TAMBANASHE ENTERPRISES PRIVATE LIMITED
versus
TWO FLAGS PRIVATE LIMITED
and
PROVINCIAL MINING DIRECTOR MASVINGO

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 23, 30 June 2017, 12 July 2017

Opposed Application

D. Mwonzora, for applicant
F R Chakabuda, for the 1st respondent
F Chingwere, for the 2nd respondent

CHIGUMBA J: In the exercise of the power conferred upon it by its own governing act to grant declaratory orders, should this court set aside its own previous declaratory order and substitute in its place a completely different declaratur, if the effect of doing so would amount to 'doing violence to the sense and substance of the original order? Put differently, is it a competent exercise of parallel jurisdiction to grant a declaratur whose effect would be to nullify another declaratur already issued by this court which is extant? A litigant who is aggrieved by the conferment of rights, title and interest in certain mining claims on its rival, in proceedings in which it was not cited as a party, has remedies at its disposal. Those remedies do not include seeking a competing declaratur, before the same court, in which it is granted rights title and interest in the same mining location, unless and until the original declaratur has been set aside.

The applicant and the first respondent are both companies which are duly registered in accordance with the laws of Zimbabwe (Tambanashe and Two Flags). The second respondent is

the provincial mining director of Masvingo, who operates under the auspices of the Ministry of Mines and Mining Development (Ministry of Mines). The dispute between Tambanashe and Two Flags relates to various mining claims, which are collectively held under and known as Lennox Mine, situate in Mashava, Masvingo Province, namely, Lennox A, Lennox, Lennox 2, 3, 5, Rex 10, 18, 19 Devon, and Gaudinia. Certificates of Registration for these claims were issued in terms of the *Mines and Minerals Act*, by the Ministry of Mines. All six opposed applications which have been consolidated for hearing at the mutual request of the parties pertain to rights, title, and interest in these claims.

The main application before me is one for a declaratory order, filed by Tambanashe on 16 March 2017, out of the High Court of Masvingo. It is common cause that various applications and counter applications had previously been filed out of the High Court at Harare by the same parties, and that, some of these applications are still pending. In the interests of resolving the dispute between the parties to finality, these six applications which had been filed out of Masvingo High Court were brought to Harare, consolidated, and allocated with new case numbers. At a case management conference held before me in chambers on 23 June 2017, it was agreed that the application for a declaratur (filed by Tambanashe), and the applications for stay of execution and rescission of judgment (filed by Two Flags) be set down for hearing at one sitting, and that, thereafter the status of the other three applications would be evaluated.

The background to these matters, as set out in the founding affidavit of Mr. *Edgar Mashindi,* the general manager of Tambanashe, is that, on 27 November 2006, the secretary of the Ministry of Mines wrote a letter in which he advised that Lennox Mines had been illegally run by a company known as *Knobthorn Investments Private Limited* (Knobthorn), for a period of two years without any title or tribute agreement. Knobthorn was alleged to be illegally mining and transporting gold ore, trading it on the parallel market, and of looting and vandalizing mining equipment, cannibalizing it and taking it to their other mines in the area. The Ministry of mines closed Lennox Mines on that date in order to facilitate investigations into these allegations. In the same letter, it was advised that Lennox Mines would now be operated by a

company named *Lamorna Investments Private Limited* (Lamorna). It is common cause that, the Ministry of Mines subsequently registered the claims in the name of a company named *Reedbuck Investments Private Limited* (Reedbuck) which company later went into liquidation, with a *Mr. McIndoe* being appointed as the liquidator. Annexure D to the founding affidavit is proof that, in 2007, the mining claims which together constitute Lennox Mine were registered to Reedbuck.

Tambanashe averred that, these claims were forfeited to the State during the period 2006-2007, and that consequently, they became open to re-pegging. Tambanashe re-pegged the claims, whereafter it acquired the claims which constitute Lennox Mine. Annexure E1-E20, F and G are mining certificates of registration, dated 26 April 2011, for Block 101 Nickel named Texas on Sans Souri Farm, confluence of Tokwe and Shashi River; block 116 Nickel named Thor. East of Kudu Kop hill; block 90 Nickel named Thor 3 north west of Nduna hill; bock 72 Nickel named Jason 4 south west of an unnamed dip tank, block 72 Niclel named Jason 4 soth west of an unnamed dip tank dated 2 September 2011, block 116 Nickel named Thor east of kudu Kop Hill dated 26 August 2011, block 90 nickel named Thor 3 north west of Induna Hill dated 26 October 2011, block 101 nickel named Texas 11 confluence of Tokwe and Shahserivers dated 26 August 2011 Tambanashe attached certificates of registration after transfer, dated 13 March 2007 for Lennox A transfer number T9701, Cam 5 transfer number (TRN) T9687 dated 9 February 2007, Cam 4 dated 9 February 2007 TRN T9686, and so on. All the certificates of registration after transfer are dated 9 February 2007.

It was averred on behalf of Tambanashe that the 2nd respondent had unlawfully and unprocedurally issued certificates of registration in favor of Two Flags, in respect of the claims which were registered in its name. The application is premised on this averment, that the certificates issued in favor of Two Flags by the Ministry of Mines be declared invalid, null and void. Two Flags filed a notice of opposition on 30 March 2017, deposed to by *Mr. Tinayeshe Hove,* its director, who averred that this court had issued a declaratory order under HC11857-15, on 19 January 2016. The terms of the declaratory order were that the agreement of sale between Two Flags and *Mr. R. M. McIndoe,* dated 30 June 2003 was lawful and binding, and that Two

Flags was the legal owner of all furniture, equipment, fixtures and fittings listed on an attached schedule, and that the provincial Mining Director Masvingo should immediately transfer all the mining claims which constitute Lennox Mine to Two Flags. It was averred further, that Tambanashe abandoned its application to have this declaratur rescinded, which it had filed under HC551-16. This application was dismissed for want of prosecution at Two Flag's instance, on 2 March 2017.

Two Flags then raised some preliminary objections, that Tambanashe had failed to serve the application despite filing it in March, that Tambanashe could not seek a declaratur which had the effect of nullifying another declaratur issued by this court which declaratur had not been set aside, that the matter was now *res judicata.* Two Flags denied that the mining claims were forfeited to the state in 2006-2007, or that the claims became open for re-pegging. The second respondent filed a notice of opposition on the 31st of March 2017, which was deposed to by *Sibongubuhle Mpindiwa,* the acting provincial mining director Masvingo province, appointed in terms of s 341 of the Mines and Minerals Act [*Chapter 21:05*] (the Act). The position taken in the opposing affidavit is that the mining claims in question could not have been forfeited because they had been sold by the liquidator of Reedbuck, *Mr. McIndoe,* but they could not be transferred to two Flags for administrative reasons. Further, that, if Tambanashe had indeed acquired the claims through re-pegging, then this should be reflected on the certificates.

The third position taken is that, if indeed Lamorna acquired any title to the mining claims in question, then that title was acquired on top of the title which vested in Reedbuck, and which had been sold to Two Flags. The Ministry of Mines stands by the title which it vested in Two Flags, pursuant to a declaration of its entitlement under HC11857-15. Finally the Ministry of Mines placed reliance on ss58, and 50 (1), (2) of the Act. It is my considered view that the issue that arises for determination in this matter is simple. Before getting bogged down with technicalities and preliminary points we must resolve the question of whether indeed Tambanashe is a legitimate holder of rights, title and interest in the mining claims which constitute Lennox Mine in Mashava. If it is a legitimate holder of such title, is a declaration of

these rights the appropriate remedy in circumstances where this court has already declared Two Flags to be the legitimate holder of title in the same claims which constitute Lennox Mine?

The next application which we are seized with is a court application for rescission of judgment which was brought by Two Flags on 2 May 2017, under MSV 117-17, Ref Case HC 102-17 Now HC 5408-17. In this application the first respondent is Tambanashe and the second respondent is the Sheriff of Zimbabwe, cited in his official capacity. The background to the dispute is largely common cause, but it seems to me that it bears repeating in order to get the sequence of events correct. On 30 June 2003 Two Flags entered into an agreement of sale with Reedbuck which was represented by its liquidator Robert McIndoe. They bought buildings, furniture, fittings, tools and equipment situate at Lennox and Empress Mines which were then owned by Reedbuck. Two Flags then makes the following averments;- that Tambanashe invaded and took occupation of Lennox mine in corrupt, illegal and dubious circumstances without just cause and caused a protracted legal battle. On 27 January 2016 Two Flags obtained a declaratory order under HC 11857-15 which confirmed its agreement of sale with Reedbuck and declared it to be the sole and exclusive owner of Lennox mine, as well as directing the Ministry of Mines to effect transfer of all the mining claims which constitute Lennox mine to it.

Two Flags averred further that, on 21 November 2016, an order by consent under HC 2901-16 was registered by this court, in terms of which it was directed that the transfer of the said mining claims be effected into its name. The resultant transfer certificates are attached to the founding affidavit, as annexures E1-E15, dated 23 January 2017. On 22 March 2017, Two Flags obtained an eviction order against Tambanashe under HC1843-17. Execution of this order took place on 28 March 2017. Annexures G1-G3 are the sheriff's returns of service. On 29 March 2017, annexure G1 is a return of service in which it is advised that execution was attempted but stopped on telephonic instructions from Harare that an urgent application to stay execution had been filed. Annexure G2 G3 is a return of service dated 28 and 31 March 2017 in which it is advised that Tambanashe and all those claiming occupation through it had been ejected from Lennox mine, the operating areas as well as the compound houses, in terms of the court order.

It is common cause that, after this eviction process, Tambanashe filed an urgent chamber application for restoration out of Harare High Court, under HC 2802-17, on 4 April 2017. The order for restoration was granted. It is common cause that Two Flags appealed against the restoration order under SC 220-17. At this stage, we get into even muddier waters. Tambanashe filed an urgent chamber application, now out of the High Court at Masvingo, on 8 April 2017 under MSV 102-17 in which it sought leave to execute its restoration order pending the appeal filed against it by Two Flags. The urgent chamber application for leave to appeal was set down for hearing in Masvingo. It is averred on behalf of Two Flags that, after hearing the parties in chambers, the Judge directed that the parties draw up a draft order by consent for his consideration.

Two Flags insists that there was never any consensus between the parties, and that, the Judge subsequently directed, through the Registrar, that each party submit its issues which it wished to be included in the order by consent. It is averred that each party subsequently submitted its own 'draft order by consent' for the Judges consideration, which was duly signed by it. The parties' respective draft orders are attached to the founding affidavit as annexures J 1 and J2. Two Flags avers that the draft orders were mutually exclusive, each reflecting its author's position, which was poles apart from the other's. It is common cause that, on 24 April 2017 an order by consent was issued. It is attached as annexure K to the founding affidavit. This is the order which Two Flags seeks to have set aside for the following reasons;-

1. There was never any consensus or a document on which both parties jointly appended their signatures, reflecting their polarized positions.
2. No reasons were given as to why this order was termed a consent order when there was no consent.
3. The order is at variance with what was discussed before the Judge in chambers.
4. The order granted was not what the parties prayed for, and both legal practitioners agree on this.

5. The mining certificates which Tambanashe seeks to rely on have been disowned and cancelled by the Ministry of Mines.
6. It does not make sense for Two Flags to agree to have the declaratur in HC 11857-17 set aside because its right, title and interest in Lennox mine were confirmed in that declaratur. This shows that it never agreed to the terms of the consent order.

It is common cause that an urgent application to have the consent order corrected was unsuccessful, under MSV110-17. Two Flags is aggrieved and now seeks to have that consent order set aside. Tambanashe opposes the application for rescission of judgment on the following premise;-

On 15 June 2017, Two Flags filed an answering affidavit in which it denied that the urgent chamber application for correction of an order was still pending before the High Court in Masvingo under MSV 110-17. It has been disposed of in terms of rr241-246 of the rules of this court. Two Flags avers that the relief which it is seeking in this application is different, that Tambanashe was not a party to the agreement of sale which it entered into with Reedbuck and therefore was not entitled to be cited as a party to the proceedings. Two Flags averred that Tambanashe never acquired any legitimate rights, title or interest in Lennox mine, and further, that, some of the certificates which it has attached in support of its application for a declaratur are a duplication of one mining claim, and some pertain to claims which have nothing to do with the claims which constitute Lennox mine (C1-C5 annexures attached to the founding affidavit MSV 81-17 (HC 65409-17). It is noted that there is no date stamp from the Ministry of Mines on these annexures, and that, all those annexures are not certified copies. The court is urged to compare those certificates to the ones issued by the Ministry of Mines in January 2017 which are uniform and provide similar information. Two Flags reiterates that MSV 102-17 was not and is not an order by consent, and should be set aside.

Case number MS121-17 (HC 5410-17) is an urgent chamber application for stay of execution pending application for rescission of judgment which was filed by Two Flags on 5 May 2017. The relief sought is an interdict to stop Tambanashe from executing the order by

consent granted under MSV 107-17 on 10 April 2017, pending the determination of the application referred to above to have that order rescinded. Quite clearly, this urgent application was not set aside because all the files were then requested to be transferred to Harare High Court for a 'holistic' resolution on merit. The founding affidavit to this application mainly relies on the declaratur issued under HC11857-15, and the order for its enforcement granted under HC2901-16, and in terms of which the mining claims which constitute Lennox mine were transferred to it by the ministry of mines.

On urgency and irreparable harm, it was averred that Tambanashe was seeking to rely on an order which was erroneously issued as an order by consent when the parties had never consented. The notice of opposition was filed on 18 May 2017. It is premised on a preliminary objection to the procedure adopted, that an application for rescission of the order by consent was inappropriate in the circumstances. With regards to the merits, Tambanashe took the stance that when Two Flags was given rights title and interest in Lennox Mine by this court, and when this court ordered the mining claims to be transferred to it, Tambanashe was not a party to the proceeedings otherwise it would have challenged Two Flags' entitlement. Tambanashe admits that the parties did not list the case numbers of the matters which would be nullified in the order by consent when they appeared before the Judge in chambers (ad par 22-23).

The application for stay of execution HC 5410-17 will be dealt with first. It is trite that, for purposes of an application for stay of execution, this court must be satisfied that;- '…real and substantial justice requires such a stay, or put otherwise, an injustice would otherwise be done'. See *Muchapondwa* v *Madeke & Ors* [1], *Strime* v *Strime* [2], *Chioza* v *Independent Property Development (Pvt) Ltd & Anor*[3], *Murimbechi* v *Townsend*[4]. In the case of *Mupini* v *Makoni*[5] we find the *locus classicus* test that ought to guide us. It was stated that;-

[1] 2006 (1) ZLR 196 (H) @ 199
[2] 1983 (4) SA 850 © @ 852 A
[3] HH 76-94 @ p.3
[4] HH 185-90

> "Execution is a process of the court, and the court has an inherent power to control its own processes, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as in casu, the judgment is for ejectment or the transfer of a property, for, in such instances the carrying of it into execution could render the restitution of the original position difficult".

In the case of *Santam Insurance Company Limited* v *Paget*[6], the court reiterated that;-

> "…the onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused to him, or to express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice. That task is by no means easy where, as in the present case, the Judgment it is sought to suspend sounds in money, for the giving of effect to it, unlike orders of ejectment or the transfer of property, does not render difficult any restitution that may have to be made".

Clearly the court must intervene if an injustice would be caused by its failure to afford relief. See *Sub-Saharan Management Consultants* v *Sirutia Investments Private Limited.*[7] It has been held that;-

> "It is common cause that the 1st respondent has a judgment against the applicant which was granted in default. It is common cause that this judgment is subject to an application for rescission. It is again common cause that the 1st respondent has caused a number of applicant's property to be attached in execution. It follows therefore that this property can be removed and sold any time soon. This makes the matter urgent. The court has to decide whether the applicant could be prejudiced if execution is not stayed, particularly in the event that the applicant succeeds in his application for rescission. The court is of the view that if execution is not stayed the applicant may be prejudiced in the event that the default judgment is set aside. In the event that the application for rescission fails the 1st respondent can still enforce his judgment". See *Muza t/a Sunset Savemore* v *Radchart Investments Private Limited*[8].

It is my considered view that, in an application for stay of execution, the exercise of a wide discretion places a lot of latitude in the hands of the court to consider the circumstances of each

---

[5] 1993 (1) ZLR 80 (S) @ 83B-D. See also Cohen v Cohen 1979 ZLR 184 (G) @ 187C; Santam Ins Co Ltd v Paget 1981ZLR 132 (G) @ 134G-135B;Chibanda v King 1983 (1) ZLR 116 (H) @ 119C-H; Strime v Strime 1983 (4) SA 850 © @ 852A.

[6] 1981 (2) ZLR 132 @pp134-135

[7] 2012 (1) ZLR 462; Road accident Fund v Strydom 2001 (1) SA 292 @ 300B; Standard Bank of SA Ltd v Malefane 2007 (4) SA 461 @466A-D

[8] HH314-14

case. The court is imbued with some leeway to make a value judgment in the interests of justice. It must balance the right of a litigant who has obtained judgment and is entitled to execute such judgment against the competing interest of the other litigant who may wish to challenge the validity of that judgment for a reason which appears to be genuine and valid, on the face of it. It is only where the court formulates an opinion that an applicant for stay of execution would be prejudiced if execution takes place resulting in a palpable injustice, that it may stay execution. It is only where the court can see clearly, that allowing execution to proceed would irreversibly alter the rights and obligations of the parties, that it ought to intervene, and regulate its own process, in the interest of justice.

The court was much persuaded by the submission made on behalf of Two Flags in this application, that what gives a writ force is the fact that it is based on a valid court order. A valid court order can only be complied with as long as it remains extant. See *Delco Limited* v *Old Mutual Properties & Anor*[9]. It is equally, correct, that a court order may arise out of consent freely given by the parties to litigation. If consent was indeed given the order is valid and must be acted upon. If there was no consent the order would be invalid if it purports to have been granted with the consent of the litigants when it was not. The onus would rest on the party alleging that it did not consent to the terms of the order to prove this averment. We note that the consent order which Two Flags takes issue with purports to nullify certain orders previously granted by this court, including the court order which gave Two Flags rights and title to Lennox mine, and the subsequent order of enforcement in terms of which the Ministry of Mines was compelled to issue certificates to Two Flags. This aspect gave us pause. Could it have been the intention of Two Flags to consent to being stripped of the very court orders which gave it the rights that it sought to enforce against Tambanashe?

We accept as correct the submissions made on behalf of Two Flags that it is inconceivable that it intended to consent to an order which undermines its interests in a manner which cannot

[9] 1998 (2) ZLR 130 (S)

be remedied. It is inconceivable that Two Flags would consent to an order which gives rights to non-title holders at its own expense. We note that Tambanashe in its opposing papers admits that there were no case numbers referred to or submitted to the Judge during the discussions in chambers. It appears that case numbers found their way onto the order by consent, and the contention is that those case numbers included cases in which Two Flags obtained title to Lennox Mine, which cases were not before the Judge for consideration. We find that the balance of convenience favors the stay of execution pending a determination of the application for rescission of this order by consent. The applicant has discharged the onus on it, triggering an exercise of the court's wide discretion in its favor. The reason given for staying execution appears to be genuine and valid, on the face of it. The applicant will be prejudiced irreversibly if the order by consent is executed upon in these circumstances. Execution is accordingly stayed.

We now turn to the application for Rescission of Judgment HC 5408-17. The background to this application is largely common cause. It is common cause that Two Flags obtained an order in this court declaring it to be party with lawful interests in certain mining claims collectively known as Lennox Mine before my sister Judge MUREMBA. It is further common cause that, after obtaining that order, it obtained another order of this court directing the Ministry of Mines officials to transfer these claims to it. Tambanashe, on becoming aware of these orders, took the view that its interests were affected and that it ought to have been cited as a party to these proceedings. It applied for the rescission of these orders. The application for rescission was dismissed on 22 March 2017 by my brother Judge TAGU. He ordered the eviction of Tambanashe and all those claiming occupation through it from Lennox Mine. Tambanashe was duly evicted.

Aggrieved by the eviction, Tambanashe approached this court again, on an urgent basis, for an order for its restoration to Lennox Mine. The order for restoration was granted by my sister Judge MUSHORE. Two Flags appealed against the order for restoration. The noting of the appeal suspended the order for restoration. To circumvent this, Tambanashe filed an application for execution pending appeal before this court. It was submitted on behalf of Two Flags that it was

agreeable in principle to an order for leave to execute pending appeal being granted. The parties appeared before my brother Judge MAFUSIRE in chambers to argue the urgent application for leave to execute pending appeal. An attempt to resolve the matter amicably was made before the Judge in chambers. It is common cause that the parties failed to agree. It is further common cause that the Judge directed each party to file an order by consent setting out the terms that it was willing to abide by in order for the dispute to be resolved amicably.

On 10 April 2017 an order by consent was issued in which the following order was encapsulated, in para 5;-

> **"Furthermore, both parties shall suspend, forfeit and relinquish irrevocably any rights flowing from any such court order or orders as they might have obtained before concerning the ownership, possession, use, control or enjoyment of Lennox"**

It was submitted on behalf of Two Flags, that, it is common cause that;-

1. The question of the validity and or continued existence of the prior orders granted to it was not before the Judge for determination.
2. In the drafts produced by the parties, none of them claimed paragraph 5 as part of the terms that they wished to agree to.
3. Other aspects of the order by consent do not derive from the agreement reached by the parties, such as;-
   (a) The financial obligation imposed upon Two Flags in paragraph 7.
   (b) The reference to the service of the mining equipment did not emanate from any of the parties.
   (c) The parties did not agree to the restoration of the status quo ante yet the court restored it. The parties merely agreed to the restoration of the occupation of certain named employees.
   (d) The order ought not to have been titled consent order because the parties never agreed to those terms before the Judge.

(e) The order takes away the gains of Two Flags which were not before the Judge for determination.

(f) The order is afflicted by a patent error.

Turning to the law, we are guided by the following cases which were cited on behalf of the applicant for rescission of the judgment. It has been held that;-

"It is common cause that the applicant neither consented in terms of Order 8 r 54 *supra*, nor was he in default. In so far as Mr. Mutizwa relies on the rules the law is against him. As stated by Herbstein & Van Winsen *The Civil Practise of the Superior Courts in South Africa* 3ed @ p 373 "But if there is any irregularity in the consent to judgment, the judgment obtained thereon will be set aside" See *Washaya* v *Washaya*[10]. This court later said that;-

> " To my mind that ends the matter…It is clear, in terms of these precedents, common sense anf justice, that once a court is not satisfied that a party consented to judgment then that party is entitled to *restitution in integrum".* See *Harare Sports Club & Anor v United Bottlers Ltd*[11].

No meaningful opposition to the application for rescission of judgment was placed before us on behalf of Tambanashe. We are persuaded by the submissions made on behalf of Two Flags, that if a judgment purports to have been entered into by consent, it ought to be set aside if the court is subsequently convinced that there was no such consent sought or obtained. We accept that the errors pointed out by Two Flags are common cause. They have not been controverted by Tambanashe in the papers filed of record.We accept the further submission that, r 56 of the rules of this court deals with judgments granted under and in terms of r 54 where the consent is in writing and signed by the party giving it. This application falls outside the ambit of rule 56.

We do accept the submission made on behalf of Two Flags, that this application is not governed by, and falls outside the ambit of r 56. The court will therefore ask itself if all the anomalies pointed out by Two Flags in the terms of the order sought establish the fact that the

[10] 1989 (2) ZLR 195 (H) Mostert v SA Association (1968) Buch 286; Royce Kincaid (Pty) Ltd v Wylfred Gardens (Pty) Ltd & Anor 1974 (2) SA 554 (D).
[11] 2000 (1) ZLR 264 (HC)

order was erroneously granted as if the parties had consented to all of its terms when in fact they did not consent to the terms set out, more particularly in clauses 5 and 7.

We do accept that there was a procedural irregularity in that two conflicting orders by consent were signed and subsequently filed by each of the litigants, and that, some of the terms of each conflicting order found their way onto the 'order by consent'. This irregularity in my view, establishes an error in terms of which the court may rescind the order. See *Proton Bakery* v *Takaendesa* [12]. We accept the submission made on behalf of Two Flags that, in introducing clause 5 in particular, the court purported to set aside previous judgments of this court which were extant, and whose validity had not been placed before it. We accept that the court could not re-open those issues other than through an application, premised on a founding affidavit, in terms of the rules of this court. See *Harare Sports Club & Anor v United Bottlers Ltd* [13].

We also accept that the court can fall back on the common law, or r 449 of its own rules which allows a Judge in addition to any other power he may have (read common law) to ***meru motu*** (my emphasis), or on application by any party affected, rescind…any judgment or order…in which there is any ambiguity or a patent error or omission. It is trite that once the error has been established the order must be set aside in those respects to which the error pertains. See *Matambanadzo* v *Goven* .[14] In the case of *Tiribhoyi* v *Janhi*[15], the court stated that;-

> "The purpose of rule 449 appears to me to enable the court to revisit its orders and judgments to correct or set aside judgments given in error and where, to allow such to stand on the excuse that the court if *functus officio* would result in an injustice and will destroy the very basis on which the justice system rests".

See also *Banda* v *Pitluck*[16], where an application for rescission of judgment in terms of r 449 was distinguished from an application for rescission of default judgment made under r 63

---

[12] 2005 (1) 60 (S) @p 62E-F, 63C-D, 63 E-F, GN v JN 2017 SA 342 (SCA) @ p356 par35, Kauesa v Minister Home Affairs & Ors 1996 (4) SA 965 Nms

[13] 2000 (1) ZLR 264 (HC); City of Mutare v Mawoyo 1995 (1) ZLR 258 (HC); S v Mambo 1992 (1) ZLR 245 (H); Stumbles & Rowe v Mattinson 1989 (1) ZLR 172 (HC)

[14] 2004 (1) ZLR 399 (S)

[15] HH 117-04

[16] 1993 (2) ZLR 60 (HC)

which requires the court, before setting aside a judgment under that rule, to be satisfied that, 'there is good and sufficient cause' to do so. A court proceeding in terms of r 449 need not even concern itself with the question of whether the defendant has 'a good prima facie defence to the action', which is the test to be applied by the court in considering an application for summary judgment. We therefore find that it would be in the interests of justice to set aside the order which is sought to be impugned for the reasons set out above, and for the simplest reason of all, that the order itself sets out its shelf life as being 'pending the determination of the application of the main case HC 81-17". It follows therefore that the terms set out in the order by consent, MSV 102-17 (HC5407-17), were valid up to the date when the main application is determined. It expires by effluxion of time. Since the main application is determined below, the order by consent is stripped of its validity by the mere determination of HC 5409-17 (MSV 81-17). The order by consent is no longer valid by operation of law, in terms of its own pronouncement of the period of its validity.

We now turn to the main application brought by Tambanashe, for a declaration of its rights and title, in the mining claims which constitute Lennox Mine. The applicant's heads of argument which it filed of record on 29 June 2017, sets out eight issues which it perceived as being the issues to be determined by the court. It was further submitted on behalf of Tambanashe that Two Flags has not placed a reasonable explanation before the court as to why it had not taken transfer of the claims constituting Lennox Mine in 2007 despite having entered into an agreement of sale to purchase same in 2003. It was submitted further, that when the Secretary for mines issued the directive in 2007, it was done in terms of s58 as read with s 341 of the Mines and Minerals Act [*Chapter 21:05*]. Section 58 reads as follows;-

> **"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. (my emphasis)"

The court was referred to the cases of *Munamato Mining Syndicate* v *Mining* [17], *and BMG Mining Private Limited* v *Mining Commissioner Bulawayo District & Ors*[18]. It was submitted on behalf of Tambanashe that the mining claims in question fell into abeyance and were forfeited to the state in 2007 when Lennox mine was given to Larmona, repegged, and issued with certificates of registration in its name. Tambanashe held title for more than two years therefore its title may not be impugned even though it may have been obtained in contravention of the provisions of the Act. This is provided for in s58 of the Act. The issuing of certificates of registration in favor of Two Flags was likened to attempting to issue title deeds in respect of a property which has existing title deeds. The subsequent title deeds would clearly be invalid in the absence of a proper cancellation of the existing title deeds. It was reiterated that the Secretary of mines could not issue certificates in favor of Two Flags because Tambanashe had held title for a period exceeding two years and its title could not be impeached, and that further, certificates were improperly issued to Two Flags before the certificates which were held by Tambanashe were cancelled, making the certificates issued to Two Flags invalid.

Two Flags filed its heads of argument late, with Tambanashe's consent, on 5 July 2017. This was accessioned by Tambanashe's late filing of its own heads of argument which late filing had been condoned by the court on application filed of record. Despite spirited opposition to the application for condonation by counsel for two Flags, the court exercised its discretion in favor of Tambanashe, in the interests of justice which favor finality in litigation. The court's dignity needed protection from the unsavory impression created by the proliferation of litigation between the parties, with no end in sight while counsel dithered and allowed themselves to become mired in interlocutory applications, *ad infinitum*. The court invoked r 4C, forgave all failure to comply with the time limits set by its own rules, and proceeded to hear counsel on the merits of the matter.

[17] 1999 (2) ZLR 136 (HC)
[18] HB 5-11

In the heads of argument which were subsequently filed on behalf of Two Flags, the stance taken was that s58 of the Act did not apply to the circumstances of this case but s59, which provides as follows;-

> **59 Lost certificates of registration**
> (1) If the holder of the certificate of registration or of special registration last issued in respect of any mining location has lost or mislaid such certificate he may, thirty days after publication in the *Gazette*, in a form to be approved by the mining commissioner, of notice of his intention to do so, apply to the mining commissioner for a duplicate copy thereof.
> (2) Such holder shall furnish to the mining commissioner with his application a solemn declaration which, *inter alia* shall state—
> (*a*) the fact of the loss or destruction of the certificate or that the same has been mislaid; and
> (*b*) that he has not delivered or pledged the certificate to any person either as security for money advanced to or owing by him or otherwise; and
> (*c*) that he is of right entitled to the mining location mentioned in the certificate of which a duplicate is required.
> (3) On receipt of such application and such solemn declaration the mining commissioner shall, if he is satisfied that no good reason to the contrary exists, issue a duplicate copy of such certificate to the applicant on payment of the prescribed fee.
> (4) A duplicate copy of a certificate issued in terms of this section shall supersede and take the place of the original.(my underlining for emphasis)

We find the submission to be correctly made, that the certificates which were issued to Two Flags by the Ministry of Mines were issued in terms of s59, and not s58 of the Act. The procedure in s59 is clear. Notice is published in the government gazette. It is notice to the whole world, including Tambanashe, that a party seeks to be issued with duplicate certificates. Tambanashe ought to have used the thirty day period after publication in the gazette, to enforce its rights. It ought to have approached the Ministry of Mines to object to the proposed issue of duplicate certificates to Two Flags. If that process was done after the horse had already bolted, in our view Tambanashe has remedies against the Ministry of Mines. Such remedies do not include impugning the certificates which were issued to Two Flags in terms of three existing court orders of this court.

What is exercising the court's mind further, is whether Tambanashe, the applicant for a declaration of rights, has shown, on the papers filed of records, that it is or was a legitimate holder of title in the mining claims that constitute Lennox Mine, and if it is or was, what the effect of the purported registration of such title in the name of Two Flags is? That is the crux of

the matter. It was submitted on behalf of the Ministry of Mines that the mining location in question could not have been forfeited to the State because the mining claims which make it up had already been sold to Two Flags by Reedbuck, and that the ministry itself was at fault in failing to expeditiously attend to the issue of transfer certificates. What is most instructive is the averment that, the certificates which were produced by Tambanashe as proof of ownership of the claims which constitute Lennox Mine do not reflect that the claims were forfeited to the State and subsequently re-pegged, as averred by Tambanashe.

According to the Provincial mining director of Masvingo province, who deposed to the opposing affidavit on behalf of the ministry of mines, the registration certificates produced by Tambanashe should show that Lennox mine was a re-pegged location. It is common cause that these certificates which were produced do not reflect this. It was submitted on behalf of Two Flags, in its heads of argument, that the following facts were established in the papers filed of record;-

1. Two Flags obtained title from a legitimate predecessor who lawfully held title, i.e Reedbuck.
2. Reedbuck's certificates were never cancelled and their claims were never forfeited.
3. The claims which constitute Lennox mine were never re-pegged.
4. Larmona, which allegedly passed title to Tambanashe, was never issued with mining certificates in respect of the mining claims which constitute Lennox mine.
5. No agreement of sale or proof of payment from Tambanshe to Lamorna was attached to the application to buttress its claim that it acquired title from Lamorna.
6. Some of the mining certificates attached by Tambanashe to the papers pertain to mining claims in Mashava communal lands, which is nowhere near Lennox Mine.

The court was petitioned to make a finding that these facts be taken as having been admitted by Tambanashe because it did not put these averments in issue. It is trite that;-

"The effect of a formal admission made in pleadings was underscored in *Gordon* v *Tarnow 1*947 (3) SA 525 (AD) where DAVIS AJA at 531-532 said;

'But this admission in the plea is of the greatest importance, for it is what Wigmore (paras 2588-2590) calls a 'judicial admission'…which is conclusive, rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it". See *Remo Investment Brokers Private Limited & Ors* v *Securities Commission of Zimbabwe*[19]. The court is persuaded by the submission that, the papers which are filed of record indeed support the proposition that the abovementioned facts are uncontroverted. The opposing affidavit of the Provincial mining director clearly states that the title which Tambanashe seeks to rely on is not supported by its averments in respect of how it was passed on to it by Lamorna. It is common cause that Lamorna was merely given the thumbs up to operate Lennox mine.

There is no evidence in these papers as to when or how Lamorna came to be in possession of mining certificates which purport to be in respect of Lennox mine. It is trite that an application stands or falls on its founding affidavit. See *Mangwiza v Ziumbe* .[20] Clearly the founding affidavit does not establish how, or when or where Lamorna acquired rights title and interests in the mining claims which constitute Lennox mine, when in 2007, it was merely appointed a caretaker. The papers fail to show actual registration of title in Lamorna's name. The papers do not show how or when Larmona passed title to Tambanashe. The requisite notice to the Ministry of Mines which is the issuing authority, was not filed. The legitimacy of the certificates which Tambanashe purports to hold has been impugned by Two Flags on various grounds, that there is no date stamp, that the location is not at Lennox mine but in Mashava communal lands, that the certificates do not state that the claims were re-pegged as demanded by the Act. We accept these averments, in the absence of such evidence in the founding affidavit.

There is no evidence on these papers as to when or how Larmona passed its title to Tambanashe. The Ministry of mines emphatically denied that these claims were ever forfeited to the Sate making them subject to re- pegging. The re-pegging procedure set out in the Act was not followed or done in consultation with and approval of the Ministry of mines. The certificates which Tambanashe is seeking to rely on ought to, but do not reflect that title was acquired

[19] SC 13-13 which cited with approval the decision in dd Transport Private Limited v Abbot 1988 (2) ZLR 92 (SC)
[20] 200 (2) ZLR 489

pursuant to a re-pegging process. The Ministry of Mines has disowned these certificates. It has challenged their authenticity. It has advised Tambanashe that it intends to cancel these certificates. The inescapable conclusion is that Tambanshe acquired title from an entity which itself did not get title from the relevant authority. Lamorna could not have passed onto Tambanashe rights title and interest which itself simply never acquired. To borrow the words of counsel for Tambanashe;, "…title deeds cannot be issued on top of other existing title deeds". Similarly one cannot purport to pass on title which one does not have. If one's title is defective, there is nothing to pass on. We accept that s 59 of the Mines and Minerals Act governs the certificates not s 58 as averred.

The court was also persuaded by the submission that it cannot overturn its own declaratur in terms of which Two Flags acquired title. This is not competent. It is indeed impermissible for this court to review its own previous declaratur which was granted by a Judge of parallel jurisdiction. See *Harare Sports Club & Anor* v *United Bottlers Ltd*[21]. In the case of *City of Mutare* v *Mawoyo*[22], the court stated that;-

> "In Parker v parker supra SCOTT J was asked to alter an order by SANDURA JP directing that an exception in case HC-196-84 and an exception in case HC-1108-85, both cases involving the same parties, be heard together on the same occasion. SCOTT J said at 85B.
>
> > "The whole thrust of the reasons advanced by Mr. O'Meara seems to point to an assertion that in his view the order was wrongly made. As a Judge of the High Court, it is not up to me to vary or alter an order of a Judge of parallel jurisdiction, short of expanding on it".

It is this court's considered view that, acceding to the relief sought by Tambanashe would be tantamount to overturning the declaratur granted by MUREMBA J, and the subsequent order in which TAGU J refused to rescind MUREMBA J's declaratur, but instead ordered that it be complied with. It would be incompetent to purport to issue the declaratur sought by Tambanashe, whose effect would be to nullify the rights title and interest in Lennox mine, which were awarded to Two Flags by these two Judges who have parallel jurisdiction to this court. The left hand cannot

[21] 2000 (1) ZLR 264
[22] 1995 (1) ZLR 258 (HC)

take away what the right hand has already awarded without 'doing violence to the sense and substance of these two previous judgments or the intention of the court that granted the order. The sense and substance of the original order will be changed'. *City of Mutare* v *Mawoyo Supra.*

The court accepts as trite the principle that;-

> "The *exception rei iudicatae* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to even if erroneous. See *Le Roux en 'n Ander* v *Le Roux* 1967 (1) SA 446 at 461 H. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or, in the case of judgment in rem, any other person), are not permitted to dispute its correctness".

See *Wolfenden* v *Jackson*[23]*, and Bertram* v *Wood*[24]*,* where the court reiterated that;-

> The meaning of the rule is that the authority of *res judicata* induces a presumption that the judgment upon any claim submitted to a competent court is correct, and this presumption being *juris et de jure,* excluded every proof to the contrary. The presumption is founded on public policy which requires that litigation should not be endless and upon the requirements of good faith which, as said by Gaius, does not permit of the same thing being demanded more than once".

The inescapable conclusion that this court comes to, is that, it has already pronounced that Two Flags in a legitimate holder of rights, title and interest in the mining claims which constitute Lennox Mine. It no longer has any jurisdiction or power to grant an order which confers the very same rights, title and interest, in the same mining claims, to a different entity, Tambanashe for the simple reason that its earlier conferment of the same rights on Two Flags stands, it has not been set aside. This court has pronounced itself on the rights, title and interest in the mining claims which constitute Lennox Mine. It may not, it ought not, it should not purport to arrogate to itself powers to set aside that previous pronouncement, which itself made. This is an ill disguised attempt to neutralize the declaratur of MUREMBA J under the guise of another application for a conflicting declaratur. It would be incompetent for this court to grant the relief sought by Tambanashe. The horse has already bolted. The stable door may only be closed by a court of superior jurisdiction to this one.

---

[23] 1985 (2) ZLR 313 (S) @ 316 B-C
[24] SC 177-10 @ 180

The application before us is ill conceived, it failed to properly set out sufficient evidence to establish the basis of the claim in the founding papers, there is no evidence on which the relief sought is established, aside from the issue of the competence of this court to accede to such relief. There have been multiple applications and counter applications which were filed first in Harare, then in Masvingo. There is no doubt that these matters reflect the acrimony between the parties. Yet some of the interlocutory applications which were brought on an urgent basis were superfluous, unnecessary, and unduly detained the court. To discourage such acrimony, proliferation of litigation, undue waste of the court's time, we find it appropriate to accede to the application that a punitive order for costs be granted.

For these reasons, it be and is hereby ordered that;-

HC5409-17(MS81-17)

The application for a declaratory order in respect of rights, title and interest in the mining claims which constitute Lennox Mine, brought by Tambanashe, be and is hereby dismissed with costs on a Legal Practitioner- Client scale.

HC 5410-17 (MS121-17)

The execution of court order HC 5407-17 MS 102-17 be and is hereby stayed with costs on a Legal Practitioner -Client scale.

HC5408-17 (MS117-17)

1. The order by consent, filed under case number MS102-17 be and is hereby set aside with costs on a Legal Practitioner-Client scale.
2. The order by consent, filed under case number MS102-17 be and is hereby declared to have no validity with effect from the date of this judgment, by effluxion of time and in accordance with its own terms, and duly stipulated period of validity.

Messrs Ruvenga, Maboke & Co, applicant's legal practitioners
Messrs Manase & Manase, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's counsel