(d) The 2nd respondent's report shows a huge variance between the ground and docket positions in respect of Glenn Arroch 80 and 81. Instead of occupying 20ha,, applied for, the two claims currently occupy 21.3ha, i.e. 1.3ha in excess of what was applied for.
(e) A declaratur or and interdict cannot be granted because applicant's rights are neither clear nor definite.

The law

The requirements of a permanent and final interdict are a well beaten path. These are they.

1. a clear and definite right
2. an injury actually committed or reasonably apprehended and
3. the absence of a similar protection by any other ordinary remedy – see *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at p 53B and *Universal Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent & Anor* 2000 (1) ZLR 294 (H) at p 239.

The applicants contend that copies of the registration certificates filed of record constitute irrefutable proof of their clear rights as the holders of title to the said mining claims. Further they aver that the provisions of section 58 of the Act fortify their clear rights of title. Applicants also submitted that the on-site survey conducted on the 24th of June 2019 and the full report of the Provincial Mining Director Midlands, dated 8 July 2019 filed of record, show that the "mining claims on the ground" are within the partially withdrawn 20Ha piece of land at the 1st respondent's farm. Further, so the argument went, the fact that the detailed survey of the GPS co-ordinates of the beacons on the ground show that the GPS co-ordinates of the partially withdrawn 20Ha are all within the GPS co-ordinates set out in the 1st respondent's letter of 2nd March 2012 puts paid to the 1st respondent's accusation against the applicants that they changed the GPS co-ordinates upon registration of their mining claims.

Finally, it was argued that applicants have established a clear right to peaceful and undisturbed possession of their duly registered mining claims in that the survey report dated 24th June 2019 under "Findings" shows that the "shaft in dispute" falls within Glen Arroch 81 both in its ground and docket position, and also falls within the partially withdrawn 20ha area both on the ground and in the docket position.

I deal 1st with applicant's reliance on section 58 of the Act. The section provides;

> "58. When a mining location or a secondary reef in a mining location has been registered for a period of 2 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 any of the provisions of this Act were not complied with prior to the issue of the certificate of registration."

I agree with *Advocate Mpofu* for 1st respondent that in seeking shelter in s58, applicants are misdirected. I say so for the following reasons. Firstly, the section does not ground a cause of action but only sets out a defence akin to estoppel. It is a negative averment that does not sustain a declaratur. It is a shield of defence and not a ground of attack. Accordingly, applicants cannot rely on this provision as founding a claim.

Secondly, in any event the present application has not been made on this basis. The basis of the application is that applicants acquired rights lawfully and not that they acquired them unlawfully but there is no longer any one to question the validity of these rights. It is trite that an applicant must stand or fall by his petition and the facts alleged therein and that although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein because these are the facts which the respondent is called upon either to affirm or deny. See *Moyo & Ors* v *Zvoma NO & Anor* SC-28-10 at page 29 and *Pointas Trustess* v *Lahanas* 1924 WLD 67 at 68.

Thirdly, s58 does not introduce an absolute bar as contented by the applicants. Section 50 of the Act provides as follows:

> "50
> (1) Subject to subsection (2) the Mining Commissioner may, notwithstanding subsection (1) of section fifty-eight, at any time cancel a certificate of registration issued in respect of a block or site if he is satisfied that –
>
> (a) at the time when such block or site was pegged it was situated on ground reserved against prospecting and pegging under section thirty-one or thirty-five or on grounded not open to pegging in terms of subsection (3) of section two hundred and fifty-eight; or
>
> (b) Provisions of this Act relating to the method of pegging a block or site were not substantially complied with in respect of such block or site."

The *non obstante* clause in section 50 undermines provisions of s58 in circumstances where the Act was not observed. It follows that title which was taken unlawfully can be vacated. *In casu,* the dispute is before the Mining Commissioner under whose jurisdiction it falls and who has made certain important findings. It would be in my view undesirable to oust the Mining Commissioner's jurisdiction through a declaratur – see *Nyagwa* v *Gwinyai* 1981 ZLR 25.

For reasons that I outline hereunder the provisions of the Act were not substantially complied with in respect to the pegging of the claims. The applicants have failed to address the issue of how they registered three claims under registration numbers 29804, 29805 and 29806 respectively. These claims are registered in favour of 1st applicant. In his founding affidavit the 2nd applicant does not give details of the process he undertook to register these claims. All he says is they were registered "after satisfying the pegging requirements in terms of the law". In the absence of any proof that the 1st respondent's consent was granted, I find that the registration by the 2nd applicant of claims 29804, 29805 and 29806 was done unlawfully. The applicants never sought the 1st respondent's permission despite their knowledge that the consent of the holder of the (EPO) No. RH 988 was a requirement. Further, no permission for partial withdrawal of the three blocks was sought from the 2nd respondent either.

Section 31 (1) (a) of the Act provides as follows:

> "(1) Save as provided in Parts V and VII, no person shall be entitled to exercise any of his rights under any prospecting licence or any special grant to carry out prospecting operations or any exclusive prospecting order –
> (a) upon any holding of private land except with the consent in writing of the owner or of some person duly authorized thereto by the owner or in the case of a portion of Commercial Land by the occupier of such portion or upon any state land except with the consent in writing of the President or of some person duly authorised thereto by the President."

In casu, the 2nd applicant avers in paragraph 6 of his founding affidavit that;

"6. When I made an application for partial withdrawal to the 1st respondent I also on the same date applied to Zibagwe Rural District Council through my pegger for authority to prospect in the area under its jurisdiction. A copy of the application is attached hereto as annexure 'E'. A response thereto authorising the request was made on the 13th of May 2012. I attach hereto same as annexure 'F'." (my emphasis)

The question that boggles the mind is why were the applicants writing to Zibagwe Rural District Council if they intended to mine on land owned by the 1st respondent. Is this not the illegality that 1st respondent complains about? Surprisingly, when 1st respondent raised this issue in its notice of opposition, it was not directly addressed by the applicants. The only time that they attempted to address it is in paragraphs 35 and 37 of their heads of argument and paragraph 4 of the answering affidavit where they argued thus;

"35 Through annexures "B", "C" and "D" to the founding affidavit the applicants have shown that they followed due process by seeking and obtaining the 1st respondent's consent and agreement to peg the mining claims in dispute. The 1st respondent in paragraph 7 of its opposing affidavit admits and confirms the applicant's averments in this regard.

36. …

37. The applicants have never disputed that the land on which they carry on mining operations is owned by the 1st respondent, while their decision to seek and obtain the 1st respondent's consent to the pegging of the claims as far back as 2012. The first respondent voluntarily granted a partial withdrawal of EPO RA 988." (my emphasis)

Paragraph 4.1 of the answering affidavit states;

4.1. The averments by the 1st respondent are without merit. The 1st applicant and I are lawfully mining at Glen Arroch 80, 81, 82 and 83 registered under 29584, 29585, 29805 and 29806 respectively. See the requisite documents attached on the founding affidavit."

From the Global Positioning System survey maps produced by the various teams it is common cause that Glen Arroch 82 reg 29806, Glen Arroch 83 reg 29805 and main 2 reg 29804 all lie within the 1st respondent's farm. They are in the same area with Glen Arroch 80 and 81. The applicants have not bothered to explain how this land suddenly falls within the jurisdiction of Zibagwe Rural District Council. Annexures E and F on pages 20 and 21 of the record

complete this deceitful conduct by the applicants. One unsuspecting Councillor Eneslia Gwatidzo allegedly penned a letter confirming that the "site of the mine claims by Fungai Bangidza ID 13-098273 C 49 is our A1 plots." The letter is dated 13 may 2012 and there are no further particulars to pinpoint the precise location of this site." Therefore there is no link between this "site" and the claims that applicants subsequently registered.

In my view claims 29804, 29805 and 29806 were irregularly and improperly registered. Quite evidently applicants cannot claim any form of clear right under the circumstances.

As regards the 20ha block under registration numbers 29584 and 29585, there is a dispute of facts on the correct co-ordinates. The 1st respondent claimed that it realised after the registration of the claims that the 2nd applicant had misrepresented to the 2nd respondent on the co-ordinates agreed upon. Indeed it is apparent from annexure C filed by the 2nd applicant that all the original co-ordinates were altered and new ones inserted on it. First respondent has produced its copy of the letter as annexure "S". It does not contain these alterations. Surprisingly, the 2nd applicant did not explain this variance or who effected those alterations. It must be noted that these are the same co-ordinates that 2nd respondent's surveyors found on the ground when they inspected the site. It is common cause that upon discovering this anomally, 1st respondent on 17 August 2012 revoked the permission it had granted to the 2nd applicant.

I now turn to the evidence that was revealed by the surveyors during the several site visits by the parties. Pursuant to my order dated 27 June 2018, the team produced a survey report on the dispute. The findings are as follows:

> "1. A total of five (5) blocks belonging o Fungai Bangidza and Tilfury Zimbabwe Ltd are in Glen Arroch Farm, namely Glen Arroch 80, 81, 82 and 83 and Main 2 registration numbers are 29584, 29585, 29805 29806 and 29804 respectively.
> 2. Ground inspection was done on Glen Arroch 80,81 and 82. On Glen Arroch 82 only beacons were observed.
> 3. Glen Arroch <u>80 and 81 docket positions do not tally with ground positions.</u>
> 4. The team was <u>denied access into the fence to pick the workings and the shaft in dispute.</u>
> 5. N.B. Refer to attached drawings." (my emphasis)

This report dated 6 July 2018 was compiled by one N. Tshulu the Chief Surveyor Midlands Province.

The Provincial Mining Director Midlands Province one N. Munyanduri also produced his report based on the survey report and office records. The survey was carried out in the presence of all disputing parties. In that report he concluded thus;

> "(a) …
> (b) Ministry of Mines officials were denied access into the fence to pick the workings and the shaft in dispute
> (c) Glen Arroch 80 and 81 mines docket positions do not tally with ground positions and should revert to original position as at registration
> (d) Glen Arroch 82 docket position (s) do not tally with ground position and should revert back to its original position as at registration. (my emphasis)

It should be noted that the applicants were and still are in physical control and occupation of the mining claims. Therefore if anyone denied the inspecting team access into the fence, it must be the applicants or its agents. This was clearly in violation of a court order in that the denial of access led to non-compliance with the court order. Since there was only partial compliance, the parties again appeared before me on 6 June2019 – one year later and consented to the order.

As pointed out above, the parties subsequently complied with these orders and the Provincial Mining Director, Midlands Province filed a survey report dated 24th June 2019. In his findings, he *inter alia* makes the following observations;

- "Glen Arroch 80 reg 29584 ground position and docket position differs
- Glen Arroch 81 reg 29585 ground position and docket position differs
- Shaft in dispute falls in Glen Arroch 81 both in its ground and direct position
- Both Glen Arroch 80 and 81 docket positions fall inside partial withdrawal area, docket position RA register.
- Both Glen Arroch 80 and 81 ground positions partly fall inside Damofalls partial withdrawal area docket position and fall outside the same on the northern side." (my emphasis)

The Chief Surveyor also attached drawings indicating more details of his findings. These diagrams show the ground and docket positions of Glen Arroch 80 and 81. They also show that those positions are different. In one of those drawings/maps on page 91 of the record the draughtsman used different ink to illustrate the point that the ground positions of Glen Arroch 80 and 81 are different from the docket positions. The difference is that both claims on the ground sit on different ground from where they are supposed to be on the docket. What this means in short is that applicants are mining in the wrong area. Put differently, the area that they are physically occupying and mining is not the area they registered to mine. Applicants have not registered claims in the area in which they are mining. Therefore, they cannot by any stretch of imagination claim to have established a clear right to mine in an area where they have no registered claims. It is trite that an interdict is not a remedy in favour of an illegal conduct. The mismatch surrounding the precise location of Glen Arroch 80 and 81 where the disputed shaft is located means in my view that the 2nd respondent must correct it by ordering the applicants to revert to the original positions namely the docket positions.

Further, while it is common cause that the 2nd applicant's application was for a partial withdrawal of 1st respondent's EPO and a request to prospect for minerals within a 20hectare area covered by Glen Arroch 80 and 81, the rights of the survey which have not been disputed by the applicants show that the area covered by these two claims on the ground exceed 20ha. The excess is approximately 1.3ha. Applicants have not explained how this came about despite bearing the evidentiary burden as occupiers, to so explain. The 1st respondent argued that applicants fraudulently altered the co-ordinates resulting in claims 80 and 81's total area exceeding 20ha.

From this evidence, applicants have however surreptitiously gone outside the agreed zone. The law would fail in its purpose if it allows applicants to derive rights out of their own stealth. Neither can they derive rights when their title is precarious. In *Standard Chartered Bank Zim Ltd* v *Matsika* 1997 (2) ZLR 389 (SC) it was held;

> "A cardinal principle of the common law is expressed in the aphorism, "n*emo ex propio dolo consequitur actionem"* which translates, no-one maintains an action arising out of his own wrong. Complementary to this principle is another which stipulates *"nemo ex suo delicto meliorem suam conditionem facere protest"*, which means "non-one can make his bitter by his own misdeed".

In my view, there is a clear illegality in the registration of these claims in that according to the report. Glen Arroch 80, 81 and 82's ground positions differ from the docket positions. Basically what this means is that what second respondent has as the registered position is different from what is on the ground. Now, if applicants pray for a declaratur, what is it that they want declared? That what is on the ground and what is registered must match is a legal requirement. In terms of s48 (1) of the Act, there must be consistency between what is on record and what is on the ground. The section provides;

> "Any pegger of any site mentioned in section forty-seven shall on the same day as each site is pegged, post on it a registration notice as nearly as material in the prescribed form, and shall within a period of 31 days from the date of such pegging apply to the Mining Commissioner for a certificate of registration.
> (2) On such application he shall lodge with the Mining Commissioner –
> (a) a copy of the registration notice and
> (b) a plan in triplicate based on a map issued under the authority of the State and of a scale of not less than 1, 25000 sufficiently identifying the form, position and extent of the site; and
> (c) A certificate under his hand that the copy of the registration notice is a true copy and that all the facts therein stated on tare true and correct; and
> (d) The prescribed registration fee
> (3) The Mining Commissioner shall, if satisfied that the applicant is legally entitled to peg such site, issue to him a certificate of registration. (my emphasis)

It follows that it is unlawful for an applicant to mine on a site whose position and extent is markedly different from the certificate of registration or plan mentioned in paragraph (b) *supra.*

A declaratur declares the standing of the parties in relation to the law and to each other. A declaratur is accordingly based on positive submissions that are placed before a court and needless to say such submissions have to arise from the founding affidavit. Not only must those

positive facts exist but the case presented must be a proper one for the grant of a declaratur – see *Johnsen* v *AFC* 1995 (1) ZLR 65 (H) (a) 72E-F where it was held that;

> "Two issues arise. The first issue is whether or not this is a proper case for a declaratory order. The second issue is if this is a proper case for a declaratory order, whether the applicant and fellow farmers are entitled to the declaratory order sought. The question of whether or not the declaratory order should be made in terms of the above named provision should be examined in two stages. Firstly the applicant must satisfy the court that he is a person interested in an existing, future or contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the court to exercise the discretion conferred on itself – *Bulawayo Bottlers (Pvt) Ltd* v *Minister of Labour Manpower Planning & Social Welfare & ors* 1988 (2) ZLR 127 (H); *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S)

In casu, the 1st applicant has no direct and substantial interest on the subject matter in respect to Glen Arroch 80 and 81. This is so because the agreement to prospect and peg 20ha of gold mining claims is between 2nd applicant and 1st respondent. Also the authority to so peg was granted to 2nd applicant only. As regards Glen Arroch 82, 83 and Main 2, l have already found that these were irregularly registered. On that basis this is not a proper case for me to exercise my discretion because what is done contrary to statute is automatically null and void. I cannot declare an illegality to be legal as the law cannot validate the invalid.

As regards the 2nd applicant while he may have a direct and substantial interest in all the claims, his position is affected by the same malady referred to above. As regards Glen Arroch 80 and 81, he is mining in the wrong area, while in respect to the rest, the registration is tainted with illegality. Fraud and deceit was allowed to pervade and permeate the whole process of registration and this court cannot simply gloss over such illegality particularly when it is asked to grant a declaratur.

The facts of this matter do not only negate the relief for a declaratur sought, but also has the effect of showing that no clear right has been established by the applicants which would entitle them to the invasive remedy of an interdict. I find also that the disputes of fact which would militate against the grant of an interdict have not gone away. It is arguable that the report

of the 2nd respondent actually alienates those disputes. Be that as it may, the simple position of the law is that neither a declaratur nor an interdict can be granted under circumstances where there are disputes of fact.

In the premises, the application for a final interdict is dismissed with costs.

Mutatu & Partners, applicants' legal practitioners
Wilmot & Bennet, 1at respondent's legal practitioners