BUCHWA IRON MINING COMPANY (PVT) LTD

versus

RODRECK MUMBIRE

and

THE COMMISSIONER OF MINES GWERU

and

THE CHIEF MINING COMMISSIONER

and

BEARABLE PROSPECTS INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE

KUDYA J

HARARE, 27 MARCH & 4 APRIL 2012

**Opposed Application**

*ABC Chinake,* for the applicant

*L Uriri,* for the first respondent

 KUDYA J: The applicant seeks confirmation of the provisional order granted by KARWI J on 18 July 2011. The terms of the final order sought and the interim relief granted were set out thus:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. It be and is hereby declared that the following claims Leleza 1-15, Registration Nos 128986 BM-12910 BM and Berlena 1-15, Registration Nos 12896 BM-12895 BM were improperly registered in favour of the first respondent and are therefore a nullity.
2. The first respondent and Bearable Investments (Pvt) Ltd and/or any other party claiming right or title through them, have no right, title and/or interest in Leleza 1-15, Registration Nos 12896 BM -12910 BM and Berlena 1-15, Registration Nos 12896 BM -12895 BM.
3. The first respondent shall pay the costs of the applicant and the costs of second and third respondents on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief:

1. That first, second and third respondent together with Bearable Prospects Investments (Pvt) Ltd or any other party claiming rights or interests through first respondent and/or Bearable Prospects Investment (Pvt) Ltd, jointly and severally, be and are hereby interdicted from dealing in, alienating, transferring or otherwise encumbering or dealing in the following mining claims in any way whatsoever:

“Leleza 1-15, Registration Nos 128986 BM-12910 BM and Berlena 1-15, Registration Nos 12896 BM-12895 BM” pending the determination of this matter and the application for rescission of judgment to be filed under HC 5125/11 by second respondent.

1. That the applicant, third respondent and Bearable Prospects Investment (Pvt) Ltd be and are hereby joined as parties under HC 5125/11
2. That Bearable Prospects Investment (Pvt) Ltd be and is hereby interdicted from reorganising its shareholding, or in any way encumbering, alienating or otherwise dealing with its shareholding in such a way as to result in the alienation or encumbrance or transfer of the following mining claims:

“Leleza 1-15, Registration Nos 128986 BM-12910 BM and Berlena 1-15, Registration Nos 12896 BM-12895 BM” pending the determination of this matter.

The general manager of Buchwa Iron Mining Company (Pvt) Ltd (BIMCO) deposed to the founding affidavit on 12 July 2011. He derived his authority for so doing from his job description. At the commencement of hearing, Mr *Chinake,* for the applicant, applied from the bar to file further affidavits establishing the authority of the deponent to its founding affidavit to depose to the founding affidavit. The affidavits had been filed and served on the first respondent’s legal practitioners of record on 8 November 2011. Mr *Uriri*, for the first respondent, opposed the application on the basis that the affidavits had already been filed without the leave of the Court contrary to r 235 of the Rules of Court. I granted the application on the authority of *Madzivire & Ors* v *Zvarivadza & Ors* 2006 (1) ZLR 514 (S) at 516G and *Direct Response Marketing (Pvt) Ltd* v *Shepherd* 1993 (2) ZLR 218 (H) at 221G-222B. In the latter case ADAM J stated that:

“The best evidence that the proceedings have been properly authorised would be to provide by an affidavit made by an official by the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court, then I consider that a minimum of evidence will be required from the applicant (cf *Parsons* v *Barkly East Municipality* 1952 (3) SA 595 (E); *Thelma Court Flats (Pty) Ltd* v *McSwigin* 1954 (3) SA 457 (C))."

The application commenced as an urgent chamber application. The founding affidavit was deposed by the applicant’s general manager. The basis of his authority was not challenged in the opposing affidavit to the urgent chamber application of 15 July or to the provisional order of 1 August 2011. It was raised for the first time in the first respondent’s heads of argument. The failure to challenge the general manager’s authority led the applicant to believe that his authority was not in issue. I was satisfied from the nature of the litigation that the general manager is not representing himself. In addition the first respondent has not demonstrated that he lacks the authority to represent the applicant. In any event the case of *Madzivire & Ors* v *Zvarivadza & Ors, supra,* allows the court to grant the party in the applicant’s shoes time to file proof of the authority. In my view, the issue of authority is not a contentious one as demonstrated by the first respondent’s silence since service of the irregular pleadings on it in November 2011. It was for these reasons that I condoned the failure to follow the strict requirements of r 235 and allowed the filed affidavit and accompanying resolution to stand.

I am satisfied that the round robin board resolution of 25 January 2011 and the affidavit of the Chairperson of the applicant’s board dated 8 November 2011 confirmed the source of his authority to depose to the founding affidavit on behalf of the applicant.

The facts in this matter were generally common cause. The founding affidavit established that on 24 February 1997, the Secretary for Mines with the approval of the Minister of Mines in terms of s 372 (5) of the Mines and Minerals Act [*Cap 165*], the precursor to s 291(1) of the Mines and Minerals Act [*Cap 21:05*], issued Special Grant No 2104 to the applicant to prospect for iron ore. The special grant covered approximately 34 700 hectares and was situated within Reserved Area No 854 in the Mining District of Gweru. One of the eight conditions attaching to the special grant was that it would be valid for twelve months. The applicant could renew the special grant before it expired. Apparently, the applicant periodically did so successfully.

In the Government Gazette of 16 May 1997, in General Notice 254 of 1997, the Secretary for Mines issued Reservation Notice No 854 in the Gweru Mining District at the instance of the Mining Commissioner Gweru and with the approval of the Minister of Mines, against prospecting and pegging in terms of s 35 (1) of the Mines and Minerals Act [*Cap 21:05*]. The area covered in the notice was approximately 34 700 hectares and its boundaries were fully delineated. The notice was posted at the office of the Mining Commissioner Gweru.

On 8 November 2006, 4 200 hectares were dereserved from Reserved Area 854. On 24 January 2007, the applicant sought renewal of SG 2104 covering 34 000 hectares after the partial withdrawal in November 2006 of 4 200 hectares for a period of 10 years from 24 February 2007 to 23 February 2017. The letter of the Secretary for Mines and Mining Development of 11 October 2007 filed by the first respondent indicates that it was renewed for three years on 23 August 2007 from 24 February 2007 to 23 February 2010.

On 6 September 2007, the second respondent wrote to Firmo (Pvt) Ltd of Gweru and Mr Mumbare (*sic)* of Masvingo. Firmo (Pvt) Ltd had apparently pegged and registered blocks 12971-12987 Leleza 17-33 in the reserved area 854 covered by special grant 2104 belonging to the applicant. Mr Mumbire had pegged claims in 12881 BM – 12895 BM Berlena 1-15, 12896BM-1910 BM Leleza 1-15 in the iron ore reserved area 854 and special grant 2104 of the applicant. The two were advised that their claims contravened s 31(1) (b) of the Act and would be cancelled 30 days from the date of their respective letters in terms of s 50 (1) (a) of the Act. They were advised of their right of appeal to the Minister of Mines. The second respondent duly cancelled the certificates of registration issued to Firmo and Mumbire on 6 November 2007. The cancellations were gazetted on 5 February 2010.

On 17 November 2009, the applicant applied for renewal of the special grant for five years from 24 February 2010 to 24 February 2015. The papers disclose that the application was held in abeyance until 23 February 2011. On 4 March 2011 the applicant applied for the further renewal of special grant 2104 to the second respondent who in turn on the same date recommended renewal to the third respondent for a period of five years.

 On 1 June 2011, the first respondent filed a court application in HC 5125/11 against the second respondent seeking the transfer of the claims in question upon service of the order from his name to the fourth respondent a company in which he was the major shareholder and a director. In his founding affidavit he averred and proved by way of certificates of registration that he registered the iron ore claims on 12 March 2007. The application was granted in default of the second respondent on 29 June 2011. The claims covered the area in which the applicant claimed pre-existing rights. On 7 July 2011, he transferred the claims into the name of the fourth respondent.

The applicant became aware of the court order of 29 June on 5 July 2011 from Mrs Muchinguri the legal adviser in the Ministry of Mines who facsimiled a copy to him. On 7 July 2011 he was shown a copy of the order in Harare by the Chief Mining Commissioner, Mr Mabena.

The applicant accused the first respondent of acting in bad faith in HC 5125/11 by failing to join it as a respondent well aware of its interest in the area in dispute and in the full knowledge that his claims had been cancelled. Notwithstanding the opposition by the first respondent, the provisional order was granted. It was served on 18 July 2011 on the first and fourth respondent’s legal practitioners and on the third respondent. It was served on the second respondent in Gweru on 19 July 2011.

The confirmation of the interim relief and the final relief sought were opposed by the first respondent only on 1 August 2011. In opposing confirmation of the interim relief and the final relief sought, the first respondent raised three preliminary objections. He set out at pp 40-41 of the application his appreciation of the applicant’s causes of action. He understood them to be that the special grant was valid and enforceable, the reserved area 854 reposed exclusive rights and unfettered use of the area to it, the claims held by first respondent and transferred to fourth respondent in HC 5125/11 were lawfully cancelled and that it had the *locus standi* to challenge his rights. In spite of this appreciation, the first respondent concentrated his firepower on the special grant.

The first objection was that the applicant had no cause of action or direct and substantial interest in the matter as it did not have a valid special grant in existence at the time it instituted the urgent application. Its preceding special grant had expired on 23 February 2010 and had not been renewed. At that time the first respondent had been holding the rights since 12 March 2007.

The second objection was that he was not served with the notice and letter of cancellation of the disputed claims. He relied on memoranda exchanged between the Chief Mining Commissioner, Mabena of 18 August 2009 and second respondent, Mr Dube of 10 September 2009. The Chief Mining Commissioner acted on the first respondent’s complaint that his claims had been cancelled and sought clarification from the second respondent. The second respondent chronicled the contents of nine documents in his office. The registration ledger indicated that the claims were cancelled on 6 November 2007. The cancellation, however, was not endorsed on the registration cards, the current ledger and farm ledger. Rather the claims were protected to 12 March 2009 by the work receipt issued on 24 October 2008 and further protected to 12 March 2010 by the production receipt issued on 4 May 2009. He further noted that the letter by his assistant of 6 September 2007 did not bear Mumbire’s address. It was sent by registered mail 36/136 on 25 September 2009 to Box 96 Masvingo instead of Mumbire’s address Box 936 Masvingo. He might as well have added that it was addressed to Mumbare. He did not know whether the cancellation had been published in the Government Gazette. The letter from Messrs Ndlovu and Hwacha, the legal practitioners of the first respondent at the time, to the second respondent of 17 September 2010 elicited the response of 2 February 2011 that the claims were registered in his name.

He believed that the issue of cancellation could only be determined from oral evidence and not on affidavits. He prayed for the dismissal of the present application on the basis of these preliminary points.

At the hearing Mr *Uriri* argued on three preliminary issues even though four were raised in the heads of argument. This was because the first issue that dealt with the authority of the applicant’s general manager to depose to the founding affidavit was disposed of at the commencement of this hearing.

Mr *Uriri* submitted that the applicant did not have a direct and substantial interest in the matter. The contention being that when it filed the application, its special grant 2104 had expired and was the subject of an application for renewal. The factual averment by the first respondent was correct. The submission, however, overlooked the existence of the reserved area in which pegging and prospecting were prohibited. He attempted to suggest that the applicant had not demonstrated that the claims registered in the fourth defendant where in the reserved area. The map on p 101 of the record clearly demonstrates that the claims were in the reserved area 854. The submission also overlooked the valid contention by Mr *Chinake* that at the time the first respondent registered the claims in March 2007, the claims belonged to the applicant.

Mr *Uriri* further contended that the applicant did not establish and prove that it had a legitimate expectation that its application for renewal would be approved. Some of the requirements for legitimacy of expectation were set out in *Matake & Ors* v *Minister of Local Government & Housing & Anor* 2007 (2) ZLR 96 (H) by NDOU J at 100G-101D. These were that the representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification; the expectation must be reasonable, the representation must be induced by the decision maker and must be one for which it is competent and lawful for the decision maker to make. Mr *Chinake* contended that the applicant established that it had mining claims protected by the inspection certificates on page 17, 19 and 100 of the application. In addition the letter of 24 January 2007 established the physical presence of the applicant on the ground and an expenditure incurred of ZW$500 000.00. In the letter of 17 November 2009 addressed to the second respondent, the applicant sought renewal of the special grant 2104 that was expiring on 23 February 2010 for a period of 5 years from 24 February 2010 to 24 February 2015. On 23 February 2011 the second respondent requested for more information before recommending renewal for a period of 5 years to the third respondent on 4 March 2011. The third respondent in turn and on the same date recommended renewal for 5 years to the Secretary for Mines and Mine Development. Those representations were confirmed on 7 July 2011 by the third respondent and on 29 August 2011 by the legal officer in the Ministry of Mines and Mine Development in her supporting affidavit filed on 31 August 2011. Again the second and third respondents filed a letter on 12 March 2012 (produced by consent at the hearing) indicating that they were not opposed to the application. These representations were clear and unambiguous and were made by the decision makers who could lawfully make them. The expectation of renewal was also reasonable.

The applicant thus had a legitimate expectation that the special grant would be renewed when it filed the present application on 12 July 2011. It had been renewed in the past. It had invested heavily in the claims. Its investments were recognised by the decision makers. I am satisfied that the applicant had a direct and substantial interest in Reserved Area 854 that was buttressed by a legitimacy of expectation of the renewal the special grant 2104.

The other objection raised in the heads of argument but not pursued orally was that oral evidence was required to determine whether the mining claims registered in the first respondent’s name and transferred to the fourth respondent were cancelled. It seems to me that there is sufficient evidence at hand to determine whether or not the registrations were cancelled. The correspondence from the second and third respondents will assist the court in determining whether or not the first respondent’s claims were cancelled. The first respondent failed to demonstrate how oral evidence would paint a different picture. This objection failed.

The last objection was that the applicant raised a new cause of action in the answering affidavit by averring that the RISCOM claims belonged to it. It is correct that a cause of action cannot be raised in an answering affidavit. See *Mangwiza* v *Ziumbe NO and Anor* 2000 (2) ZLR 489 (S) at 492D-G and *Hiltunen* v *Hiltunen* 2008 (2) ZLR 296 (H) at 301B-C. On p 7 in para 17.4 of the founding affidavit reference was made to these claims for which inspection reports on pp 17 and 19 similar to those on p 100 were filed. They refer to the claims in issue and were paid for by the applicant. It is incorrect to suggest that the applicant raised a new cause of action in the answering affidavit. But even if a new cause of action had been raised in the answering affidavit; it would not have substituted the other causes of action based on the reserved area, the special grant and the General Notice 12 /2010.

It was for these reasons that all the preliminary points raised were dismissed.

On the merits, Mr *Chinake* submitted that the registrations by second defendant of the disputed rights in the name of the first respondent on 12 March 2007 were a nullity and could not have been legally transferred to the fourth respondent, even by order of this court in HC5125/11. He relied on the provisions of s 3, 31, 35 and 50 of the Mines and Minerals Act. Section 3 states that mining rights can only be validly acquired in terms of the Act. Section 31 (1) (b) subordinates the enjoyment of rights under any prospecting licence, special grant or exclusive prospecting order, in a mining location, to the provisions of Part V and VII of the Act. Section 35(1) prohibits prospecting and pegging in a reserved area. Section 50 sets out the reasons for and the manner of cancelling a certificate of registration.

Section 50 reads:

**50 Cancellation of certificate of registration**

(1) Subject to subs (2), the mining commissioner may, notwithstanding subs (1) of section *fifty eight*, at any time cancel a certificate of registration issued in respect of a block or site if he is satisfied that—

(*a*) at the time when such block or site was pegged it was situated on ground reserved against prospecting and pegging under section *thirty-one* or *thirty-five* or on ground not open to pegging in terms of subs (3) of section *two hundred and fifty-eight*; or

(*b*) provisions of this Act relating to the method of pegging a block or site were not substantially complied with in respect of such block or site.

(2) At least thirty days before cancelling a certificate of registration under subs (1), the mining commissioner shall give notice to the holder of the block or site of his intention to cancel such certificate and of the grounds for such cancellation and of the proposed date of such cancellation, and shall at the same time inform the holder that he may, at any time before that date, appeal in writing to the Minister against such cancellation.

(3) Such notice shall be given by registered letter addressed to the holder of the block or site at the postal address recorded in the office of the mining commissioner or, if no such address is recorded, by publication thereof in the *Gazette.*

(4) Where such an appeal is made, the Minister shall give directions to the mining commissioner as to whether or not the certificate of registration is to be cancelled, and the mining commissioner shall comply with such directions.

(5) Upon such cancellation the mining commissioner shall post upon the board whereon notices of forfeiture are posted a notice giving particulars of such cancellation and shall, in addition, publish those particulars in the *Gazette* and in a newspaper circulating in his district.

(6) A mining location, the certificate of registration of which has been cancelled in terms of this section, shall, for the purposes of sections *two hundred and sixty-eight*, *two hundred and sixty-nine*, *three hundred and* *sixty-three* and *three hundred and seventy-five*, be deemed to have been forfeited and, accordingly, any reference in section *two hundred and sixty-nine* to the posting of a forfeiture notice shall be read as including a reference to the posting of the notice of such cancellation.

Mr *Uriri* submitted that the mining claims were registered in the name of the first respondent in terms of the Act for at least two years before the dispute to his title was raised in this court and were validly held by him when he transferred them by order of this court in HC 5125/11 on 7 July 2011. He relied on s 50 and 58 of the Act and correspondence emanating from the second respondent’s office on whether or not the certificates were cancelled. Section 58 reads:

**“58 Impeachment of title, when barred**

When a mining location or a secondary reef in a mining location has been registered for a period of two years it shall not be competent for any person to dispute the title in respect of such location or reef on the ground that the pegging of such location or reef was invalid or illegal or that provisions of this Act were not complied with prior to the issue of the certificate of registration”.

He contented that the first respondent was not aware of the dispute raised against him by applicant on 25 July 2007. The applicant did not write to him or copy to him the letter of complainant dispatched to the second respondent. He disputed the alleged cancellation of his rights and averred that he was not served with the letter of cancellation even though it was purportedly copied to him. The letters of 6 September 2007 notifying him of the proposed cancellation and 6 November 2007 on the cancellation and 2 February 2011 indicating that he was the holder of the claims in dispute were all written on behalf of the second respondent by the same individual. He attached an inspection certificate issued on 14 December 2010 indicating that he held the claims pending the next inspection on 12 March 2011. He maintained that the applicant’s claims lapsed while his were alive as confirmed by the inspection certificate of 14 December 2010 and the second respondent’s letters of 10 September 2009 and 2 February 2011 notwithstanding the gazetting of 5 February 2010. He was aware of the former rights that applicant used to have before they lapsed.

Mr *Chinake* correctly contended that the prospecting and pegging in a Reserved Area is outlawed by s 31 (1) (b) as read with s 35 (1) of the Act. It was common cause that Reserved Area 854 was extant at the time the first respondent prospected, pegged and registered the claims in issue in March 2007. Mr *Uriri* did not and could not argue against the existence of the reserved area 854 on the date of registration. The Reserved Area 854 had an indefinite life span.

Neither counsel addressed me on whether the special grant 2104 was in existence on 12 March 2007 when the first respondent registered the claims in dispute. That the special grant had expired is apparent from two letters, the first emanating from the applicant’s chief geologist and the second from the Secretary for Mines. Both were addressed to the second respondent. The first is the letter of 24 January 2007; on p 20 of the application. It is clear from the second paragraph of that letter that the special grant expired on 23 January *(sic)* 2007. The second is on pp 50 and 84 of the application. It indicates that the special grant was renewed on 23 August 2007 for three years to 23 February 2010. It would appear from these two letters that the applicant did not have a special grant on 12 March 2007 but it was renewed in retrospect from 24 February 2007 to 23 February 2010. The registration of 12 March 2007 did not therefore abrogate the applicant’s prior rights as on that date. It would appear therefore, that when first respondent registered the mining claims, the applicant’s special grant had expired. The registration of 12 March 2007 was, however, contrary to s 35 (1) of the Act. Mr *Chinake* appeared to be on firm ground that the registration was void. He also relied on the cancellation of the certificates of registration purportedly done on 6 November 2007 and confirmed in the Government Gazette of 5 February 2010.

Mr *Uriri,* however, submitted that the first respondent’s title was protected by s 58 of the Act as his rights had been registered for more than two years. The precursor to s 58 of the present Act was s 55 in the Mines and Minerals Act [*Cap 203*]. An interpretation of that section was rendered by DAVIES J in *Robinson* v *Trojan Nickel Mine Ltd* 1969 (2) RLR 571 (GD). In that case a certificate of registration was issued by the Mining Commissioner on the false representations of the predecessor of Trojan Nickel Mine that it had the permission of the predecessor of Mrs Robinson to peg mining claims within 50 feet of her cultivated lands but not within 500 yards of her homestead. At the time of registration the registered area was not open to prospecting and could not be registered. Mrs Robinson’s application for a declaration of invalidity of the registered mining claim was dismissed on the ground that despite the allegation of fraud the provisions of s 55 protected the defendant’s title from attack as it had been registered for more than two years.

It seems to me that like s 55 before it, s 58 protects title from attack two years after registration, firstly, on the ground that such title was acquired through invalid or illegal pegging; and secondly, on the ground that before the certificate of registration was issued, some provisions of the Act were not followed. The declaration of invalidity sought by the applicant is based, amongst others, on the ground that pegging in Reserved Area 854 was illegal. Such a ground is hit by s 58 unless the challenge is raised within two years from the date of registration. The other ground on which the declaration is sought was that the first respondent prospected in Reserved Area 854 in contravention of s 31 (1) (a) and s 35 (1) of the Act. In other words, the ground for invalidity was that the first respondent did not comply with the provisions of the Act. Again, this submission flounders on the s 58 rock if it is raised after two years of such registration.

The next issue for determination is to consider whether the applicant raised the dispute within or after two years of registration. The letter from the second respondent of 6 September 2007 addressed to Mr Mumbare and copied to the applicant indicated that the applicant disputed the first respondent’s title on 25 July 2007. The procedure taken by the second respondent was to initiate the cancellation of the first respondent’s title. Again, the letter of 6 November 2007 cancelling the certificate of registration of the first respondent was copied to the applicant. The process of cancellation culminated in General Notice 2/2010 of 5 February 2010 in which the cancellation was published in the Government Gazette. The conduct of the second respondent led the applicant to believe that the certificates had been cancelled.

The documentation in question indicates that the certificate of registration of the first respondent was cancelled on 6 November 2007. It is correct that there is subsequent correspondence to the effect that the certificates issued to first respondent were still valid. The correspondence in question amount to a tacit admission by the second respondent that the first respondent was not given notice of the cancellation and that the provisions of s 50 especially subs (2) to (6) of the Act were not complied with. I did not hear Mr *Chinake* counter the forceful argument of Mr *Uriri* that the purported cancellation was void for lack of compliance with the provisions of s 50 of the Act. It was an appreciation of that failure that elicited the admission from the second respondent of 2 February 2011 that the certificates issued to the first respondent were valid.

It is apparent from the correspondence filed of record that the first respondent was not aware of the dispute raised by the applicant on 25 July 2007 until sometime in August 2009 when Mr Hwekwete informed him of the purported cancellation of 6 November 20007. He became aware of the dispute two years after he had registered the mining claims. The applicant has not averred or proved that the first respondent was aware of the challenge to his title within the period of two years within which his title could be impugned. Thus, while the applicant raised the dispute to first respondent’s title with the second respondent timeously, in the absence of proof that the first respondent knew of the challenge within two years, the applicant is precluded by the provisions of s 58 from attacking his title.

 The applicant brought the present application disputing the first respondent’s title more than two years after registration of 12 March 2007. The attack on the first respondent’s title is protected by the provisions of s 58 notwithstanding that it was based on an invalid act.

 It does not seem to me that the applicant has any reason to despair. The attitude of the second and third respondents appears to be that the certificates were erroneously issued. Section 50 (1) of the Act provides a safety value against injustice. It overrides the provisions of s 58 of the Act. The ball remains in the second respondent’s quarters, if so advised, to invoke the provisions of s 50 of the Act.

The second respondent is largely to blame for the debacle that the applicant and the first respondent found themselves in. He failed to diligently discharge his mandate in terms of the Act.

Costs are always in the discretion of the court. The applicant was misled by correspondence he received from the second respondent that his dispute had been taken to the first respondent and that the erroneous certificates had been cancelled. The first respondent’s actions in pegging and prospecting in a reserved area were unlawful and rendered the subsequent registration of the mining claims in dispute void. The invalidity is, however, saved by s 58 notwithstanding that ordinarily on the authority of *Macfoy* v *United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) at 1171 an act that is *void ab initio* is incurably bad and incapable of vindication. It is for these reasons that I would deprive the first respondent of costs that ordinarily follow victory. While I was inclined to grant the applicant costs on the ordinary scale for partial victory arising from the dismissal of the preliminary points, on better reflection, I consider it fair and just for each party to bear its own costs including the costs occasioned by the postponement of 8 March 2012.

Accordingly, it is ordered that:

1. The provisional order be and is hereby discharged
2. Each party shall bear its own costs.

*Kantor and Immerman,* applicant’s legal practitioners

*Tizirai-Chapwanya Legal practitioners,* first respondent’s legal practitioners