PRIVILEDGED TRUST
versus
ALEXON SHUMBA
and
THE PROVINCIAL MINING DIRECTOR
MASHONALAND WEST

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 7 December 2021

Opposed Application

T Musarurwa, for the applicant
T Magwaliba, for the first respondent
No appearance for the second respondent

MUZOFA J: I granted this application in an *ex tempore* judgement and the first respondent requested for the reasons which are set out in this judgment.

The first respondent is the registered owner of a farm known as Roon Estate. The applicant is a miner and is the registered owner of mining claims known as Roon 1 - 9. The mining claims are within the first respondent's farm.

According to the applicant, sometime in August 2020 the first respondent commenced mining activities at Roon 8. The first respondent posted a discovery notice at Roon 8 and started pegging. This conduct was unlawful. The applicant engaged the second respondent for resolution of the dispute to no avail. Infact when the second respondent attempted to hear the matter, the first respondent opted not to submit to the second respondent's jurisdiction. The first respondent has continued to conduct mining activities on Roon 8.

The first respondent opposed the application; nothing was filed on behalf of the second respondent.

The first respondent raised preliminary points at the outset that there is no applicant before the court, that the office of the second respondent is not designated in the Mines and Minerals Act, invalidity of the certificates of registration issued in the name of the applicant and that there are material disputes of fact that cannot be resolved in the absence of oral evidence.

Locus Standi

The point taken is that a trust has no legal personality. The rules do not confer it legal personality. The rules provide procedural convenience only. Where a trust sues the trustees must have authority either clearly set out in the Deed of Trust or by way of a resolution by all the trustees .The court was referred to cases to support the submissions. I will revert to the cases in due course.

The subject on the *locus standi* of trusts has been considered in various cases. See *Crundal Brothers (Pvt) Ltd* v *Lazarus NO and Anor* 1991 (2) ZLR 125 (S) *Chiite and Ors v Trustees, Leonard Cheshire Homes Zimbabwe Central Trust* CCZ10/17, *Veritas* v *ZEC and Ors Finnine Trust also known as Veritas* v *ZEC and Ors SC103/20.*

The authorities establish that a trust is not a legal persona but a *legal institution sui generis*. Rule 8 is a convenience rule for the citation of a trust as a party. Trustees can sue in the name of the Trust. In terms of r8A it is not a requirement for the names of the trustees to be listed when they bring an action on behalf of the Trust

. In this case a trustee is suing in the name of the applicant, a trust, the deponent averred that he is a trustee. The Deed of Trust was attached which shows that he is a trustee. I was not persuaded that the deponent to the applicant's founding affidavit required authority to sue in the name of the applicant. The authority to act on behalf of the trust is derived from the fact of being a trustee. The concept of authority to sue is applicable to incorporated companies. It is trite that these have legal personality and are assumed to speak through a board resolution. A trust cannot speak, when trustees meet they do not purport to give a voice to the trust.

The rationale for authority to sue in respect of incorporated companies is to identify the real litigant which must be the company.

In this case Chigumba properly identified himself as a trustee and the Deed of Trust confirms him as such. The other trustee Patony Musendo is the legal practitioner who prepared the application which means he is in agreement to litigation. There is no doubt the trustees are suing in the name of the Trust.

There is no hard and fast rule that such trustee(s) must have authority from other trustees. Evidence that the deponent is a trustee should suffice.

The preliminary point is dismissed.

Non-existence of the second respondent

The point taken has merit. In terms of s 343 of the Mines and Minerals Act, the Mining Commissioner is the recognised authority. The applicant conceded that the second respondent is not a designated officer however the court was urged to recognise the *de facto* position that

the office of the Mining Commissioner was abolished and replaced by the Provincial Mining Director (the PMD). The PMD is responsible for all the day to day activities in the Ministry. There was no evidence of such abolishment. The court is unable to recognise what is said to be a *de facto* position. I agree with the reasoning that the second respondent is non-existent in terms of the enabling Act. The preliminary point is upheld. The application cannot be dismissed on account of a misjoinder. The court will proceed to decide on the remaining parties' rights.

The finding on the capacity to sue is linked to the point taken that the certificates of registration relied upon by the applicant are defective as they were issued to a non-legal persona which cannot own property.

The applicant averred that the claims were registered since 1987. This was not disputed. In terms of s58 of the Act where a title has been registered for two years, it shall be incompetent to impeach such title. In any event the first respondent cannot seek to attack the applicant's title by way of a plea. A plea is said to be a shield and not a sword.

The preliminary point is dismissed.

Disputes of fact

According to the first respondent, there are material disputes of fact that cannot be resolved on paper more specifically in that the coordinates identifying Roon 8 are abstract. Roon 8 has not been properly identified. Conflicting maps have been issued by the Mining Commissioner.

That there are disputes of fact is evident. However the disputes can be resolved on the papers. I find the approaches advocated in Soffiantini v *Mould* 1956 (4) SA @154 that a mere denial in general terms cannot defeat a cause on motion. The court can take a robust approach and resolve the dispute. I do not think that in this case what the applicant has set out and what the respondent has traversed leaves the court uncertain as to where the truth lies. See *Supa Plant Investment (Pvt) Ltd v Edgar Chidavaenzi* 2009 (2) ZLR (H). It is my view that the dispute can be resolved.

The preliminary point is dismissed.

On the merits the applicant seeks a declaratur and an interdict.

Interdict

The applicant has to prove that it has a clear right, an injury actually committed or reasonably apprehended and absence of similar protection by any other remedy. See: *Setlogelo v Setlogelo* 1914 AD 221 pp 227, *Rowland Electro Engineering (Pvt) Ltd v Zimbank* 2003 (1) ZLR 226 (H).

The existence of a right is a matter of substantive law. On the other hand whether the right is clearly established depends on the evidence.

In this case the applicant's right is established by the certificates of registration in respect of Roon 8 and the official coordinates. At the time of litigation the certificates of registration were still valid. I do not accept the first respondent's submission that it is not valid since it must be renewed annually. The certificate is clear that is it valid for two years. Section 3 of the Civil Evidence Act provides for admission of such evidence unless the contrary is shown. The first respondent did not adduce evidence to substantiate his submission.

From the first respondent's founding affidavit. Roon 8 is not located where he posted the notice of Discovery. The location where he posted the notice was at some point invaded by gold panners. He managed to subdue the gold rush. He posted some security guards at the location. It must be noted that the first respondent posted security guards when he did not have the requisite paper work for a mining location. He was surprised that the applicant also posted some security guards. The first respondent's defence raises so many issues that do not assist his case. He has attempted to register mining claims on his farm in 2001 and was unsuccessful. He blamed the Mining Commissioner for the non-registration. In paragraph 10:8 of his affidavit, the first respondent said he instructed his agents to apply for a pegging licence obviously at the location in dispute. I quote verbatim his averments,

> 'They were advised of the existence of an EPO over the area. When such EPO was registered is a mystery. It could have only been so registered irregularly with the involvement of the applicant or its trustees.'

This was in August 2020. By his word there was an EPO for the applicant. The first respondent was advised of an impediment but he went ahead and posted the Discovery Notice. An Exclusive Prospecting Order shows that the location is not available for prospecting. That the first respondent suspected that the EPO was irregularly issued is mere conjecture. No evidence was placed before the court to substantiate the assertion. As matters stand the first respondent has no legitimate mining right on Roon 8. His defence is a bare denial. A simple

denial of the applicant's location is not enough. He could not even refer to any coordinates that locate his rights. If he has any rights they remain as be the farming rights only.

The applicant has established its clear right over Roon 8.

The injury is clear. The Notice of Discovery and the mining activities already commenced are evidence of the harm. It is trite that minerals are a finite resource .There is no other remedy that can provide adequate protection to the applicant except the interdict.

Declaratur

In *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) GUBBAY CJ (as he then was) pronounced the remedy available in terms of section 14 of the High Court Act [*Chapter 7:06*].The learned Chief Justice at pages 343 [G-H], 344 [A-F]:- had this to say,

"The condition precedent to the grant of a declaratory order is that the applicant must be an interested party, 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 & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C)at 415; *Milani & Anor v South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G-H. The interest may 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 S A Mutual Life Assurance Soc* 1977 (3) SA 631 (T) at 635G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to the exercise by the court of jurisdiction. See *Ex parte Nell* 1963 (1) SA 754 (A) at 759-760A. Nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Gelcon Investments (Pvt) Ltd v Adair Properties (Pvt)* 1969 (2) RLR 120 (G) at 128A-B; 1969 (3) SA 142 (R) at 144D-F.

This then is the first stage of the determination by the court.

At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14. What constitutes a proper case was considered by WILLIAMSON J in *Adbro Investments Co Ltd v Minister of the Interior and Ors* 1961 (3) SA 283 (T) at 285B-C, to be the one which generally speaking, showed that-

"…… despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation claimed to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought"

In this case the applicant is the registered owner of the mining claim. The certificate of registration bears such testimony. It therefore has a direct and substantial interest in the subject matter.

On his part the first respondent failed to establish any mining right over Roon 8.

The applicant's case was clearly established for the granting of the relief sought.

The applicant requested for costs on a higher scale. No valid reasons were given for such a scale.

Having considered the above the following order was issued.

1. The application is granted with costs.
2. The presence and actions by the first respondent and all persons acting through him on the applicant's mining claim known as Roon 8 are hereby declared unlawful and illegal.
3. The first respondent and all persons acting through him be and are hereby interdicted from occupying and carrying mining activities at Roon 8 mining claims.

Kamusasa & Musendo, applicant's legal practitioners
Magwaliba & Kwirira, first respondent's legal practitioners