RIO ZIM LIMITED
versus
MINISTER OF DEFENCE AND WAR VETERANS AFFAIRS (N.O)
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE,21 May, 2019 and 15 September 2021

Opposed application for review

T. Mafukidze with *S.T. Manjengwa*, for the applicant
L. Uriri with *G. Dzitiro,* for the 1st respondent
L.T. Muradzikwa, for the 2nd respondent

CHITAPI J: After counsel made submissions on points *in limine*, I reserved judgment on them. I furnish herein my reasons for judgment and the consequential order made. The brief background to the application is as follows:

(a) Through the passage of Statutory Instrument 145/2018, which was gazetted on 3 August, 2018, the first respondent acting in terms of the powers granted in s 89 of the Defence Act, [*Chapter 11-02*] declared as cantonments area in a notice headed "Defence (Cantonments) notice 2018 (No. 51)" land described in the notice as-

> "A piece of land in the District of Lomagundi being Darwendale on the 1:50 000 map Darwendale 1730 DI Edition 2, held at the office of the Surveyor-General, Harare. The land being Darwendale North Farm bounded on the North by Abercorn on the east by Greenside ranch, on the south and south west by Darwendale A and Darwendale South and on the north-west by Maryland. A 10 kilometre radius from and around 3 referenced points is inclusive with grid points 389, 559, 395, 528, 434, 483, 369, 398, 408, 399, 364, 371, 368, 365 and more clearly indicated by a plan which may be inspected free of charge at the office of the Secretary of Defence, Defence House, Kwame Nkrumah Avenue, Harare."

The applicant attached a copy of the statutory instrument as annexure A to its founding affidavit. The copy is faint and illegible in most parts. I had to download a copy and thanks to the internet. I should express the court's disapproval of the practice by counsel of attaching unreadable photocopies of documents. The effect is not only that the

document will not assist in evidence assessment but where a matter stands or falls on the interrogation of such document, then the court would be justified to dismiss an application comprised of undecipherable documentary evidence. Such evidence will be excluded as being of no evidential value and accordingly counsel should be warned. I was persuaded to download the statutory instrument because it is a public document and a law of which the court is the custodian. Had the documents been a private one of which the party producing it was the depository, then the document would have been ignored as evidence to the detriment of the applicant's case.

(b) The applicant avers that the area described in the notice of declaration aforesaid covers all of its 206 mining claims. The applicant attached a map of the area covered by the claims which it asserts rights to as Annexure E to the founding affidavit. It averred that the initial cantonment area covered an area of 2541.4 hectares before the declaration in S.I 145/18 extended the area by a further 79300.00 hectares. The applicant complained that it prepared the map, Annexure E after vain attempts to inspect the plan referred to in the notice of declaration. The notice as evident therefrom gave out that the plan was open for free inspection at the office of the Secretary for Defence at Defence House. The applicant attached correspondence in the form of letters marked Annexures F,G,H and I respectively dated 15 August 2018 addressed to the permanent secretary for defence protesting the impact and purport of the statutory instrument 145/18 as well as its *bona fides* and inviting a meeting of the parties to try and resolve the dispute, dated 17 August 2018 addressed to the Judge Advocate, Ministry of Defence requesting to inspect the plan referred to in SI 145/18, dated 6 September, 2018 as a follow up to the letter of 17 August, 2018 and lastly dated 19 September, 2018 being alter from the Secretary for Defence to the applicant's Chief Executive advising of the Ministry's preparedness to hold a meeting with the applicant's representatives. It is common cause that the parties did not meet to resolve the dispute between them.

(c) The nature and extent of the dispute was and remains that the applicant challenged the validity of and seeks a declaratur setting aside S.I. 145/18 on review by this court. Various grounds for review are put across. I do not deal with them at this stage because of the need to clear points *in limine* raised by the respondents.

(d) The dispute concerning the notice has not come to court for the first time through this application. The applicant in Case No. 5212/18 sued Falcon Resources (Pvt) Ltd and Rusununguko Nkululeko (Private) Limited for an interdict to stop the respondents from carrying out mining activities on the applicant's claims in Wendale 43, Darwendale. It was alleged that the respondents were carrying out the illegal mining activities with the blessing of the 1st respondent. What is significant to take note of is that the respondents would have been mining not just on the applicant's claims but in an area now declared to be a cantonment area. The allegation was made then that the respondents had prior to the declaration resisted the interdict on the ground that the applicant had no right or *locus standi* to remove them because the area was a cantonment area meaning that the first respondent was the one which was in control of the area. Consequent on the dispute, the first respondent then made the declaration now under challenge. The court on 15 June, 2018 granted an interim order interdicting the respondents from mining and removing ore from the disputed area. The respondents noted an appeal to the Supreme Court and the appeal is pending under case no SC 476/18. The long and short of the applicant's contention is that the declaration made in S.I 145/18 was activated by the first respondent's desire to elbow out the applicant from its claims rather than for security considerations and in the process to give the respondents in case NO. HC 5212/18, a window to continue mining activities on applicant's claims as there was a connection between the first respondent herein and the respondents in HC 5212/18.

In so far as the merits of the case will help the resolution of the points *in limine* in part I note that, the first respondent denied that the declaration in S.I. 145/18 covered the applicants' "purported claims". The first respondent also denied the validity of the document to the disputed mining claims which the applicant produced as annexure B and C to the founding affidavit. The first respondent further averred that the area covered by the statutory instrument did not cover 79300 hectares as averred by the applicant but 31 420 hectares. Equally disputed was the accuracy of annexure E, the map of the cantonment area produced by the applicant. The first respondent denied that the plan of the area which was open for inspection as per S.I 145/18 was unavailable since it was part and parcel of the statutory instrument. First respondent also denied that there was

a connection between the declaration in S.I 145/18 and mining activities of the respondents in case No HC 5212/18. It was averred that the mining activity was being carried out outside of the disputed area in S.I 145/18. The first respondent respondent also questioned the title of the applicant to the claims since the applicant did not attach proof of current title for any of the claims. The first applicant attached affidavits from a senior army officer Felix Kanavati a major who sought to justify the declaration of the area set out in S.I 145 as a contonment area. Significantly he averred that mining operations and ammunition depots cannot co-exist because of danger to the public caused by explosion operations which are a common feature of both. An affidavit by a geologist Betrode Nyarufero was also attached. The key material averments which he makes is that the cantonment area S.I 145/18 covers 31420 hectares. He also compared the applicant's claims map Annexure K with respondents annexure L and concluded that some of applicant's claims do not fall within the declared cantonment area.

In reply the applicant questioned the qualifications of Major Kanaveti and alleged that he did not qualify to be an expert since he did not purport to be an explosive engineer with a "geo-physics and seismology background. The same criticism was made of the geologists Nyarufuro that he was not a professor in the subject of ammunitions locations, seismology explosive engineering or geo-physics. Unfortunately the applicant for its part ill-advisedly did not provide contrary expert opinions save to impugn the standing and qualifications of Kanaveti and Nyarufero. The court is in such a situation left without contrary evidence. The uncontroverted factual averments and opinions expressed by the deponents to the affidavits which evidence unless controverted must be accepted.

The second respondents Counsel indicated to the court that he was present in a watching brief. Indeed the second respondent was barred because he did not file any opposing papers. The passive participation of the second respondent has not assisted in the resolution of the matter. His participation would have greatly assisted because the parties are polarized as to the location of the applicants' claims *vis-à-vis* claims which were covered by the declared cantonment are under S.I 145/18. The second respondent is in charge of the Mines Ministry which is a depository of all records of mining claims and their situations. Ordinarily, disputes regarding location of claims are and should be resolved within the structures of the second respondent's headed Ministry.

Reverting to points raised *in limine*. I carefully considered them and determined that they really do not materially impact on the application as to merit its dismissal as prayed for by the first respondent. The first point *in limine* is procedural. The first respondent averred that the applicants papers did not comply with the provisions of r 257 of the High Court Rules in that the applicant did not state "shortly and clearly the grounds upon which the applicant seeks to have the proceedings (in case, decision) set aside or corrected and the exact relief prayed for." In the heads of argument, the first applicant submitted that the grounds of review as couched by the applicant are long, winding and argumentative. Counsel submitted in exaggerated language that the grounds of review canvassed facts issues and …" every conceivable topic under administrative law such that it is not quite clear which case the first respondent is requested to answer." The language is ornate or flowery because it would require a whole books for one to raise every conceivable topic in any area or branch of law. The second objection was that the relief sought in the application was not stated. In consequence thereof, the first respondent submitted that the application should be dismissed. Counsel cited the case of *Mwayera* v *Chivizhe* and Others 2016 (1) ZLR 15 (s) as authority that "an affidavit that is not attached to a notice of motion does not constitute an application and the purported application will be void *ab initio*." Having read through the cited cases, the facts of that case are different from the facts herein. The Supreme Court therein simply pointed out that a counter application had to be in form 29 just like the main application. The respondents in that matter had filed an affidavit only in making a counter claim. The purported counter claim was consequently held to be void *ab intio* as it was not brought in terms of the rules.

In order to appreciate the first respondent's objection to the form of the application I consider it necessary the set out what the applicant's papers show in regard to the grounds of review. The applicant averred as follows;

> "The grounds for review are as follows:-
> a) The decision by of the first respondent, with regard to the declaration of the area described in the schedule to **Statutory Instrument 145 of 2018** ("SI 145/2018) as a cantonment area was exercised in a manner that contravened the first respondent's duty to act lawfully, reasonably an fairly;
> b) The decision by the first respondent to declare the area described in the scheduled to SI 145/2018 as cantonment was grossly irregular and *ultra vires* toe empowering provisions of s 89 of the Defence Act [*Chapter 11:02*] as the first respondent exercised the power for a purpose other than that for which the power was conferred;
> c) The first respondent failed to follow the appropriate procedure as set out in s 3 of the **Administrative Justice Act** [Chapter 10:28] and in terms of natural justice when it made the decision to declare the area described in the schedule to SL 145/2018 a cantonment area. This

done without due notice the applicant, the nature and purpose of the proposed action hence failing to give applicant an opportunity to make representations, despite its knowledge of applicant's rights and interests;

d) The first respondent failed to act reasonably and/or rationally in coming to the decision to declare the area described in the schedule to SI 145/2018 a cantonment area, a decision that was adverse to the applicant who had legally registered mining claim in the area in question, and showing favour to Falcon Resources (Pvt) Ltd and Rusununguko Nkululeko (Pvt) Limited, who were and are still conducting unauthorised activities on applicant's mining claims; and
e) The decision by the first respondent gives rise to a serious miscarriage of justice which cannot be redressed by means other than an application for review. The relief that the applicant seeks is an order setting aside the declaration of the cantonment area made by the first respondent."

It will be apparent that in the last ground of review, the applicant stated in the last sentence as follows:

> "The relief that the applicant seeks is an order setting aside the declaration of the cantonment area made by the 1st respondent."

Mr *Uriri* argued that the challenge to the S.I. was a challenge to an existing law. As such, it was necessary that the applicant should not have just prayed for a declaration and setting aside of the S.I. He submitted that it was necessary for the applicant to state what should happen to the Statutory Instrument because it will have been passed as constitutional by the Parliamentary Legal Committee in terms of s 152(3) and ()4) of the Constitution. It appears to me that the court has wide powers under s 175 of the Constitution go give an appropriate order regulating the state of affairs in a matter where a law has been declared invalid. A failure or omission by the applicant to suggest interim relief consequent on the declaration of the invalidity of a law does not in my view render the application a nullity. The dicision as to what interim order to give is in the discretion of the court and will be informed by the particular facts of each case. Whilst accepting that the relief sought could have been worded and should in fact be worded in a meticulous manner, the want of meticulousness does not *in casu* render the application void or dismissible for want of form.

Mr *Uriri* attacked the grounds of review as not being succinct, short and clear. Mr *Mafukidze* for the applicant submitted to the contrary and argued that the question as to what constitutes short and clear grounds was in every case a value judgment. I must agree. Mr *Mafukidze* submitted that a determination on this aspect was akin to the court being asked to determine how short is a piece of string. Mr *Mafukidze* was not to be left out in demonstrating his

own penchant for flowery language in quoting the use of the piece of string as an example to demonstrate a clear point that one cannot really be precise on what in a given case constitutes a clear and short ground of review. The first respondent quoted several cases on the need for strict compliance with r 257. The cases referred to were *Chitaura v ZESA* 2001 (1) ZLR 30(H); *Minister of Labour* v *PEN Transport* SC 45/89; *Mushaishe* v *Lifeline and Anor* 1990(1) ZLR 284(H); *Chairman PSC and Anor* v *Marumahoko* 1992(1) ZLR 304(S). The cases apart from emphasizing on the need for applicant to comply with r 257 express the view that the continued flouting of the rule despite warnings by the courts on the need for compliance may justify a dismissal of the defective application without considering the merits. As I have already noted, every case should be determined on its merits. I would postulate that a dismissal of the application should be reserved for the most flagrant non-compliance with the provisions of the rule.

In my view, before the court can hold that grounds of review are non-compliant with r 257 for want of shortness of expression and clarity, the purpose of listing the grounds for review should be appreciated. The listing of grounds of review is necessary as an informative mechanism for the respondent and the court to appreciate the grounds of challenge at first glance. This is necessary because apart from listed grounds for review set out is s 27(1) of the High Court Act, [*Chapter 7:06*], S 27(2) provides that the grounds listed in s 27(1) do not affect any other law relating to reviews of proceedings or decisions of inferior courts tribunals or authorities. See *Fikilini* v *Attorney General* 1990(ZLR) 105(S) and *Secretary for Transport & Anor* v *Makwavarara* 1991(1) ZLR 18(S) wherein the Supreme Court stated that administrative actions were subject to judicial review on the grounds of illegality, irrationality and duty to act fairly. The Administrative Justice Act [*Chapter 10:28*] weighs in. Thus, because of the wide grounds on which decisions and actions are susceptible to be reviewed, the listing of such grounds as provided for in r 257 narrows down the scope or area of the challenge being brought before the court.

If one considers the grounds of review *seriatim*, ground:

(a) alleges a failure by the first respondent to act lawfully, reasonably and fairly in declaring the area described in S.I. 145/2018 as a cantonment area.
(b) Irregularity and ultra vires conduct contrary to provisions of section 89 of the Defence Act;

(c) A failure to follow procedures to ensure that natural justice is realized by not according a party who will be affected by an administrative conduct an opportunity to make representations before effecting the proposed action.

(d) Bias and favour towards another mining entity and disfavour to the applicant by making a declaration in S.I. 145/2018 which affected only the mining claims of the applicant and not the other entities which continue to engage in illegal mining claims belonging to the applicant.

(e) This is not a ground of review because it alleges miscarriage of justice requiring redress by review. This amounts to a statement of argument or a conclusion. However it is this purported ground of review that the relief sought is mentioned.

I do not consider from the above that the applicant did not comply with the provisions of r 257. Even if one were to argue that the manner in which the grounds were couched was circuitous and included too much detail, there was substantial compliance in that upon a holistic consideration of the grounds, the nature and scope of the applicants' complaint, or cause of attack could easily be picked as I have detailed above. Grounds of review should not in any event be too shortly expressed as would leave the court and the respondent unsure as to the nature and scope of the ground. It is therefore difficult to drawn a line or lay a test for what constitutes a short and clear ground of review. The concern should be whether any valid ground of review has been pleaded. It is the substance rather than the form which must be determinant although parties should refrain from being argumentative or pleading actual conclusions in grounds of review. That aside, I do not find the first point *in limine* on non-compliance with r 257 well taken and the point is dismissed.

The next point *in limine* was that the applicant lacked *locus standi* to bring this application. The argument put forward in support thereof was that the applicant had lost title to the claims in dispute because the claims had been forfeited. The respondent further submitted that consequent to the forfeiture of claims, the area to which the forfeited claims related to had by S.I. 145/2018 been lawfully declared a cantonment area. The respondent further submitted that the applicant had failed to relate to S.I. 145/2018 in that whereas SI 145/2018 set out the area covered as measuring 31 420 hectares on which lay claims owned by entities other than the applicant, the applicant sought to rely on a map which covered 79 300 hectares. The respondent submitted that the area depicted on the map attached to the applicant's papers did not relate to the area covered the S.I.

145/18. In my view the objections relating to what area is covered by the map *vis-a-viz* S.I. 145/18 is an issue to be determined on the merits.

The parties as properly noted by the respondent's counsel were agreed on the test of *locus standi* being that the applicant has *locus standi* in a claim where the applicant has established that he or she has a direct and substantial interest in the matter. The applicant in my view established its *locus standi* because it attached to its application documents of mining claims which *prima facie* relate to the area or part thereof as appear covered by S.I. 145/18. In such a case the applicant must be allowed the opportunity to asset its claims. Whether there is substance in the claims made is an evidential manner to be determined on the merits.

In the premises, the point *in limine* on *locus standi* fails. The point *in limine* that the review application was incompetent was abandoned and no argument was made on it. The ruling on the points *in limine* is that:

Disposition

1. The 1st respondent's points *in limne* be and are hereby dismissed with costs in the cause.
2. If the applicant is still persisting in the claim, it may set down the hearing of the application on merits.

Wintertons, applicant's legal practitioners
Mutumbwa, Mugabe & Partners, respondent's legal practitioners