SEABRIDGE MINE (PVT) LTD
versus
THE MINING DIRECTOR, MASHONALAND CENTRAL N.O.
and
THE SECRETARY FOR MINES & MINING DEVELOPMENT N.O.
and
BBL MINING SYNDICATE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 23 May & 28 June 2017

Opposed Application for Review

Mr WT Mufuka, for the applicant
Mr LT Muradzikwa, for 1st & 2nd respondent
Adv. T Zhuwarara, for 3rd respondent

CHAREWA J: This is an application made in terms of Order 33 r 256 of the High Court Rules, for review, of the first defendant's decision. The applicant sought an order on the following terms:

1. The ruling by first respondent allowing third respondent to mine on applicant's mining location known as Dulana 45, registration number 21483, be and is hereby set aside.
2. Third respondent's Registration Certificates numbered Appex 205 No 44638, Appex 206 No. 44639 and Appex No. 44640 for mining rights that encroach on and subsume Applicant's mining site be and are hereby cancelled.
3. Applicant's undisturbed right to own and exploit mineral rights known as Dulana 45 as originally pegged and registered in 1994 be and is hereby upheld.
4. Third respondent and all those claiming occupation of applicant's registered mining site through 3rd respondent be and are hereby ordered to vacate applicant's mining site, Dulana 45, together with their plant and equipment within five days

from the date of this order, failing which the Deputy Sheriff of Mt Darwin shall evict them and third respondent shall bear the costs of the said eviction.

5. Respondents shall jointly and severally, the one paying the other to be absolved, bear the cost of suit on a legal practitioner and client scale.

While I noticed that the applicant's draft order could have been couched better, I did not dwell on it because, at the conclusion of the parties submissions on a point *in limine:* that the application ran afoul of r 257 and was therefore fatally defective, I agreed with the respondents and summarily struck out the application with cost of suit to be borne by the applicant's legal practitioners.

Note must be made that I did not dismiss the application since I was of the view that I could not dismiss something which did not exist, the application being null and void *ab initio.* I therefore delivered an *ex-tempore* judgment striking out the purported application for failure to comply with the provisions of r 256 as read with r 257 under which it was pretended to have been made.

On 5 June 2017, applicant requested for written reasons for my decision to enable it to appeal, and these are they.

The facts and background

In 1994, the applicant acquired mining rights consisting of 4 blocks known as Dulana 45, under registration number 21483. Twelve years later, on 25 June 2006, mining claim Appex 205/7, Registration no. 44638/40 was registered in favour of 3rd respondent. Consequent upon a dispute between the applicant and 3rd respondent as to the boundaries of their respective claims, the Mining Director, Mashonaland Central directed the Regional Mine Surveyor, Mr Chitaukire, to carry out a survey of the disputed boundaries. The outcome of the on-field inspection and survey carried out by the Mine Surveyor- Harare, Mr Pazvakavambwa, and the plan he drew are shown in his report at p 21-27 of the record as follows:

"OBSERVATION FROM THE RESULTANT PLAN

Appex 205 Reg. No. 44638, Appex 206 Reg. No. 44639, Appex 207 Reg. No. 44640 and Dulana 45 Reg. No. 21483 are core existing on the same place. These blocks are almost equal in area.

REGISTRATION INFORMATION

Dulana 45 has no coordinates of registration and Appex 205, 206 and 207 have them orientation comparison becomes impossible.

Dulana 45 is not plotted on our 1:25 000 map 1631 DC1.

Appex 205, 206 and 207 were registered as 10 gold reefs. However, on the ground they are reduced to a similar size of Dulana 45.

CONCLUSION

All registered blocks should be plotted on our maps to avoid some over pegging cases like this."

Upon receipt of Mr Pazvakavambwa's report, the Mining Director rendered the decision at p 17-18 of the record, to the effect that Dulana 45 was, on the ground, in the wrong position as compared to its registration papers, and therefore that Dulana 45 should revert back to its original position. Aggrieved by this decision, which on the face of it, is contrary to the findings of the surveyor's report, applicant launched this application for review.

Parties' submissions

At the hearing of this matter the third respondent raised a preliminary point of law: that the application having been made in terms of r 256, the applicant's papers are palpably defective for want of compliance with Order 33 r 257 of the High Court Rules 1971. It was the third respondent's submission at the hearing that, non-compliance with the rules being a matter of law, can be raised at any time, and if the point is well taken, then the applicant's case is dead in the water and ought to be struck out.

I note that this point was also made in the third respondents heads of argument except that there, the prayer was for outright dismissal of the application.

Upon receipt of third respondent's heads of argument, applicant filed supplementary heads of argument contending that, because the facts upon which this point of law is based were not pleaded in the opposing or supplementary affidavits, then non-compliance with the rules could not be raised.

It was the third respondent's submission that this attitude of the applicant's legal practitioner, of failing to appreciate that non-compliance with the rules was fatal, whether or not factual evidence was led, was a profound disservice to their clients which merited an order of costs against the legal practitioners.

For the first and second respondents, it was submitted that because of non-compliance with the rules, the application was null and void, such that it was not even necessary for the court to make any order of nullity.

The applicant insisted, during the hearing, that its application was properly before the court because the factual basis of the point of law was not raised in the opposing affidavits. It further averred that raising the issue of non-compliance with the rules was tantamount to leading evidence in heads of arguments or from the bar. Further, applicant submitted that its application was made in terms of s 26 of the High Court Act and also in accordance with common law and could therefore not be impugned.

Reasons for judgment

I was not impressed with the applicant's arguments. It is a sterile argument that a point of law cannot be raised if its factual basis has not been traversed in the pleadings. The law remains the law, and must be complied with, whatever the facts may be. A nullity does not become valid because evidence on the factual basis alleging that it is void has not been pleaded.

In this case, it is clear on the face of it that the application before me was made in terms of r 256, because it says so. The evidence is there for all to see. In that respect, it ought to have complied with r 257 in that the notice of application should have had the grounds for review stated thereon.[1]

Respondents did not have to lead any evidence of non-compliance. Form 29, which is inappropriate, was evidently used in making the application. The cases cited by applicant at para 5, 6, 7, and 8 of its heads of arguments and relied on at the hearing are clearly unhelpful to its cause.

In para 10 of its heads of argument, and in the submissions before me, the applicant sought to suggest that its application was made in terms of r 56 (which relates to setting aside of an order made by consent), s 27 of the High Court Act, [*Chapter 7:06*] and S3 of the

[1] Pasalk & Anor v Kuzora & Ors 2003(1) ZLR 287 @ 292E

Administrative Justice Act, [*Chapter 10:03*]. However, it is apparent that the applicant itself clearly laid the basis for its application as follows:

The cover page reads:

> "COURT APPLICATION FOR REVIEW OF THE DECISION OF THE PROVINICIAL(sic) MINING DIRECTOR OF MASHONALAND CENTRAL IN TERMS OF ORDER 33 RULE 56 OF THE HIGH COURT RULES, 1971" (My emphasis).

Since Order 33 does not have a Rule 56, I allowed that this was a mere typing error. This was more so when I had regard to the application itself which is headed:

> "COURT APPLICATION FOR THE REVIEW OF THE DECISION OF THE MINING DIRECTOR FOR MASHONALAND CENTRAL PROVINCE IN TERMS OF RULE 256 OF ORDER 33 OF THE HIGH COURT RULES, 1971" (My emphasis)

The body of the notice of application then proceeds to follow form 29, in that the application is made for an order in terms of the draft, and the accompanying affidavit of John Gilbert Dinha would be used in support. No grounds for review are traversed at all, thus making the application a nullity at law[2].

Paragraph 6 of the founding affidavit states the legal basis of the application, and it certainly does not refer to common law or any other enactment. In para 7 of the founding affidavit, the applicant states:

> "The power of the High Court to review all decisions of administrative tribunals is also provided for in section 26 of the High Court of Zimbabwe Act [*Chapter 7:06*]".

Unfortunately, in my opinion, this statement is only imparting information as to the power of review of the High Court. It merely informs the Court that s 26 could also ground an application for review. However, it does not assert that this particular application is being made in terms of s 26. In any event, the procedure for bringing s 26 into operation is set out in the rules, r 257 of which requires that the notice of application should set the tone by traversing the grounds for review, not the founding affidavit.

In addition, nowhere in the notice of application or even the founding affidavit does applicant refer to the Administrative Justice Act or common law as the basis for its application. It is only in para 7 and 8 of its heads of argument that applicant avers that the nature of its application is in terms of s 361 of the Mines and Minerals Act [*Chapter 21:05*]

[2] Chataira v ZESA SC 83-01 @ p. 6 of the cyclostyled judgment.

as read with s 27 of the High Court of Zimbabwe Act [*Chapter 7:06*] and s 3 of the Administrative Justice Act [*Chapter10:08*], a procedural impropriety.

To compound its error, the applicant avers in supplementary heads of arguments that the basis of its application is traversed in the founding affidavit, answering affidavit and heads of argument, in the process, totally missing the point that the basis of the application ought to be traversed in the notice of application. The affidavits are only supposed to support the application itself. Applicant's error is akin to a plaintiff failing to raise a cause of action in the summons and insisting that since the particulars of claim or further particulars or the replication contain the basis of its action, then *causa* is duly established in the summons.

Applicant further got hopelessly lost by insisting that the fact that an application for review can be brought in any other lawful manner than in terms of r 256, that means that its application was properly made. With respect, that is not the point of law raised by the respondents; but that, having made an application solely in terms of r 256, the applicant failed to comply with r 257.

As pointed out by Mr *Zhuwarara*, that applicant refers to the 8 week period within which to file the application for review, subject to any extension granted by the court in terms of r 259, is further proof that this is an application brought solely in terms of r256.

Therefore, while the form and basis for applications for review may vary according to the legal basis, this particular application is made in terms of r 256. And because it fails to conform to the requirements of r 257, it is not properly before the court.

It is evident that the legal practitioner for the applicant exhibited such ineptitude as to render, in Mr *Zhuwarara's* words "a profound disservice to their client". Upon it being pointed out in 3rd respondent's heads of argument, that the application failed to conform to the rules, wise counsel would have immediately withdrawn it and filed an appropriate application.

It is trite that in such situations, were a legal practitioner exhibits less than reasonable appreciation of the rules and procedures, for which his expertise is sought, then he must bear the costs[3]. Clearly, it is the failure of the legal practitioner to appreciate the relevant procedural aspects of the nature and basis of the application for review that has made this

[3] Ministry of Labour & Ors v PEN Transport (Pvt) Ltd 1989 (1) ZLR 293 (SC) @ 296. See also Mambo v National Railways of Zimbabwe & Anor 2003 (1) ZLR 347(H).

application a nullity. Where the legal practitioner, being the expert expected to competently advise his client and draw up proper pleadings, fails to do so, he must bear the costs.

In the result, the application is summarily struck out for failure to comply with the rules with the applicant's legal practitioner to bear the costs.

Thompson Stevenson & Associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st & 2nd respondent's legal practitioners
Musoni Masasire Law Chambers, 3rd respondent's legal practitioners