

**LOREEN MASHANGWA**

**And**

**VANDAI NGORIMA**

**Versus**

**WILFRED CHIPFUMO**

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 13 NOVEMBER & 15 DECEMBER 2024

*Application for a Declaratory Order.*

*Mr. W. T Davira, for the Applicant.*

*Mr. B.B Robbie, for the Respondent/Plaintiff.*

**NDLOVU J:**

[1] This is an application for a Declaratory Order in terms of *Section 14* of the *High Court Act*, [Chapter 7: 06]. The dispute between the parties is broadly centred on the miner and farmer's entitlement to a common piece of land in the Midlands Province.

***BACKGROUND FACTS.***

[2] The applicants are a couple. They have two mining claims at **SELUKWE PEAK FARM**. The 1<sup>st</sup> applicant avers that she has rights over Eagle's Friend Mine. She has tendered the Certificates of Registration and Inspection. She avers that she has been mining gold and selling

the same to Fidelity Printers and Refiners. She has attached evidence in that regard. The 2<sup>nd</sup> applicant has rights over Derino 20 Mine, located beside Eagle's Friend. The Certificates of Registration and Inspection are attached to the application as proof of the same.

[3] On or about the 9<sup>th</sup> of February 2010, the Respondent was allocated by the responsible authority land under the fast-track land reform exercise. The allocated land was identified as **STAND NO. 47 MONT DOR SOUTH FARM**. The offer letter was from the Shurugwi District Land Committee. This fact was confirmed through a letter from the Ministry of Lands, Agriculture, Water and Rural Resettlement, Shurugwi Office on the 7<sup>th</sup> of October 2020. Evidence in that regard has been duly attached to this application. Selukwe Peak Farm and Mont Dor South Farm are two different farms on the ground. Notwithstanding that physical position on the ground, the Respondent however settled in Selukwe Peak Farm and on the mining claim registered in the 1<sup>st</sup> Applicant's name. This anomaly was brought to the attention of the District Lands Officer by the Applicants' Legal Practitioners and was requested to reverse the anomaly but the request drew a blank.

[4] On the 8<sup>th</sup> of October 2020, the respondent filed an interdict application at the High Court Masvingo [HCMSV 266/20]. The Court ordered the Ministries of Mines & Development and the Ministry of Lands, Agriculture, Water & Rural Resettlement to do a ground verification of the situation and thereafter compile comprehensive reports and submit same to the court.

[5] The District Lands Officer compiled the report on behalf of his Ministry. Of relevance and critical importance to this application is the fact that the District Lands Officer in that report did not provide any information contradicting the applicants' claim that the respondent had settled in **SELUKWE PEAK FARM** and on the mining claim registered in the name of the 1<sup>st</sup> Applicant as alleged and complained of by the Applicants and that the respondent's offer letter related to a different farm.

[6] The Provincial Mining Director [*the PMD*] Midlands Province in his/her report on behalf of his Ministry stated that: There is common ground between the farmer and the miner and that Eagle's Friend Mine Reg. No. 31393 is a re-peg of Eagle's Friend Mine Reg. No. 17056, which was registered on December 17, 1981, and forfeited on January 18, 2019. He went on to state that the farmer had re-settled on an existing mine. According to the PMD, the farmer could not produce any document to prove or back his claim that he was re-settled on that land during the fast-track land reform program.

[7] One Gladys Mavingire occupies **STAND No. 47 SELUKWE PEAK FARM** and she is not part of these proceedings. Stand No. 47 is far from Eagle's Friend Mine and does not share common ground or border with the mine. The effect of this is that the land in dispute is not Stand 47 Selukwe Peak Farm.

***RELIEF SOUGHT.***

- 1. The Applicants' occupation of Eagle's Friend Mine Reg. No. 31393 be and is hereby declared legitimate*
- 2. Respondent be and is hereby declared an illegal settler within Selukwe Peak Farm.*
- 3. The 1<sup>st</sup> Applicant is declared the sole lawful occupier of Eagle's Friend Mine Reg. No. 31393 located in Selukwe Peak Farm, Shurugwi to the exclusion of the Respondent.*
- 4. If the Respondent opposes the Application, the Respondent be and is hereby ordered to pay the costs of this application on an attorney and client scale.*

***ISSUES FOR DETERMINATION.***

1. Whether or not the Respondent is legally occupying land in SELUKWE PEAK FARM that is common to both parties.
2. Whether or not the Applicants have better title to the land than the Respondent.
3. Costs of suit.

***POINTS IN LIMINE.***

[8]The Respondent took several points *in limine* in this matter. I tabulate them hereunder.

1. *Res judicata*
2. *Material dispute of fact*
3. *Non-joinder*
4. *Forum shopping*
5. *Answering affidavit*

### ***Res judicata***

[9] The parties have been at the High Court in Masvingo before on the same subject matter. On 4 July 2024, the High Court in Masvingo ordered that “*The parties apply for set down, merge, and index the pleadings by end of day on 5 August.*” The consequence for failure to comply with this direction was that “*... the matter [would] be deemed abandoned and dismissed and the Registrar [would] notify the parties accordingly.*” None of the 2 Applicants and 4 Respondents applied for the set down date nor did the Registrar inform the parties accordingly after 5 August 2024.

[10] What then happened is that on 4 September 2024, [*that is within 30 days of the parties’ failure to comply with the court order*], the Applicants proceeded to withdraw its application. The Registrar accepted the withdrawal and duly stamped and issued the notice of withdrawal. The Applicants then filed the application in *casu* at the High Court Bulawayo.

[11] It admits to no argument that the matter in Masvingo was not dealt with and determined on the merits. There was no final and definitive decision on the dispute. For that reason alone the plea of *res judicata* does not avail to the Respondent. The Respondent has argued that the withdrawal was improper in that it was not done with a tender for costs by the Applicants. It should be noted that a withdrawal of a matter with a tender for costs applies to action proceedings and not motion proceedings, in terms of the High Court Rules, 2021.

This point *in limine* is therefore dismissed.

***Material dispute of fact***

[12] The Respondent argues that the court cannot determine the dispute concerning the geographical location of the mine, farm and the farm name without full information from the Ministry of Lands and from the Ministry of Mines. He calls for the dismissal of the application. The Applicants argue otherwise.

The Respondent has not substantially denied any factual allegation made by the Applicants in this matter.

I am persuaded by the Applicants' argument that the facts of this dispute are clear and well-documented. Where a dispute is apparent, I find it resolvable on the papers. ***Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi HH 92/09.***

This preliminary point is dismissed.

***Non-joinder***

[13] It has been stated for time without number that a preliminary point should be taken in circumstances where if upheld it is capable of disposing of the matter. On this point, the respondent has answered his question. The respondent avers that the applicants should have cited the Ministers of Mines and Mining Development and the Minister of Lands, Agriculture, Fisheries, Water and Rural Development because the two Ministers are the custodians of relevant information. In the same breath, he proceeds to aver that the two Ministries prepared reports that were accepted in the interdict proceedings and those reports are part of the pleadings before me as annexures to the Founding Affidavit.

Non-joinder is not fatal to an Applicant's case. *Rule 32[11] refers.*

This point *in limine* is dismissed.

***Forum shopping***

[14] Forum shopping happens when a party files his or her matter at a particular court or jurisdiction where he feels that he will receive the most favourable verdict. He who alleges forum shopping must give more than a mere allegation of forum shopping. He must show that the choice of the Court station is motivated by reasons other than the legitimate exercise of choice motivated by legitimate considerations like the court role of a particular station or the number of Judges stationed thereat. He must show mischief on the part of the Applicant or Plaintiff.

In the instant matter, forum shopping is alleged on the basis that there was an interdict application by Respondent in Masvingo. The current application is for a declaratory order.

This point *in limine* is without merit and is dismissed.

***Answering affidavit***

[15] The Applicants have correctly conceded that attaching some images in their answering affidavit was prejudicial to the Respondent and moved the court to expunge those images from the record. They are expunged.

*Mr Robbie* did not press further on the issue of the notice of withdrawal, and rightly so. The notice of withdrawal is part of the court record and the courts have access to all the records in their registries.

The point *in limine* is dismissed to that extent.

## MERITS

### THE LAW

[16] In terms of the High Court Act, in its discretion, the High Court may at the instance of any interested person enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person, cannot claim any relief consequential upon such determination.

[17] A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. There must be a clear legal dispute or legal uncertainty. A person seeking a declaration of rights must set forth his contention as to what the alleged right is. A declaratory order is a means of curing illegal activity. The court gives a definitive and authoritative answer to the question as to the legal position of a particular given state of affairs.

### APPLICATION

[18] The given state of affairs in this matter is that the Respondent was allocated land in February 2010 under the land resettlement program. The land allocated to him was identified as being **STAND No. 47 MONT DOR SOUTH FARM**. The Respondent however for reasons he has withheld went and resettled on an existing mining claim in another farm known as **SELUKWE PEAK FARM**. On that alone he was acting illegally The mining claim in question is known as **EAGLE'S FRIEND MINE REGISTRATION NUMBER 31393** and is registered in the name of the 1<sup>st</sup> Applicant. **STAND 47 SELUKWE PEAK FARM** is occupied by another individual known as **GLADYS MAVINGIRE**. These are all common cause facts. The two Ministries concerned confirmed as much.

### DISPOSITION

[19] The common cause facts in this matter establish one clear thing and that is that the Respondent is illegally settling at **SELUKWE PEAK FARM** and on the **EAGLE'S FRIEND MINE**. That ends the matter.

**ORDER**

- 1. The 1<sup>st</sup> applicant be and is hereby declared the sole lawful occupier of Eagle's Friend Mine Reg. No. 31393 located in Selukwe Peak Farm, Shurugwi to the exclusion of the Respondent.*
- 2. Respondent be and is hereby declared an illegal settler on Eagle's Friend Mine within Selukwe Peak Farm.*
- 3. The respondent be and is hereby ordered to pay the costs of this application.*

***NDLOVU J.***

*Gundu Dube & Pamacheche, Applicants' Legal Practitioners.*

*Mapfumo Mavese & Associates, Respondent's Legal Practitioners.*