ANDREW ZUZE
versus
PULSERATE INVESTMENTS (PVT) LIMITED
and
BARRINGTON RESOURCES (PRIVATE) LIMITED
and
THE PROVINCIAL MINING DIRECTOR, MASHONALAND EAST PROVINCE
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
HOPE MINING SYNDICATE
and
OFFICER COMMANDING ZIMBABWE REPUBLIC POLICE, MASHONALAND EAST
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE; 3 March 2025

Opposed Application

Adv *T Mpofu*, for the applicant
Prof *W Ncube*, for the respondent
Adv *L. Matapura*, for the second respondent

KATIYO J: The applicant is seeking a declarator and consequential relief in terms of section 14 of the High Court Act in the following terms;

IT IS DECLARED THAT:

1. The applicant's certificate of registration for two mining locations known as Good and Good Days, (registered under certificate of registration number 33908BM, and 33909BM, respectively) are valid and extant.
2. The applicant is entitled to exercise mining rights on the mining locations known as Good Days and Good Days 6 (registered under certificates of registration number 33908BM, and 33909BM, respectively) to the exclusion of the 1st and 4th respondent or any other person acting for them or deriving rights from them.

3. To the extent that the 1st respondent's rights to the Good Days K mining location conflict with the applicants' rights to the mining locations kwon as Good Days and Good Days 6 (registered under certificates of registration under 33908BM, and 33909BM, respectively), the applicant's rights are superior to those of the 1st respondent.

Consequently, IT IS ORDERED THAT;

4. The 1st and 4th respondent are ordered to forthwith stop interfering with the applicant's mining rights and mining activities on the two mining locations known as Good Days and Good Days 6 (registered under certificates of resignation number 33908BM, AND 33909BM, respectively)
5. Should the 1st and 4th respondent fail to comply with paragraph 4, above, the 6th respondent is ordered to evict the 1st respondent and all those claiming through it, occupation of the two mining locations kwon as Good and Good Days 6 (registered under certificates of registration number 3390BM, and 33909, respectively).
6. The 1st respondent shall pay costs on a legal practitioner and client scale.

Background and Submissions

The applicant was in 2007 issued with a license to prospect for minerals in the Mutoko area. The licenses were issued under number s391717J and 391716J. The licenses were attached to the application. Their legal validity was not contested. The applicant complied with all the requirements, including prospecting notices. He discovered Lithium. He issued and posted a Discovery notice on the 8th of December 2007. He proceeded to peg the mining block in terms of provisions of the Mines and Minerals Act. A map of the mine was also done and adequate notices to the public given. The registration number of the map is 1732 BC 2 defining the mining block and its 3 HCH 8254/24 extent including boundaries. The master claims plan as kept by the Ministry responsible was also attached to this application. In the year 2012, the applicant purportedly disposed of his claims by selling to the 2nd respondent. However, the sale was set aside by my brother MUTEVEDZI J who made a finding that the sale was invalid and of no force of law. This was because when the purported agreement was entered into between the applicant and the 2nd respondent, the 2nd respondent had not yet been incorporated, therefore non-existent in terms of

the old companies act. It was not yet recognised as a legal persona. So the interdict that had been pursued against the 1st respondent had no leg to stand on.

Meanwhile, the title to the mining claims held by the applicant had always been maintained and continues to be maintained in terms of the Mines and Minerals Act. In 2016, the 5th respondent acquired rights to a mining location known as Good Days K which is described as being adjacent to the applicant's claims. The certificate of registration issued in the 5th respondent' name in 2016 is that…**on the state land approx. 3.6 km NE of Nyarangwe Hill and adjacent Gold Days mine**. The same description was maintained when the mining location was transferred from the 5th respondent to the 1st respondent in 2018. The 1st respondent then sought and was issued with a conversion certificate from Tandalite to Lithium from the responsible authority. This resulted in the new conversion having a description of the general location with no clear explanation. It then became known as Good Days K, a state land located on state land approximately 3.6 km North East of Nyarangwe and adjacent to Old Gold Days Mine. This new description and change were done without any due process of prospecting and pegging of the mining location and over a mining location under the applicant area. This resulted in the encroachment leading to the start of this prolonged dispute.

The 2nd respondent on a mistaken but genuine belief that it had acquired rights through the applicant through their flawed agreement, instituted proceedings under HCH 8671/22. The applicant was not a party to these proceedings as it was believed to be that of a simple encroachment dispute. The 1st respondent alerted the court to the fact that the applicant had no leg to stand on as the agreement he relied on was a nullity since it was drawn before the 2nd respondent was incorporated in terms of the old Companies Act, a fact which MUTEVEDZI J agreed with. It therefore follows that there was no valid transfer of title from the applicant to the 2nd respondent. The second respondent appealed against this decision and the Supreme Court in terms of section 25 of the Supreme Court Act as exhibited by the notice issued by the Registrar of the Supreme Court on the instruction of MUSAKWA JA and captured in the record under SC448/23 that MUTEVEDZI J had not resolved rights of 3rd Parties.

Following this litigation, there was further litigation before MUNGWARI J involving the parties. Her judgment handed down deals with spoliation on the issues of encroachment between the applicant's claims and those of the 1st respondent. This judgment was appealed against and is

still pending in the Supreme Court. Following the declaration of invalidity, the applicant has petitioned this court for a declarator on the existence of his rights.

The two learned respected advocates made both oral and written submissions, which are quite detailed. This court will not belabor itself by repeating the detailed submissions.

The argument by Advocate *Mpofu* that as a matter of the applicant fact acquired rights in 2008 and proof of that acquisition was the certificate of registration tendered before the Court. Also argued that those rights are real and enforceable against the whole world. A chain of case authorities was placed before the court in support of that proposition. The decision in *Takafuma* v *Takafuma* 1994(2) ZLR 103, *Folly Shannon & Anor* 1998(1) ZLR 78 HC for the proposition that proof of title acquisition by the applicant was reflected in the certificate of registration issued in favour of the applicant and in the process acquired real rights which could be enforceable against the whole world. It also followed that in terms of section 31(1)(b) of the Mines and Minerals Act, once one acquires the rights it ceases to be open for further prospecting. *Matore Investment Private Limited* v *Sithole and others* HH 49/22 on that position. It was further argued that at no time this issued certificate was never cancelled or revoked in terms the Mines and Minerals Act. As much as the 1st respondent averred that there is 5 HCH 8254/24 nothing put forward to support that position. Specifically, section 50 of the Mines and Minerals Act provides for the cancellation of the certificates but nothing was done again. There was also no proof to show that mining claims were abandoned as contemplated by section 259 of the same act. As much as the responsible Minister can forfeit a claim in terms of section 260 of the same act, in this case it was never done. This forfeiture must follow due process and it was never carried out. As submitted by Adv *Mpofu*, the reasons why the rights could not have been lost is that they were inspections and given effect by the provisions of section 197 to 199 of the same act. He further argued that certificates of inspection were exhibited and their validity was never put in issue. The presumption of validity attached to these certificates by them being public documents cannot be refuted in the absence of any evidence countering that. *Matsika and another* v *Chingwena & others* HH 573/20.Submitted that in the absence of any other ado the certificates are presumed genuine. It therefore follows that the invalidation of the sale of claims by the court does not at law invalidate the rights held by the applicant and rightly so. Title cannot be lost because there has been an attempt to transfer it, unless the statute specifically says so Al, MUTEVEDZI J did was to confirm invalidity of the sale

agreement. Also further submitted that the attempt by the first respondent to change description of the location to its title was wrong. The 1st respondent was supposed to acquire a license to prospect beyond its location and this license could only be issued to 1 land open to inspection in terms of section 20 of the Act. Submitted that the second respondent was not even supposed to oppose this application. Further submitted that when rights overlap and there is consequent administration of rights, the first remedy is to challenge the diminution, if the challenge is not brought within two years is considered barred. The case of *Maxnote Investments (Pvt) Limited* v *Majola & Ors* HB 40/17 gives the interpretation of section 58 of the Mines and Minerals Act. The existence of a bar means that there is a collusion of rights. Where rights conflict the matter is governed by priority provisions of section 177(3) of the same act. Where there is a diminution of rights, the prior pegger prevails. In this case the applicant was first to do so. The law as laid out in s 372(1) of the Act is very clear that one cannot peg a 6 HCH 8254/24 ground not open for prospecting. Violation s372(5) and (6) of the Act constitutes a criminal misconduct. Submitted that the change in the description of the mining location by the 1st respondent was both deliberate and mischievous.

As regards the preliminary points raised, it was submitted that the two judgments by MUTEVEDZI and MUNGWARI JJ constituted a bar to the relief sought by the applicant. A closer look at the two judgments did not in any way deal with the issues in this case. The cause of actions is apart from each other. It was resolved based on the Old Companies Act. The issue of the existence of the applicant rights was never discussed. The note by MUSAKWA J put issues beyond doubt. There is no order which affects an absent party. Submitted that res juducata cannot arise in these two judgments.

Professor *Ncube* for the first respondent, that para 4 of the applicant answering affidavit should be expunged from the record for the reading that it was introducing new facts which the first respondent had no chance to respond to. He further submitted that the applicant has not proved at law that he is entitled to the relief being sought. Also arguing that the SC has already decided on the matter. Further argued that the 2nd respondent's attempt to seek cancellation of the first respondent was thrown away by the High Court and the Supreme Court on appeal. Let me hasten to comment that the second respondent was found to have no leg to stand on and it is not an issue before this court.

Properties of the Application before the court

The applicant approaches this Court of provisions of s 14 of the High Court Act seeking a declarator and ancillary relief. As submitted by Adv *Mpofu*, it is important to consider the respective causes of action under the two judgments of MUTEVEDZI J and MUNGWARI J to probe whether the two judgments induce res judicata. In the matters under HC 8071/22, the 2nd respondent Barrington Resources (Private) Limited approached the High Court seeking an order for enforcement of rights which it believed to have acquired from the applicant by a sale which had been concluded in 2012. MUTEVEDZI J refused to grant the Interdict and ancillary relief sought on the basis that. 2nd respondent having concluded the sale in violation of the provisions of the Old Companies Act acquired no rights. The Court then dismissed the application. MUTEVEDZI J did not enquire into the existence or validity of applicants' rights. The Court could not have done so, in the absence of the applicant. I concluded from the papers placed before me that he did not. The Supreme Court on Appeal confirming the decision of MUTEVEDZI J I did not enquire into the rights of third parties who were not before it.

The note issued by MUSAKWA JA and placed before me as a clarification to the Order granted by the Supreme Court on Appeal puts the issue to rest. The relevant portion of the note reads, "in the extempore judgment, we made it clear that we were not entertaining the interests of third parties. That is why the Court did not invoke s 25 of the Supreme Court Act" Mr. *Ncube* having participated in the Supreme Court hearing of the Appeal under SC448/23 was aware that the Court, following an application made by 2nd Respondent for the Court to invoke the powers of the Supreme Court in terms of section 25 of the Supreme Act and quash certain portions of MUTEVEDZI J's Judgment, the Supreme declined to do so indicating that MUTEVEDZI J's Judgment was simply a dismissal which did not enquire into the rights of any third parties. Mr *Ncube*'s written submission and oral submission before the Supreme Court were that the decision by MUTEVEDZI J was a mere dismissal which did not affect the rights of any third party, I had an opportunity to go through the heads of argument settled by Mr. *Ncube* on behalf of the 1st respondent on Appeal and the record of proceedings in that matter. Having taken the position that the judgment of MUTEVEDZI J was a mere dismissal which did not affect rights of third parties, it is not true for the Respondent to submit that the same judgment retired questions relation to the existence of his rights and was barred from being heard by this court. To quote some portions of

MUTEVEDZI J's judgement piecemeal, which are not even the ratio of the decision as a demonstration of that bar reveals the desperate attempt by 1st respondent to avoid an enquiry on the merits of this matter.

Turning to the judgment of MUNGWARI J on spoliation, not only where the proceedings confined to the question of unlawful deprivation of possession but also that 8 HCH 8254/24 the applicant did complain on the nature of proceedings to an extent that he sought to raise a constitutional issue relating to his inability to advance before the Court an enquiry on any question relating to his rights to the mining location. The judgment of MUNGWARI J did not, and could not have enquired into the existence of any rights. At page 17 of her judgment, MUNGWARI J stated; "The only issue which arises for determination is whether or not the 1st respondent despoiled the applicant of its mining claims". The conclusion I make here is further fortified by what MUNGWARI J said on page 19 of the same judgment. She stated, In any case, the 1st respondent does not deny being in occupation of the mining location in question. He erroneously believes that he is entitled to be in such occupation. I say erroneously because whatever right he claims to be exercising is not relevant in spoliation proceedings. He argued about having regained title of the mining claims after this Court's judgment by MUTEVEDZI J and the Supreme Court Appeal. That argument speaks to ownership of the claims. It is not a consideration in the determination of an application for spoliation. His reference to Certificate of registration is equally misdirected. It is not important in this instance; a Certificate of registration would be necessary to prove ownership. Spoilation does not concern itself with that. It deals only with possession only Any Court considering the judgment of MUNGWARI J and the nature of the proceedings before her would not conclude that the judgment created a bar to an application for a declaration of the existence of applicant's rights. After MUNGWARI's judgment, naturally applicant would be expected to approach the Court seeking that relief. The preliminary points raised lack legal merit and were only raised as an attempt to evade the Court's enquiry on the merit of the matter, MUTEVEDZI J's judgment was a dismissal against 2nd respondent and did not affect the rights of the applicant. The applicant would not have invoked the provisions of Rule 29 and tile an application for rescission. That relief was not available to him and the preliminary objection raised that applicant ought to have proceeded in terms of Rule 29 of the High Court is lacking in merit. The Order granted by MUTEVEDZI J did not affect the rights of

third parties and would not have done some. The note by MUSAKWA J clearly confirms the nature of the enquiry and determination which was dealt with by the Court.

Accordingly, the preliminary objections raised by the first respondent having no legal merit are hereby dismissed in their entirety. I now proceed to deal with the matter on the merits.

Merits of the Matter

Without doubt, applicant acquired mining rights within the two mining blocks in 2008. He complied with all the pre-registration and registration processes for the acquisition of the rights. Since then, he had continued maintaining the mining location as exhibited by the Inspection Certificates placed before this Court. As correctly submitted by Mr. *Mpofu* and conceded to by Mr. *Ncube*, the rights acquired by the applicant are real rights and are enforceable against the whole world. The attempt by Mr. *Ncube* to place a distinction between the real rights in other properties and in mining rights was in vain. At least no authority was referred to the Court to establish the said distinction. Upon acquisition of rights by the applicant on those two mining locations, the land where they are situated ceased to be a ground open for prospecting. This Court had to speak to the bar on prospecting on grounds similar to that of the applicant. In the case of Matore Investments (Pvt) Limited vs Sithole & Ors HH 49/22, this Court said;

> "There is no dispute in the interpretation of Section 48, 31(1) (b) and 50 (1) (a) of the Act. The 4th respondent issued the 1st respondent with a Certificate of registration for the purpose of carrying out prospecting operations and pegging. Section 31 (10 (b) of the Act reads:
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> "Grounds not open to prospecting; same as provided in Parts V and VII no person shall be entitled to exercise any of his rights under any prospecting licence or any special grant to carry out prospecting operations or any exclusive prospecting order. Upon any mining location, other than one in respect of which he may have acquired the exclusive rights of which he may have acquired the exclusive rights of prospecting under such license or special grant or exclusive prospecting order. This Section is drawn in peremptory terms by the use of the word shall it prohibits prospecting upon any mining location"

MANZUNZU J, after a full consideration of the meaning and effect of failure to comply with the provision of the section in preregistration processes proceeded to order for the cancellation of the Certificates of registration on the basis that it had been 10 HCH 8254/24 unlawfully issued. The same conclusion was also reached by the Court in *Mount Grace Farm (Private) Limited* vs *Jumua Metals and Minerals (Pvt) Limited & Ors* HH 844/20 first respondent predecessor in title, 5th respondent, did prospect, peg and register mining rights over land which land already been

prospected and pegged by the applicant in 2008. That land was not open for prospecting and the Certificate of registration issued to the 1st respondent in 2016, was issued in violation of the provisions of Section 31(1) (b) of the Mines and Minerals Act. They are unlawful. It is common cause that the rights which were acquired by the applicant were neither cancelled or forfeited in terms of the provisions of the Mines and Minerals Act and remain extant. Section 50 (1) of the Mines and Minerals Act governs the cancellation of registration Certificates. No process was engaged by any authority to have the Certificate cancelled. As correctly submitted by Mr. *Mpofu*, cancellation has to be preceded by an Order of Court granted on good cause. See the case of *Mvududu* vs *Mvududu No. & Others* 1981 ZLR at page 403-40, *Tushin & Others* vs *Mzobe & Anor* 1949 (30 SA 623 (AD). The papers placed before me demonstrate that the applicant did not at any material time and in terms of the provisions of Section 259 of the Mines and Minerals Act abandon his right. In the absence of such abandonment, his title remained valid. Moreso, the Certificates of Inspection which were exhibited before the Court and whose validity was never put in issue confirms that the applicant's rights were never lost and were preserved through the inspection as contemplated by the provisions of Sections 197 - 199 of the Mines and Minerals Act. The inspection Certificates are public documents and their validity is presumed. See *Matsika and Anor* vs *Chigwena & Ors* HH 573/20. I found them to be valid and relies on them and other documents placed before, in concluding that the applicant's rights were never lost and remains preserved. The validity of the Certificate in terms of the Act is accordingly beyond any doubt Having concluded that the applicant bolas valid rights, the question which follows is, whether the attempted invalid sale to the 2nd respondent affected the validity of title held. I conclude that it did not. The validity of title stands quite apart from an invalid attempt to transfer it. Title cannot simply be lost because there has been an attempt to invalidly transfer it. The matter cannot be much clearer than this, The argument by the 1st respondent that the applicant by virtue of the provisions of Section 275 of the Act, surrender the last issued Certificate of registration for transfer and as a result, lost its title is not only contradictory to what Section 275 says but what is pleaded in its opposing papers. First respondent argues that in terms of Section 275 of the Act, for transfer of mining rights to be affected, two requirements must be met, which are; The surrender to the issuer of the last issued Certificate of registration, and The application by the Purchaser to have new Certificates of registration issued in their name by the issuer and granting of mining rights. Consequently, for a

valid transfer to be affected in terms of Section 275 of the Act, there must exist a purchaser who must file an application to the issuer and grantor of rights. First respondent accepts that MUTEVEDZI J made a finding that the 2012 transaction was a none event. The sale was invalid. The sale having been declared invalid, the 2nd respondent ceased to be a Purchaser and the requirements of Section 275 were therefore never met. MUTEVEDZI J having made a finding that what was done was a nullity, no rights are lost neither are rights acquired in a nullity. See *Muchakata* vs *Netherburn Mine* 1996 (1) ZLR 153 (SC). Again, I agree with the applicant's submissions that the 2012 transaction was a non-event. It was a nullity for all purpose. It cannot be a nullity for some purposes and valid for other purposes. The applicant who was a holder of rights before the transaction continues to hold them after the invalidation of the 2012 transaction. It is also imperative to note that there was never a time when the applicant cancelled its title. The attempt to dispose of title did not affect the existence of the title. MUTEVEDZI J held that the attempt to pass transfer failed and therefore the holder of title did not change. I therefore conclude that title would not disappear as a result of a failed transfer.

Diminution in rights held in terms of the Act

After scrutinizing the papers and submissions made by the parties, I came to the conclusion that there was diminution of rights in this matter. The very first remedy against a diminution is to file a challenge against such diminution If it is not brought within a period of two years, it is however considered barred, See the cases of *Minute Investments* vs *Majola and Ors* HB 340/17.However, there are some exceptions to this bar and this Court had an occasion to comment on them. In *Baikone Mining (Private) Limited* v *John Rushinga & Ors* HMA11-23, my brother ZISENGWE J, had an occasion to speak to the interpretation of Section 58 of the Mines and Minerals Act and the bar it creates. He said;

> "The crisp question which begs is whether the applicant has managed to prove the existence of a clear right in the convert of the elaborate definition above, the onus to prove the existence of a clear right in the context of the elaborate definition above, the onus to prove its existence being on him. When viewed in reverse and in context, the question is whether the applicant's mining rights are materially impaired by the absence of written consent by either the respondent themselves or the Rural District Council of the area concerned as required by Section 31 of the At. Should the latter be the case, the question that follows is whether the applicant's position is rescued by s 38 of The Mines and Minerals Act, [*Chapter 21:05*]. The said Section as a general principle, protects a mining registration from impeachment if it has been in existence for two or more years. There are divergent views on the question of whose consent is required before prospecting can commence on communal land in question. The respondent argues that it was their consent as occupiers of the land that was

required in terms of Section 31 (1)(a)(ii) of the Act. However, in his determination, the Provincial Mining Director on the other hand states, for the reasons alluded to earlier, that it is the consent of the Rural District Council in terms of Section 31 (h) of the Act. Whichever position one takes, it is plain to see that applicant's position is impaired by the absence of written consent before he would legally commence any prospecting activities which led to registration of his mining claims. Section 58 impeachment of title when barred; When a mining location or a second reef in a mining location has been registered for a period of two years, it is must be competent for any person to dispute the title in respect of such mining location or reef on the ground that the pegging of such location was invalid or that provisions of this Act were not complied with prior to the issue of the Certificates of registration"

This provision does not always provide an impregnable shield to the holder of defective title. Section 50 of the Act for instances allows the cancellation of Certificate of registration notwithstanding the provisions of Section 58.

Barrington Resources (Pvt) Ltd vs *Pulserate Investments (Pvt) Ltd* HH 446/23, MUTEVEDZI J pointed that the bar in Section 58 of the Act is not absolute or all embracing, bit is circumscribed by the acts by which title many not be impeached. The acquisition of title to the mining location by the first respondent was materially impaired by the violation of the provisions of s 31, as in 2016 when the sin respondents prospected, pegged and registered mining rights over the land, the land was not open for prospecting and the Act prohibits such processes. This on its own would be sufficient to retire the dispute. The first respondent problems do not end here. Considering this matter from the Section 58 angle, the existence of the bar in terms of Section 58 of the Act, means the rights of the applicant and 1st respondent collided. This creates a conflict in respect of priority of rights between the applicant and 1st respondent. Where rights conflict, the matter is governed by the priority provisions of the Act. Section 177 (3) of the MINES AND MINERALS ACT enacts as follows;

"Priority acquisition of title to any mining location, reef or deposit, if such title has been duly maintained, shall in every case determine the rights as between the various peggers of mining locations, reefs or deposits as aforesaid and in all cases of dispute, the rule shall be followed that in the event of the rights of any subsequent pegger conflicts with the right, the rights of any subsequent pegger shall be subordinated to those of the prior pegger, and all Certificates of registration shall be deemed to be issued subject to the above conditions"

In *Victoria Secret* vs *Edgars Stores* 1994 (30 SA 739 (A), the Court has this to say;

"In determining which of competing Claimants should prevail, the guiding principle is incapsulated in the maxim qui prior *est tempore est jure*, he has the better title who was first in point of time. In Moorgate Judgment, Mr. Trollip said; In a situation in which competing applications for the

> registration of the same or similar marks are filed. In the RSA, the general is that, all else being equal, the application prior in point of time of filing should prevail and be entitled to proceed to registration in a quarrel of that kind 'blessed is he who gets his blow first."

The quoted paragraph from the Victoria Secret case correctly captures and reflects the law applicable in Zimbabwe. Where there has been a diminution of rights, the first in time prevails.

Conclusion

Upon consideration of the papers and submissions made, I conclude that the applicant who acquired his rights in 2007, as exhibited by the Certificates placed before me, is undoubtedly and for all the reasons I stated herein above, the Tilt in time against first respondents, the qua first respondent's predecessor in title, which acquired ins rights in 2016. Therefore, the applicant being the prior pegger, his rights supersede those of first respondent. The conclusion that applicant is a prior pegger and that his rights supersede those of first respondent takes me to the issue whether the respondent has done what it is accused of and therefore applicant entitled to the consequent relied sought, The papers before me established beyond any doubt, a position admitted by the first respondent that it is and continue to have conflict over the ownership of the mining location with the applicant. Further, the Department of Mines accepts and acknowledges that there was an encroachment dispute which requires resolution. The existence of this diminution mandates the granting of the consequent relief sought. This case, as presented by the applicant, is an appropriate one for the granting of the relief sought. MAKARAU J (as she was then was) in *Sibanda & Anor* vs *Chinemhute N.O and Anor* HH 131/04 had this to say concerning the powers of this Court to granting declaratory relief; "Thus, the power to issue a declaratur is not available in all Courts that apply common law. It is specific to this Court, High Court" In *Mugangavari* vs *Provincial Mining Director, Midlands N.O & Anor* HB 63/20, this Court discussed the requirements necessary for the granting of a declarator had this to say;

> "In *Johnson* vs *AFC* 1995 (1) ZIR 65 (HI) GUBBAY CJ had occasion to consider when a declaration can be granted. The learned Chief Justice at p 72 E - F;
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> "The conditions precedent to the granting of a declaratory order under Section 14 of the High Court of Zimbabwe 1981 is that applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of suit which would be prejudicially affected by the judgment of the Court. The interest must concern an existing future or contingent right. The Court will not decide abstract, academic or hypothetical accessions unrelated thereto. But the presence of actual dispute or controversy between the parties interested is not a pre-requisite to the exercise of jurisdiction." See also *Mondo Resident Association* vs *Moyo & Ors* HH 66/07."

From the papers filed and submissions made by the parties, I concluded that the applicant has valid and extant rights within the two mining locations. The overlap or encroachment dispute, which existed between the applicant's rights and those of the 1st respondent, which dispute is captured in a series of litigation before this Court, is adequate proof that an enquiry and declaration of the applicant's rights must be made. The defenses proffered by the 1st respondent challenging the request for the declarator and consequent relief lack merit and I accordingly dismiss it.

In the final analysis, on a balance of probabilities, the application meets the requirements for the granting of the declarator and the consequential relief sought but with some amendments. As discussed above, it is quite clear that the administrative authorities bungled up thereby leading to the clashing of rights between the applicant and the 1st respondent. The issue of encroachment remains one of the hotly disputed issues, which MUTEVEDZI J and MUNGWARI J judgements did not deal with.

In the same vein, it is not prudent to issue a conclusive declaration which will not give the authorities in the Ministry of Mines a chance to redeem themselves. The court notes with concern the way this whole dispute was handled. In my order, I will not hesitate to direct that a neutral professional with expertise in the mining industry be appointed to resolve the issue of encroachment.

In conclusion, I will therefore grant the application with amendments. As for costs, given the manner in which this matter was handled, will spare the 1st respondent and order each party to bear own costs.

Disposition

IT IS ORDERED THAT:

The Application be and is hereby granted with amendments as follows;

1. The applicant's certificate of registration for two mining locations known as Good Days and Good Days 6, registered under certificate of registration number 33908BM, and 33909BM, respectively, are valid and extant.
2. The applicant is entitled to exercise mining rights on the mining locations known as Good Days and Good Days 6 (registered under certificates of registration number 33908BM, and 33909BM, respectively) to the exclusion of the 1st and 4th respondent or any other person acting for them or deriving rights from them.

3. To the extent that the 1st respondent's rights to the Good Days K mining location conflict with the applicants' rights to the mining locations kwon as Good Days and Good Days 6 (registered under certificates of registration under 33908BM, and 33909BM, respectively), the applicant's rights are superior to those of the 1st respondent.

Consequently, IT IS ORDERED THAT;

4. The 1st and 4th respondent are ordered to forthwith stop interfering with the applicant's mining rights and mining activities on the two mining locations known as Good Days and Good Days 6 (registered under certificates of resignation number 33908BM, AND 33909BM, respectively)
5. The issue of encroachment be and is hereby referred back to the Minister responsible for the appointment of a neutral Mining expert (to be agreed by both parties) to resolve the encroachment dispute within 30 days of this order.
6. Each party to bear its costs.

KATIYO J: ………………………………………………..

Mundieta and Wagoneka Madenyika Law Chambers, applicant's legal practitioners
Thompson Stevenson and Associates, respondent's legal practitioners