BOARDER TIMBERS LIMITED
Versus
THE MINING COMMISSIONER, MANICALAND PROVINCE N.O
And
SECRETARY FOR MINES AND MINING DEVELOPMENT N.O
And
MININISTER OF MINES AND MINING DEVELOPMENT N.O
And
THE ENVIRONMENTAL MANAGEMENT AGENCY
And
HUZODI INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 27 January 2025 & 3 February 2025

OPPOSED APPLICATION

Advocate *J.R.G Sithole with* Mr *P. Nyakureba*, for the applicant
Mr *P. Garwe* for the 1st, 2nd and 3rd respondents
No appearance for the 4th respondent
Mr *J. Mudimu*, for the 5th respondent

SIZIBA J**:**

BACKGROUND FACTS

1. The applicant's case is simple. It is a company which grows or produces timber consisting mainly of pine and eucalyptus which it sells both to the domestic and international market. It has a plantation called Tyrconnel East in Mutare measuring 31,5158 hectares which it privately owns under Deed of Transfer 2572/80. On 4 January 2024, it learnt that the fifth respondent which is a mining company had occupied and excavated the upper portion of Tyrconnel in furthering its mining activities. The fifth respondent is alleged to have destroyed trees in interference with applicant's business and also as a threat to the environment. When the applicant confronted the fifth respondent about its conduct, the fifth respondent showed it its registration certificates of mining claims which were issued by the first respondent in respect of the whole area of Tyrconnel East. Applicant argues that the land in question is an area which is not open for prospecting as it is privately owned and no consent was

obtained from it as required by ss 30 and 31 of the Mines and Minerals Act [*Chapter 21*:*05*].

2. Furthermore, the applicant argues that the certificates of registration for mining claims that were issued by the first respondent to the fifth respondent on 6 and 13 December 2023 are null and void for the reason that no Environmental Impact Assessment Certificate was issued by the fourth respondent to the fifth respondent prior to obtaining such certificates. It is argued that the failure to obtain the certificate in question violates s 97 of the Environmental Management Act [*Chapter 20*:*27*].

3. As a result of the fifth respondent's alleged unlawful activities and interference with applicant's business operations, the applicant seeks a declaratory order from this court to the effect that the certificates of registration for mining claims that were issued by the first respondent to the fifth respondent on 6 and 13 December 2023 are null and void for the reason that no Environmental Impact Assessment Certificate was issued by the fourth respondent to the fifth respondent prior to obtaining such certificates.

4. The application is opposed by the fifth respondent. The first, second and third respondents have opted to abide the decision of the court. The fourth respondent has not filed any opposition to the application. The first respondent also filed a report which outlines the steps which one must take in order to obtain mining rights. Such curtesy is commendable.

5. In opposing the relief sought by the applicant, the fifth respondent has taken points in *limine.* It is argued that the matter is *lis pendens* as a similar case before the parties is before the Magistrates Court where a *Rule Nisi* was granted and the case was then postponed *sine die*. Another point in *limine* is that the applicant has no cause of action by reason of its failure to produce maps to demonstrate that the fifth respondent is operating or mining within its coordinates. The other argument on this same point in *limine* is that the applicant's title deed contains a clause which confirms that its rights or title is subservient to mining rights which vest in the government of Zimbabwe. The

last point in *limine* by the fifth respondent was that the applicant is seeking wrong relief before this court. This argument goes on to say that the applicant should have sought an injunction from the Mining Commissioner. In passing, the fifth respondent also alluded in its opposing affidavit to the fact that the case by applicant was a disguised review instead of a case calling for declaratory relief and that there are statutory remedies available to the applicant in terms of the Environmental Management Act. There was also an argument by fifth respondent that it did comply with all requirements under the Environmental Management Act in its operations although it did not attach any documents to this regard. It also argued that there are disputes of fact since the applicant has not provided any coordinates or maps for its land.

ORAL SUBMISSIONS BY COUNSEL

6. During the hearing, *Mr Mudimu* advanced arguments relating to the points in *limine* concerning *lis pendens* and the alleged absence of a cause of action. Whilst he was still on his feet, I indicated that I would like both parties to address me on whether or not this was not a matter where the Administrative Court had exclusive jurisdiction. I indicated that I would require both parties to address me on the applicability or otherwise of s 32 of the Mines and Minerals Act as well as s 130 of the Environmental Management Act. *Mr Mudimu*'s submission was that in light of s 32 of the Mines and Minerals Act, this matter should be referred to the Administrative Court. He submitted that s 32 is peremptory.

7. On his part, Advocate *Sithole,* advanced arguments against the points in *limine* which were raised by the fifth respondents. His argument was that the case which was before the Ministry of Mines had been withdrawn by the applicant. Concerning the case which was before the Magistrates Court, his view was that a plea of *lis pendens* does not preclude the court from dealing with a case especially in light of the fact that the remedy sought which was a *declaratur* could not be granted by the Magistrates Court. On the alleged absence of a cause of action, his view was that that was an issue which dealt with the merits of the case. Concerning the issue of the exclusive jurisdiction or otherwise of the Administrative Court, counsel's submission was that s 32 does not

oust the High Court's jurisdiction. He submitted that the court was dealing with a *declaratur* which could only be granted by the High Court exercising its inherent common law powers. Furthermore, counsel submitted that the court was faced with an illegality where the fifth respondent had illegally obtained registration certificates from the first respondent without the required Environmental Impact Assessment Certificate and as such the court was constrained to deal with such illegality. On the question of whether s 97 of the Environmental Management Act did not contain a sanction for one's failure to comply with it, counsel's submission was that it was only the fourth respondent who could decide to prosecute the fifth respondent whereas the applicant could not have any recourse under that provision. Counsel's view also was that s 130 of the Environmental Management Act did not apply to this case since the Minister of Mines and Mining Development was not the one who administered that Act. According to Advocate *Sithole*, the other reason why s 32 of the Mines and Minerals Act did not apply to this case was that the applicant was not a holder of a prospecting license but a miner.

8. Having noticed that none of the parties had said anything about the case of *Retinue Stars Investments (Pvt) Ltd* v *Olympus Gold Zimbabwe Ltd and Others* SC 27-24, I gave counsels the case and stood down the matter so that they could address me about its applicability to the case at hand. When we resumed, Mr *Mudimu*'s submission was that it was inescapable that the Administrative Court had exclusive jurisdiction to deal with this matter. Advocate *Sithole* on his part, conceded that the Supreme Court in the *Retinue Stars* case had equated mining to prospecting for purposes of s 32 of the Mines and Minerals Act. Counsel, however, still submitted that since the applicant was seeking a declaratory relief which could not be granted by the Administrative Court, this court should still deal with the matter. After the hearing, I then reserved my judgment on the preliminary issues.

THE LAW AND ITS APPLICATION TO THE CASE

9. Section 32 of the Mines and Minerals Act [*Chapter 21:05*] provides as follows:

*"**32 Disputes between landowners and prospectors***
*If **any dispute arises** between the holder of a prospecting licence or a special grant to prospect or an exclusive pro-specting order and a landowner or occupier of land as to whether land is open to prospecting or not, **the matter shall be referred to the Administrative Court for decision.**"* (My emphasis)

10. In *Retinue Stars Investments (Private) Limited* v *Olympus Gold Zimbabwe Limited and Others* SC 27-24 at pp 10 to 11 of the cyclostyled judgment, the Supreme Court of Zimbabwe articulated the position as follows:

"The appellant thus, by basing its case on s 31 (1) (a) (i) of the Act placed itself in the ambit of s 32. Section 32 is not ambiguous but makes it clear that disputes between land owners and prospectors fall under the exclusive jurisdiction of the Administrative Court. It is common cause that the Act does not define prospecting.

It is however, common practise that prospecting is almost invariably antecedent to and inseparable from mining. The process of prospecting by nature is associated with mining. In the present case, the appellant placed itself under s 31 in its founding papers and pleadings. It can therefore, not rely on a selective application of the law by advancing argument under s 31 on infringement of the 450 metres buffer zone on one hand and on the other hand resisting the application of s 32 which stipulates the Administrative Court as the court of jurisdiction."

11. At p 13 of the same cyclostyled judgment in the *Retinue Stars* case, the court highlighted the need for exhaustion of statutory remedies and held that where such remedies do exist, the court may, in its discretion, not assume jurisdiction.

12. In this case, it is inescapable that the gravamen of applicant's case is that it owns a piece of land where it produces timber and that the fifth respondent which is a mining company is now mining on its land unlawfully. This is basically what made the applicant not sit back but come to this court. That is its cause of action. The allegation that the fifth respondent does not have an Environmental Impact Assessment Certificate is a secondary issue which applicant raises so as to solve its predicament by asking the court to nullify fifth respondent's registration certificate and I will later on revert to the question of whether or not that is the only remedy that is available to the applicant at law. The applicant's cause of action is captured in paras 13 to 17 of its founding affidavit and it is laid out thus:

> *"13. Amongst its various plantations within the Manicaland Province, the Applicant owns a plantation known as certain piece of land called Tyrconnel East of Tyrconnel situate in the District of Umtali measuring 301,5158 hectares. The land falls under Applicant's administrative lmbeza Estate. It is land privately owned under Deed of Transfer No. 2572/80 which I attach hereto and mark as Annexure"B".*
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> *14. On the 4th of January 2024, Applicant learnt that the 5th Respondent had occupied and commenced excavations in a portion of land in the upper end of Tryconnel East. 5th Respondent had a 32-ton SANY excavator and other equipment. The portion of land it occupied and excavated through its agents is also a source of a perennial stream that flows downhill and feeds into Mutare River.*
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> *15. The 5th Respondent made excavations on the land in question, destroying trees, Applicant's business and the environment in general. I attach hereto photographs of the excavations in question and visuals of the damage caused as "Annexure C1- C4".*
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> *16. When approached by the Applicant, the 5th Respondent produced certificates of registration of mining locations issued by the 1st Respondent on the 6th and 16th of December 2023. The certificates were in favour of the 5th Respondent and in respect of Tyrconnel East. They cover the whole of Tyrconnel East. I attach hereto the said certificates being numbers 66649, 66749, 66750, 66751, 66752, 66754, 66760, 66761, 66762, 66785, 66786, 66787, 66788, 66790, 66792, 66793, 66794 and 66795 as "Annexure D1~D18".*
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> *17. The land is ground not open for prospecting without the consent of the owner thereof in terms of the provisions of section 30 and 31 of the Mines and Minerals Act [Chapter 21:05]. The Applicant did not give any consent to the 5th Respondent. The Applicant advised the 5th Respondent to vacate Tyrconnel East citing the provisions stated above. The 5th Respondent refused and continued mining."*

13. Having alleged a violation of its rights under the provisions of s 31 of the Mines and Minerals Act [*Chapter 21:05*], the applicant has placed itself in the ambit of s 32 of the Act which confers exclusive jurisdiction to the Administrative Court to deal with the present dispute. That is simply where the applicant should go. The fact that the applicant has couched its relief in form of a declaratory order does not detract from the fact that the dispute concerns a land owner which is the applicant itself against a party carrying out mining activities which is the fifth respondent in this case. It is the cause of action and the choice of a correct forum or court with competent jurisdiction which should inform the relief sought and not the other way round. The relief sought is not the foundation of a case. It is the cause of action as articulated in the founding affidavit that constitutes the foundation of a case. If such fact is ignored, then litigants may take the easy way in crafting their relief in each and every case in a declaratory format so as to plead or argue that it is only this court that can handle each and every such dispute

even where a statute has given exclusive jurisdiction to another court. The court in such instances would then be compelled to consider whether such litigant cannot be afforded relief in any other manner other than in such a declaratory format. In this particular matter, the court is alive to the fact that what applicant simply wants is to stop the mining activities of the fifth respondent and remove it from its land. Such result can be achieved even by an eviction order, an interdict, an order cancelling or nullifying the fifth respondent's registration certificates among other remedies without necessarily requiring a declaratory order. Resultantly, even if it may be correct to say that the Administrative Court has no jurisdiction to grant a declaratory order, that argument does not advance applicant's position in any way in this context.

14. There is an argument again by applicant's counsel that there may be an illegality for this court to address in that the fifth respondent is mining without an Environmental Impact Assessment Certificate. Again, there are statutory remedies to deal with such complaints at law. A closer examination of s 97 of the Environmental Management Act when taken in the context of the whole Act shows that it goes on to provide the consequences and effects of one's failure to comply with subsection (1) of s 97. Section 97 (2) provides a criminal sanction as follows:

"(2) Subject to subsection (4) any person who knowingly implements a project in contravention of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

15. Furthermore, subsection (5) directs licencing authorities not to issue licences to entities who do not have the Environmental Impact Assessment Certificates in providing as follows:

"(5) A licensing authority shall not issue a licence ***under any enactment*** *with respect to a project referred to in subsection (1) unless the Director-General has issued a certificate in respect of the project in terms of section one hundred or the project has been deemed to have been approved in terms of subsection (1) of section one hundred."* (My emphasis)

16. In this context, it cannot be avoided to conclude that the applicant is aggrieved by the administrative decision of the first respondent who in his or her capacity as the

licencing authority, has allegedly licenced the fifth respondent to implement a mining project without an Environmental Impact Assessment Certificate duly issued by the Director General of the fourth respondent. The fact that the first respondent is a licencing authority for purposes of s 97 of the Act is inescapable and it steams also from section 2 of the Environmental Management Act which defines a licencing authority as follows:

"licensing authority" means any person on whom power is conferred under any enactment to issue a licence in respect of any activity required under that enactment to be done or carried out with a licence;"

17. The person or entity which issues a licence which authorises an entity to carry out an activity which requires a licence is the one which is defined as a licencing authority. It is not necessary here to examine whether a certificate of registration is a licence or not but it suffices to say that the applicant's grievance is against the conduct of the first respondent who issued the certificates which allegedly allowed the fifth respondent to implement a project without an Environmental Impact Assessment Certificate as required by s 97 of the relevant Act. Section 130 of the Act provides remedies to one who is aggrieved by the administrative conduct of any authority as follows:

*"**130 Appeal against decision of authority***
*(1) Subject to this section, any person who is **aggrieved by any decision of any authority in terms of this Act**, may within twenty-eight days after being notified of the decision or action of the authority concerned, **appeal in writing to the Minister**, submitting with his appeal such fee as may be prescribed:*
*Provided that **such appeal shall not suspend the operation of any order, decision or action of the authority issued by the Authority**.*
(2) For the purpose of determining an appeal noted in terms of subsection (1), the Minister (if he is not the authority concerned in the appeal) may require the authority to furnish him with the reasons for the decision or action that is the subject of the appeal and a copy of any evidence upon which the reasons are based.
(3) The Minister, after due and expeditious inquiry, may make such order on any appeal noted in terms of subsection (1) as he considers just.
*(4) A**n appeal shall lie to the Administrative Court against any order of the Minister in terms of subsection (3)**.*
(5) An appeal in terms of subsection (4), shall be made in the form and manner and within the period prescribed in the rules of court.
(6) On appeal in terms of subsection (4), the Administrative Court may confirm, vary or set aside the decision or action appealed against and may make such order, whether as to costs or otherwise, as the court thinks just." (Emphasis added).

18. It is clear from the above provisions that the Environmental Management Act provides statutory remedies to one who is aggrieved by the administrative conduct of a licencing authority. In arguing that the above section does not apply to the present case, Advocate *Sithole* submitted that the third respondent is not the Minister who administers the Environmental Management Act and as such he cannot deal with such issues. What counsel then missed out was that the Minister of Environment and Tourism who administers the Environmental Management Act is the one who is empowered by s 130 of the relevant Act to deal with any complaint against a licencing authority who in this context would be the first respondent who allegedly wrongly licenced the fifth respondent. In terms of s 130 (1) of the Act, such an appeal to the Minister does not suspend the decision of the authority being complained of. This basically means that the decision of the first respondent in issuing the relevant certificates remains in force until all these statutory remedies are exhausted. An appeal from the decision of the Minister would again exclusively lie with the Administrative Court. In this context therefore, there is no need for this court to interfere by pronouncing on the validity or otherwise of the registration certificates until the Minister or a court which has been clothed with the correct jurisdiction in terms of s130 of the Act should decide the issue.

19. For the reasons articulated above, I am constrained to hold that this is a matter that is within the exclusive jurisdiction of the Administrative Court to adjudicate having regard to s 32 of the Mines and Minerals Act [*Chapter 21*:*05*]. It is simply a dispute between a land owner and a prospector. The case can be settled without necessarily requiring a declaratory relief from this court. Furthermore, there is no need for this court to assume jurisdiction so as to deal with the alleged illegality of contravention of s 97 (1) of the Environmental Management Act [*Chapter 20*:*27*] when such legislation provides statutory remedies under s 97 (2) and (5) as read with s 130 of the same Act which remedies also culminate with the exclusive appellate jurisdiction of the Administrative Court. It is trite that this court should exercise its discretion to refuse to assume jurisdiction where a statute confers exclusive jurisdiction to another court.

20. This question of jurisdiction resolves the case without any need for me to decide the points in *limine* that were raised by the fifth respondents. The case is simply not properly before this court. I am not persuaded to award any costs against the applicant because the fifth respondent did not raise the issue of jurisdiction in its points in *limine*. The applicant would not have considered it prior to the hearing. In the result, I order as follows:

    (a) The matter is not properly before this court and it is hereby struck off the roll.
    (b) Each party shall bear its own costs.

Maunga Maanda &Associates, applicant's legal practitioners
Civil Division of the Attorney General, 1st ,2nd & 3rd respondents' legal practitioners
Mudimu Law Chambers, 5th respondent's legal practitioners