

PORE PORE MINING SYNDICATE  
versus  
LITRA MINING SYNDICATE  
and  
THE MINING DIRECTOR, MASHONALAND CENTRAL  
and  
THE SECRETARY FOR MINES AND MINING DEVELOPMENT N.O

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 3 October 2017 & 25 October 2017

### **Opposed Application**

*W. Chinamhora*, for the applicant  
*O. Mushuma*, for first respondent

MUSAKWA J: This is an application for a declaratory order. The applicant seeks an order that it be declared the registered holder of mining rights known as Miralto 32, that the first respondent be ordered to vacate Miralto 32 forthwith plus costs of suit.

The background to this matter is that the applicant claims to have acquired mining rights in a mining claim known as Miralto 32 in 2003. This was given registration number 30682. In the founding affidavit deposed to by William Magora on behalf of the applicant, it is averred that in 2003 one Tracy Nyabawa caused the arrest of the deponent on allegations of trespassing on her mining claim. William Magora was subsequently released and was cautioned to confine himself to Miralto 32 whilst Tracy Nyabawa was confined to Miralto 16 (registration number 15061). It is averred that the applicant is now being thwarted in its operations by the first respondent. This is despite the two mining blocks, Miralto 16 and Miralto 32 being distinct from each other.

The applicant annexed to the application a diagram (fig 1) depicting Miralto 16 and Miralto 32 as separate claims. He also annexed another diagram (fig 2) depicting Miralto 16 and Miralto 32 overlapping each other. Then there is a letter from the Provincial Mine

Surveyor, Mashonaland Central Province dated 23 May 2107 and addressed to the Provincial Mining Director, Mashonaland Central which reads as follows-

“RE: POSITIONING OF MIRALTO 32 AND MIRALTO 16: REG. NO. 30682 AND 15061  
REGISTRATION POLYGONS

The matter refers,

The issue of the positions of Miralto 32 and Miralto 16 as per registration information had some challenges. One docket for Miralto 16 could not be located. Hence other means had to be used to ascertain the position of Miralto 16 registration number 15061.

In this case the docket for Azah 6 registration number 20443 had to be used the map in this docket was of the same area as where Miralto 16 and 32 are located. Azah 6 was pegged (30 June 1993) much later than Miralto 16 (23 July 1986) while Miralto 32 (27 June 2003) was pegged after Miralto 16.

The map for Azah 6 had other claims which were pegged earlier and were already plotted on the map. This included Miralto 16 with the position highlighted in blue.

Hence the positions of Miralto 16 registration number 15061 and 32, registration number 30682 that are shown on the attached map fig 1 are as per registration information as they appeared on the public map. Attached also is appendix 1, which is a copy of the registration card for Miralto 16 giving the locality description of the claim.”

On the other hand, the respondent contends that the dispute between the parties was determined by the Mining Commissioner on 11 September 2003. The applicant did not appeal against the decision in terms of Mines and Minerals Act [*Chapter 25:05*]. Essentially the defence is that this matter was adjudicated by an appropriate authority and that decision has not been set aside.

Jenny Nyabawa contends in the opposing affidavit that the applicant used to work for her late mother, Tracy Nyabawa. Jenny and her siblings inherited the mining claim Miralto 16. She contends that the applicant was dismissed by her late mother after he fraudulently obtained a map depicting mining rights that encroached on Miralto 16. Attached to Jenny Nyabawa’s opposing affidavit are a number of supporting documents which will either be summed up or quoted hereunder.

The decision of the Mining Commissioner of 11 September 2003 reads in full as follows-

“I refer to the above matter and the physical inspection of the above blocks of mining claims by this office on 4 September 2003 to determine ownership of the same.

The inspection revealed that on the grounds the Miralto 32 (Reg. Number 30682) overpegs Miralto 16 on the South and Miralto 2 (A) and 2 (B) (Reg. Numbers 20220 and 23022) to the North. Taking into consideration that Miralto 16 was registered on 23<sup>rd</sup> July 1986 and Miralto 2 (A) and 2 (B) on 31<sup>st</sup> May 1993, these blocks of claims have priority of mining rights above Miralto 32 which was only registered on 2 June 2003. Refer to section 177 of the Mines and

Minerals Act [Cap 25:05]. In this regard it is therefore naïve for Pore Pore Mining Syndicate to claim rights over ground which is already occupied and is closed to pegging and prospecting. This dispute would have been avoided had the pegger for Miralto 32 taken care to consult holders of existing claims as to the confines of their boundaries and not to simply opportunistically post the block on claims and ignore the ground positions of existing claims. By this minute and under my hand, Pore Pore Syndicate i.e. William Magora and Farai Takadya is enjoined to refrain from encroaching upon, occupying, using or working on the location in dispute or extracting or removing any mineral from the same or from doing any act which might interfere with T Nyabawa's enjoyment of mining rights on the said property. T. Nyabawa is entitled to continue mining on the property without interference whatsoever. I have copied this minute to Zimbabwe Republic Police, Shamva to ensure enforcement of the above.

This matter is now closed.”

On 3 September 2003 the Magistrates Court sitting at Bindura issued a rule *nisi* against William Magora, Farayi Takadya, Onismo Bvute (Marere), Pabvabango and Banda. The order directed the respondents to keep peace towards the applicant (Tracey Nyabawa) and interdicted them from visiting Miralto 16. The respondents were also interdicted from taking the applicant's ore or interfering with the applicant's operations.

On 23 June 2010 the Magistrates Court sitting at Bindura issued an interdict against William Magora. The effect of the order was to restrain William Magora from visiting Miralto Gold Reef claims and he was to maintain peace towards Jenny Nyabawa.

On 22 February 2016 the Magistrates Court sitting at Bindura dismissed an application for an interdict made by William Magora against Jenny Nyabawa. The basis was that the court had no jurisdiction by virtue of s 345 of the Mines and Minerals Act.

There are several correspondences from the Ministry of Mines And Mining Development. On 19 October 2009 the Ministry addressed a letter to Mr W Magora in which it referred to his complaint of 2 September 2009. He was advised that the issue was finalised. He was referred to the letter of 11 September 2003 referenced 9-Miralto 160. Another letter dated 31 March 2015 and addressed to Mr William Magora upheld the decision of 11 September 2003. The same applies to further letters dated 26 May 2015 and 7 December 2016.

Then there is another letter dated 10 April 2017 which in part reads as follows-

“Your application for review is well out of the prescribed appeal time. (sic). You were supposed to have lodged any grievances you had against the Mining Commissioner's decision within 30 days from receipt of the determination.

May you therefor seek another appropriate legal recourse.”

Then on 25 April 2017 another letter was addressed to Pore Pore Mining Syndicate, c/o Mr W Magora. It reads as follows-

“Reference is made to the above subject.

Please find attached a response to your request for a review of a determination previously made by the then Mining Commissioner on the dispute. Your request for a review was turned down on the basis that you failed to lodge your grievances against the Mining Commissioner’s decision within 30 days of receiving the determination. You are therefore advised to pursue other legal routes if aggrieved by the Permanent Secretary’s decision.”

The second and third respondents did not effectively oppose the application save to take issue with the draft order where it seeks to order them to enforce the order. In any event they are barred for failing to file heads of argument.

I now proceed to determine the issues that arise.

### **Whether This Is A Disguised Application For Review**

The first respondent took a preliminary point that this is a belated review that has been cast as an application for a declarator. Reference was made to the various attempts that the applicant made post the Mining Commissioner’s decision of 2003. Reference was also made to the case of *Mazuva v Simbi and Another; Simbi v Mazuva* 2011 (2) ZLR 319 (H) and the Mines and Minerals Act s 361 of which provides that-

“Any party who is aggrieved by any decision of a mining commissioner’s court under this Act may appeal against such decision to the High Court, and that court may make such order as it deems fit on such appeal.”

Mr *Mushuma* was of the firm view that what has to be considered is the substance of the present application. In his view, the application is a disguised review or appeal.

On the other hand Mr *Chinamhora* submitted that the application does not purport to be for review. It is an application for a declaratory order in terms of s 14 of the High Court Act [*Chapter 7:06*]. He referred to paragraph fifteen of the founding affidavit in which is averred that the court is being moved to declare the applicant as the legitimate holder of the mining claim registered as Miralto 32.

In answer to the court’s query on the legal status of the Mining Commissioner’s decision, Mr *Chinamhora* submitted there is no proof of compliance with the provisions of the Mines and Minerals Act. He also submitted that the applicant’s certificate of registration has not been cancelled in terms of s 50 of the Act. Mr *Chinamhora* also placed reliance on the letter from the Provincial Mine Surveyor as being admissible as a public document in terms of s 12 of the Civil Evidence Act [*Chapter 8:01*].

Although the Mining Commissioner made a determination in 2003 there is nothing that reveals that he conducted any proceedings in terms of the judicial powers vested in him in

terms of the Mines and Minerals Act (s 346). For example, the proceedings before him should have commenced by way of summons in terms of s 347 (1). In the alternative, the Mining Commissioner is also empowered to conduct summary hearings in terms of s 348.

Section 348 provides that-

“Notwithstanding requirements of sections *three hundred and forty-five* and *three hundred and forty-six*, the mining commissioner may, if the parties concerned consent thereto in writing and are both present at the hearing, hear and determine any such complaint as above mentioned, summarily, and without any formal proceedings taken before him.

A minute of the decision shall be made by him in a register of complaints in which shall be entered every complaint laid before him, together with particulars thereof.”

Before me there was not produced a written consent by the parties for a hearing by the Commissioner in terms of s 348. At the end of it all, although that decision exists as a public document, its status remains vague. It matters not that the applicant did not seek to appeal against that decision within the prescribed period. It appears the appellant sought to have that decision reviewed administratively to no avail. In any event there is no provision for such review in terms of the Act. The applicant had an option to seek review by this court in terms of the relevant rules and he did not do so timeously.

Mr *Mushuma* listed five requirements for a declaratory order but cited no authority in support thereof. In *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1995 (4) SA 675 (ZS) at 680 GUBBAY CJ summed up the requirement as follows-

“The condition precedent to the grant of a declaratory order 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. See *United Watch & A Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415 in fine; *Milani and Another v South African Medical and Dental Council and Another* 1990 (1) SA 899 (T) at 902 G-H. The interest must relate to an existing, future or contingent right. The Court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo-Transvaal Collieries Ltd v South African Mutual Life Assurance Society* 1977 (3) SA 631 (T) at 635G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by the Court of jurisdiction. See *Ex parte Nell* 1963 (1) SA 754 (A) at 759 H-760 A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Gelcon Investments (Pvt) Ltd v Adair Properties (Pvt) Ltd* 1969 (3) SA 142 (R) at 144D-F, (1969 (2) RLR 120 (GD) at 128A-B).

This, then, is the first stage in the determination by the Court.”

I would hold that the present application is valid as the applicant has identified the issue for which he seeks a declaratory order. This is notwithstanding that he could have had the 2003 decision reviewed on the ground of jurisdiction.

**Whether Or Not The Applicant Is Entitled To The Relief Sought**

The applicant contends that the Mining Commissioner did not deal with the *locus* of the parties' mining claims. The dispute related to alleged encroachment on the first respondent's claim by the applicant. It is also contended that the first respondent has not been able to justify why it claims the documents relied upon by the applicant are fraudulent. The second and third respondents have not disowned the documents. This is why they did not file heads of argument in the matter. Mr *Chinamhora* further submitted that whatever disputes of fact exist are immaterial.

Mr *Mushuma* submitted that it is baffling that the second and third respondents did not oppose the application. He queried the authenticity of the map (annexures B and E). He posed the question as to when the map was produced and cast doubt that this was in 2003. The second respondent must explain this development. Mr *Mushuma* also queried annexure D to the applicant's papers, whether it was prepared by the second respondent. Thus, he submitted that these issues entail that oral evidence be led. He further submitted that without oral evidence it cannot be established if the applicant is entitled to the mining rights he claims.

That there are real disputes of fact is undeniable. There is a map depicting the parties' respective claims as distinct from each other. Then there is diagram depicting Miralto 16 superimposed on Miralto 32 despite a Mining Commissioner determining in 2003 that Miralto 16 has precedence over Miralto 32. With the coordinates for the mining claims having been queried by the applicant's legal practitioners in June 2017, the Surveyor General commented that they are presently expressed in Universal Transverse Mercator (UTM) format, a two dimensional Cartesian coordinate system. It was also suggested that this can be transformed into a Geographic Coordinate System which depicts longitude and latitude for a fee of only \$35.00. This does not appear to have been taken up.

It is also not clear what prompted the Provincial Mine Surveyor, Mashonaland Central Province to address to the Provincial Mining Director, Mashonaland Central a letter titled "RE: POSITIONING OF MIRALTO 32 AND MIRALTO 16: REG. NO. 30682 AND 15061 REGISTRATION POLYGONS"

It seems this letter and the map and diagram annexed to the applicant's papers are the ones that prompted the applicant to mount the present application. But the genesis of the documents has not been explained. It is not good enough to claim that they are public documents. Their existence contradict the Mining Commissioner's determination of 2003 although the latter's legal status is hazy.

I agree with Mr *Mushuma*'s submission that the attitude of the second and third respondents is baffling. They do not seem to be keen to interrogate the matter in order to bring it to finality. They would rather wash their hands and hear no evil and see no evil. Despite the automatic bar operating against the second and third respondents, Ms *Musangwa* appeared on their behalf on the date of hearing. Instead of applying for upliftment of the bar, the best she said was that she wanted to ensure that the order sought did not affect the second and third respondents. All that she was taking issue with was the framing of the draft order.

The material disputes were evident from the onset. Mr *Mushuma* moved for dismissal of the application on account of these irreconcilable disputes and referred to the case of *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 (H). Whilst a court has discretion to refer a matter with disputed facts to trial, in *Mashingaidze v Mashingaidze supra* ROBINSON J made the following remarks at 221-222:

“While it would have been an easy way out simply to refer this matter to trial, I saw fit, in the exercise of my discretion, to dismiss the application with no order as to costs for the following reasons.

It is necessary to discourage the too-oft recurring practice whereby applicants who know or should know, as was the case with the applicant in this matter, that real and substantial disputes of fact will or are likely to arise on the papers, nevertheless resort to application proceedings on the basis that, H at the worst, they can count on the court to stand over the matter for trial.

Unless this practice is seen to be curbed, applicants will continue to believe A that they have nothing to lose and, indeed, everything to gain tactically by embarking upon application proceedings notwithstanding their knowledge or belief at the time of doing so that the respondent will be able to show that genuine and serious disputes of fact exist on the papers.

In this respect, it is relevant to quote the following extract from the judgment B of MCNALLY J (as he then was) in *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) at 234D-F:

The applicant's legal adviser however wrote back disputing this claim. By insisting on proceeding he brings himself within the scope of the dictum of MILLER JA in *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 C (1) SA 398 (A) at 430 G-H where the learned Judge of Appeal says:

“A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed, he chooses that procedural form at his peril, for the court in the exercise of its discretion, might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application.”

In that case McNALLY J, in the exercise of his discretion, declined to refer the matter to trial and, accordingly, dismissed the application with costs.

In *Magwaza v Magwaza & Ors* HH-227-89 (not reported), a case in which SMITH J also dismissed an application with costs, chiefly because the applicant should have realised that a serious dispute of fact between himself and the first respondent was bound to develop, the learned judge quoted the following statement by CENLIVRES CJ in *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 350 A:

“... where the facts are in dispute a court has a discretion as to the future course of the proceedings. It may dismiss the application with costs or order the parties to go to trial or order oral evidence in terms of any rule of court. The first course may be adopted when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop.”

I do not think that the applicant can seriously argue that there are no material disputes. This is why the parties have been at loggerheads for the past fourteen years. This is a matter that requires resolution through oral evidence. Despite the evident material dispute the applicant chose to seek redress through motion proceedings.

In the result, it is ordered that the application be and is hereby dismissed with costs.

*Thompson Stevenson & Associates*, applicant's legal practitioners  
*Mushuma Law Chambers*, first respondent's legal practitioners