ANDREW KUNAKA
and
KUDAKWASHE GOVO
versus
SECRETARY OF MINES AND MINING DEVELOPMENT
and
THE PROVINCIAL MINING DIRECTOR MIDLANDS PROVINCE
and
THE MINISTER OF MINES AND MINING DEVELOPMENT
and
TILFURY ZIMBABWE (PVT) LTD
and
FUNGAI BANGIDZA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE; 20 January 2025 & 7 May 2025

Opposed Application

Mr M Chasakara for Applicants
Advocate T Zhuwarara for fourth and fifth Respondents
No appearance for first, second and third Respondents

MHURI J**:** This is a Court application for a Declaratory Order in terms of s 14 of the High Court Act [*Chapter 7:06*] and final interdict. Applicants seek an order in the following terms:

1.The suspension of Certificate of Registration Number 31283 under case number HC2242/19 be and is hereby declared to have lapsed.

2.The fourth and fifth Respondents continued mining activity after the finalization of HC1707/18 and 1824/21 within the operation of mining certificate (registration number 31283) be and is hereby declared to be unlawful.

3.Consequently, fourth and fifth respondents herein be and are hereby ordered to stop all mining operations at and move out of the mining location defined in Certificate of Registration 31283.

4.The fourth and fifth respondents herein be and are hereby ordered to stop interfering with first and second applicant mining operations at the mining location defined in Certificate Registration Number 31283.

5.The fourth and fifth Respondents shall pay costs of suit on a scale as between a legal practitioner and client scale.

The brief background facts giving rise to this application are common cause. Damafalls Investments (PVT) Ltd issued AGK Mining Syndicate with registration notices for the following mining claims:

a. 0797 840

7892 701

b. 0797 840

7893 000

c. 0797 900

7893 000

d. 0797 915

7892 776

e.0798380

7892 776

f. 0798380

7892 700

A certificate of Registration Number 31283 was issued to that effect. On the other hand, the fourth and fifth Respondents were litigating against the second Respondent under case number HC1827/19. The fourth and fifth Respondents were granted an order barring the current second Respondent from issuing registration papers to any person in respect of Glen Arroch 80 and 81 under registration 29584 and 29585 respectively and if any registrations had been done by the second Respondent herein in respect of the same, the order declared such to be invalid. The fourth and fifth Respondents filed another urgent chamber application under

HC2242/19 before MAKONESE J wherein Respondents sought and were granted an interim order to suspend the "operation and effectiveness" of the applicants certificate (registration number 31283). The same order interdicted respondents from parcelling out any more mining claims in the area pending finalisation of HC1707/18 and HC1827/19.

TAKUVA J then dismissed the application under case number HC1707/18. The fourth and fifth Respondents herein appealed to the Supreme Court under Civil Appeal Number SCB37/20 .The Supreme Court disposed of the matter by upholding the appeal. HC1827/2019 was dismissed by the Registrar of the Court as it was deemed abandoned and lapsed.

At the commencement of the hearing fourth and fifth respondents raised two points in *limine* to the effect that; firstly, applicant lacks *locus standi* and secondly, lack of jurisdiction by this Court. The fourth and fifth Respondents submissions to the first preliminary point raised was that the applicants lack *locus* since the matter relates to AGKK Mining Syndicate which Syndicate has the mining rights and should have brought this application. They further contended that there is nothing to prove that the Syndicate is aware of the proceedings hence its rights are under debate. In the present matter the applicants herein have no locus standi to seek a declaration and interdict on the basis of a Certificate of Registration issued to an entity called AGKK Mining Syndicate. The ability to sue on the certificate of registration is reposed in the Mining Syndicate and not the Applicants. To substantiate their argument reliance was made on the case of *Pahasha Somalia Mining Syndicate* v *Earthrow Investments Pvt Ltd & 2 Ors* HH 450/21 which at p 5 has determined that a mining syndicate has the requisite *locus standi* to institute proceedings in its own name.

Fourth and Fifth Respondents further argued that applicants are not an interested person in an existing, future or contingent right or obligation because AGKK Mining Syndicate is a separate legal persona in the eyes of the law and is not the party seeking declaratory relief in terms of its Certificate of Registration [No 31283].

Submitting on the second preliminary point raised, fourth and fifth respondents contended that the Applicants are seeking a Declaratory Order that is aimed at undoing an extant Provisional Court Order that was handed down on 13 September 2019 in Case Number HC 2242/19. The present application seeks to contradict or alter the effects of an extant Court Order. Reliance was made on the case of *Godza* v *Sibanda & Anor* 2013 (2) ZLR 175 (H).

Applicant's submissions on the preliminary points raised

With regards to the first preliminary point raised, it was Applicant's submission that the parties who are before this Honourable Court are the same parties who appeared in HC2242/19 and HC1827/19 hence their *locus* cannot be challenged. Applicant further contended that Rule 11 of the High Court Rules SI 202/2021 allows a syndicate to sue and be sued hence applicants have rights to make the present application. Applicants contended that r11(3) of the High Court Rules 2021 suggests that the common law position has not been vacated. It was applicant's further argument that the reason for the suspension of the mining certificate has been disposed of and there is impetus on applicants to have the matter proceed to determine whether or not they are entitled to the relief they are seeking. It was applicant's prayer that the points *in limine* raised be dismissed and the matter proceed to the merits to ensure finality to litigation.

Analysis and disposition on the preliminary points

The Supreme Court clarified the effect and procedure to be followed after granting of an interim order in *Samantha Ndede* v *Andrew Zigora* SC102/22 at p 12

> "After the grant of interim relief in the form of a provisional order, the matter does not end there. The procedure is that the respondent is allowed to file a full dossier of opposition to the confirmation of the provisional order, which confirmation takes the form of granting the terms of the final order sought in the prescribed form of the provisional order. After the provisional order is granted, the full procedure of a court application, including the filing of a notice of opposition, answering affidavit and heads of argument, kicks in. It is a procedure which allows the applicant to fully prove his or her case and the respondent to disprove it without the pressure of urgency. On the return date of the provisional order, a fully-fledged opposed application is set down and heard on the opposed roll. Following that hearing the court may either confirm or discharge the provisional order."

In HC2242/19 MAKONESE J granted an interim order interdicting the second respondent (the Provincial Mining Director Midlands) from issuing mining certificates to any person in respect of Glen Arroch 80 and 81 pending finalisation of HC1707/18 and HC1827/19. The Mining licenses of AGK Syndicate were suspended.

It is noteworthy that HC1827/19 was removed from the roll by the Registrar for failure of the present fourth and fifth respondents to set the matter within the time frames provided in the High Court Rules.

In June 2018 before TAKUVA J under case number HC1707/18 an urgent chamber application for a temporary interdict was made by the present Fourth and Fifth Respondents and the application was dismissed with costs.

The issue for determination is whether this Court has jurisdiction to hear the present application for a declarator and interdict. The applications before MAKONESE and TAKUVA JJ were for interdicts, before me is an application for a declarator. Basing on the sequence of events the interdict granted in favour of respondents was dismissed hence they have approached this Court with an application for a declarator.

In *Chiwenga* v *Mubaiwa* SC 86/20 at p 13 of the cyclostyled judgment the Court held:

> "The purpose of a final order is different from that of a provisional order in that a final order is conclusive and definitive of the dispute. It finally settles the issues and has no return date. Once a final order is given the court issuing the order becomes functus officio and it cannot revisit the same issues at a later date."

In *casu*, the Court's order by MAKONESE J related to an interdict and was provisional in nature. This order was not final as evidenced by the sequence of events outlined above as such the court is not *functus officio*. There is need for finality to litigation. It is for the foregoing that I find the preliminary point relating to jurisdiction meritless and dismiss it.

I will now determine the second preliminary point raised relating to applicants' *locus standi*.

Locus standi was defined in the case *of Makarudze and Anor* v *Bungu and Ors* HH08/15 at p 5 wherein MAFUSIRE J stated,

> *"locus standi in judico* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the subject matter or outcome of the litigation."

The position of the common law that a syndicate could not sue or be sued in its name has been altered by Rule 11of High Court Rules SI 202/2021. It provides,

11. (1) In this rule—
"associate" in relation to—
(a) a trust, means a trustee;
(b) an association other than a trust, means a member of the association;
"association" means any unincorporated body of persons, and includes a partnership, a syndicate, a club or any other association of persons;
"firm" means a business including a business carried on by a body corporate, carried on by the sole proprietor under a name other than his or her own;
"plaintiff" and "defendant" include applicant and respondent;
"sue" and "sued" are used in relation to actions and applications;
"summons" includes a combined summons.
(2) A firm or an association may sue or be sued in its name.
(3) A plaintiff suing a firm or association needs not allege the names of the proprietor or associates. If he or she does, any error of

omission or inclusion shall not afford a defence to the association.
(4) Subrule (3) shall apply with the necessary changes to a plaintiff suing a firm.

In *Doctor Daniel Shumba And Another* v *The Zimbabwe Electoral Commission And Another* SC 11/08 the Court had occasioned to enlighten on the use and effect of the word "may" at p 21 it held;

> "It is the generally accepted rule of interpretation that the use of peremptory words such as "shall" as opposed to "may" is indicative of the legislature's intention to make the provision peremptory. The use of the word "may" as opposed to "shall" is construed as indicative of the legislature's intention to make a provision directory."

The Rule is discretionary on the parties when instituting proceedings before the High Court. It therefore does not oblige the syndicate to sue or be sued in its name.

In the same vein s 2 of the Companies and Other Business Entities Act [*Chapter 24:31*] defines a "syndicate" as means an association of individuals, companies or other business entities, or other bodies corporate or unincorporated, formed for the purpose of conducting and carrying out some particular business transaction.

Noting that the partners of the syndicate have sued and been sued in the previous legal disputes before MAKONESE and TAKUVA JJ, it boggles the mind for Respondents to now query their legal standing. I believe if this was a pertinent issue the Respondents would have raised it in the previous legal disputes. The Fourth and Fifth Respondents are approbating and reprobating. The applicants have direct and substantial interest in the subject-matter and outcome of the application. In the circumstances I dismiss the second preliminary point raised and will determine the issue on the merits.

An application for a declaratory order ought to be considered and ventilated in light of the provisions of Section 14 of the High Court Act [*Chapter 7:06*] which provides:

> "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."

The requirements of declaratory order were considered in the case of *Johnsen* v *Agricultural Finance Corporation* 1995 (1) ZLR 65(S) the Court stated,

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court Act of Zimbabwe, 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties is not a prerequisite to the exercise of jurisdiction."

Identical requirements were stated in the case of *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S). In casu, the applicants are the proprietors of AGK Mining Syndicate and therefore have a substantial interest in the matter. Considering that these proprietors have been sued and have been suing using their names, it follows that proprietary rights emanating from AGKK's certificate of registration herein vests with the applicants as the proprietors.

The requirements of a declaratur that the interest must concern an existing, future or contingent right has been met in that the mining licences of AGK mining Syndicate were cancelled following the filing of HC2242/19. At the onset the applicants had been issued with same. However, those were provisionally cancelled pending determination of HC1707/18 and HC1827/19 of which both of these matters have been finalised. Hence, the applicants' interest in the matter arises. The applicants as the holders of the registered claims, have the exclusive rights of mining the claims under dispute, see the case of *Chase Mineral (Pvt) Ltd* v *Madzikita* HB44/02 at p 2. It is an irrefutable fact that a holder of a certificate of registration has an inherent interest in the affairs of the certificate.

Applicants also pray for a final interdict. The requirements of a final interdict were outlined in the case of *Movement for Democratic Change (Tsvangirai) and others* v *Lilian Timveos and Others* SC 9/2022 at p 10 as follows:

> "The requirements for a final interdict on the other hand are:
> i. A clear right;
> ii. Irreparable harm actually committed or reasonably apprehended; and
> iii. The absence of an alternative remedy.*"*

A clear right must be established on a balance of probabilities. In Herbstein and van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa fifth Ed 2009 at page 1459-60 the authors whilst noting the difficulty in defining the term 'clear right' acknowledged that:

> "What is meant by the phrase is a right clearly established, that the word 'clear' relates to the degree of proof required to establish the right and should strictly not be used to qualify "right" at all. ... a clear right must be established on a balance of probabilities."

The definition of a clear right was succinctly discussed in *Movement for Democratic Change (Tsvangirai) and Others* v *Lilian Timveos and Others* (supra)where the Court held,

> "where a final interdict is sought, the right must be established clearly as opposed to it being *prima facie* established. Thus, the word clear in the context of rights in an interdict does not qualify the right but rather expresses the scope to which the right has been established by evidence on a balance of probabilities."

Applicants were granted the mining licences, in the legal dispute before TAKUVA J the present applicant's rights were not in question neither were their mining licences queried. The learned Judge went on to state that the mining claims held by the present respondents were unlawfully acquired and disputable. In the legal proceedings before MAKONESE J the fourth and fifth respondents were interdicted from parcelling out mining licences relating to the mines in question. It is in the circumstances that I find that applicants have a clear right and have shown same. The respondents have not rebutted this nor proven otherwise. The fourth and fifth respondents' certificates of registration were cancelled by the first respondent on account of the frailty attendant to the manner in which the fourth and fifth respondents procured them. The first Respondent's decision to cancel the fourth and fifth Respondents' certificates of registration is extant and presumed by law to be valid until it has been lawfully vacated. The current state of affairs denotes a clear right in favour of the applicants.

The second requirement of an interdict is an actual or reasonably apprehended injury The continued presence at the mining location is prejudicial to the Applicants' business interests in that it is causing delays in bringing into operation the Applicants' lawful and extant mining certificate 31283. Furthermore, the fourth and fifth respondents mining certificates were cancelled hence their continued occupation of these mining areas whilst depleting the minerals is causing an injury to the applicants. In the same vein, it is my considered view that applicants have no other remedy except to stop the fourth and fifth respondents from continued mining activities in the area.

The balance of convenience must favour the granting of the interdict. This was aptly stated by ADAM J in *Econet (Pvt) Ltd* v *Minister of Information, Posts and Telecommunications* 1997 (1) ZLR 342 at 344-345 that,

> " …Be that as it may, for a temporary or interim interdict the requisites are: (1) that the right which is sought to be protected is clear; or (2) (a) if it is not clear, it is prima facie established, though open to some doubt and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right; (3) that the balance of convenience favours the granting of interim relief; and (4) the absence of any other satisfactory remedy"

Without a certificate of registration of a mining location, the fourth and fifth Respondents cannot lawfully mine at the contested mining location. They similarly have no cause to be at the mining location. Is there any prejudice that may be suffered by the fourth and fifth respondents if the present application is granted which will interfere with the exercise of

balance of justice? I find none in the circumstances. It is for the foregoing that I find that the applicants have satisfied the requirements of a declarator and a final interdict.
Resultantly, it is ordered that:

1.The suspension of Certificate of Registration Number 31283 under case number HC2242/19 be and is hereby declared to have lapsed.

2.The fourth and fifth Respondents continued mining activity (after the finalization of HC1707/18 and 1824/21 within the operation of mining certificate (registration number 31283) be and is hereby declared to be unlawful.

3.Consequently, fourth and fifth respondents herein be and are hereby ordered to stop all mining operations at and move out of the mining location defined in Certificate of Registration 31283.

4.The fourth and fifth respondents herein be and are hereby ordered to stop interfering with first and second applicants' mining operations at the mining location defined in Certificate Registration Number 31283.

5.The fourth and fifth Respondents shall pay costs of suit on a scale as between a legal practitioner and client scale.

MHURI J……

Gunje Legal Practice, Applicant's legal practitioners
Mutatu & Partners, Fourth & Fifth respondent's legal practitioners