

NAVADA RESOURCES (PRIVATE) LIMITED
versus
RED GRANITE INVESTMENTS(PRIVATE) LIMITED
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE
and
THE COMMISSIONER-GENERAL OF THE ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE; 18 & 26 March 2025

Urgent Court Application

E Mubaiwa, for the applicant
T Midzi, for the first respondent
No appearance, for the second respondent
N.L Mabasa, for the third respondent

ZHOU J: This is an application for a declaratory order and consequential relief made in terms of s14 of the High Court Act [*Chapter 7:06*] in which the applicant seeks an order couched in the following terms:

1. That the agreement of sale of 2000 gold dumps entered by applicant and first respondent on 29 October 2024 is valid, subsisting and obligating on the parties.
2. That in terms of that agreement, applicant is entitled to access and collect 1384 loads of gold dump from first respondent.

AS TO THE CONSEQUENTIAL RELIEF

3. That the first respondent shall not sell, dispose, corrupt, pollute or otherwise interfere with the quality or quantity of the gold dump in paragraph 2 above.
4. That the first respondent shall give applicant full and unrestricted access to allow applicant to collect and remove 1384 loads of gold dump from the same place and dumps where the initial 616 loads of gold dump were collected.
5. That should it become necessary, the second and third respondents stand directed to assist applicant to realize the terms of paragraph 4 above.
6. That the first respondent shall pay costs on the scale of legal practitioner and client.

The applicant Navada Resources (Private) Limited is a company registered in terms of the law of Zimbabwe. The first respondent is Red Granite Investments (Private) limited a company registered in terms of the law of Zimbabwe. The second respondent is the sheriff of the High Court of Zimbabwe. Third respondent is the Commissioner General of the Zimbabwe Republic Police.

The application is opposed by the first respondent. The second and third respondents did not oppose the application.

The facts of this matter may be summarised as follows: On 29 October 2024 the applicant entered into an agreement of sale with the first respondent. In terms of that agreement, the first respondent sold 2000 loads of gold dump to the applicant for a total sum of USD 354 000,00. The agreement was reduced to writing and a copy thereof is annexed to the applicant's founding affidavit. The applicant duly paid the agreed purchase price in cash. The payment is acknowledged in the written text of the agreement. The applicant managed to collect 616 loads of gold dump leaving a balance of 1384 loads priced at 245 491,00. Due to unforeseen heavy rains, it became impossible for the applicant to collect the remaining dump. When the rains stopped in March 2025, the applicant sought to collect the remaining loads but was denied access to the dump or to collect it.

The applicant avers that when it went to collect the balance of the loads the first respondent stated that it realized that it had sold the dump at a lower price than the market rates and so would only allow applicant to access the dump if it paid an additional USD 300 000, 00. On the 6th of March 2025 there were attempts to collect the remaining balance again but there was no success. This propelled the applicant to take legal action against the applicant through a letter of demand.

The applicant avers that there were correspondences between the applicant and the first respondent's legal practitioners in an attempt to settle the dispute. The applicant states that there was an offer in settlement wherein the first respondent was supposed to make a full refund of USD 245 491,00 paid for the 1384 loads of gold dump, the first respondent was to refund in cash by the 10th of March 2025.

The applicant contends that the offer in settlement was not accepted by the first respondent in that the first respondent did not make the refund on the specified days, but rather wanted to make the payment on another day and also that the first respondent wanted to refund by transfer instead of cash.

The applicant submits that the agreement of sale entered on the 29th of October 2024 is still valid and binding on the parties.

The first respondent in its notice of opposition avers that the terms of the agreement are contested in that the parties vacated, in writing specific performance of the agreement in favour of a refund. It states that the written agreement was not conclusive and the greater part was verbal.

The first respondent avers that clause 7 of the agreement speaks to the changes in the structure of the agreement and thus the incessant rains changed the structure of the agreement. Furthermore, the first respondent denies the allegations that it required the applicant to pay more. It further denies that there was an offer in settlement but rather an agreed position between the two parties.

The first respondent contends that specific performance was impossible and the parties agreed to a refund. It further argues that the dispute in question is about the dates of the collection of the refund. It states that it wanted to deliver cash on 14 March 2025 as 11 March 2025 was impossible for it to get cash.

The first respondent raised two preliminary points. The first one relates to forum shopping. It states that the application is improperly before the court particularly due to the applicant's choice of the High Court, Harare. The first respondent argues that the principle of *rei forum sitae* should have been applied and the applicant ought to have filed its application at Masvingo, the nearest High Court station to the cause action.

The High Court has inherent jurisdiction and the choice of court by the applicant has no effect on the merits of the case and thus this point *in limine* is dismissed on that basis. There is only one High Court of Zimbabwe. What is at Masvingo or Bulawayo are merely stations of the High Court.

Furthermore, that respondent raised another point in *limine* relating to an incompetent relief being sought by the applicant. The first respondent submitted that the agreement of sale had been overtaken by refund agreement. The applicant did not receive any payment refund from the first respondent nor did it collect the remaining dump of gold. The position that the said agreement of sale has been overtaken by the refund agreement does not stand and thus there is a live case before this honourable court. The point *in limine* is dismissed.

This is an application for a declaratory order and consequential relief in terms of s14 of the High court Act. The law governing the grant of a declaratur is trite. It was summed up in the case

of *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation 1994 (1) ZLR 337 (S) at 343-344*, where GUBBAY CJ made the finding that:

“The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor 1972 (4) SA 409 (C) at 415 in fine; Milani & Anor v South African Medical & Dental Council & Anor 1990 (1) SA 899 (T) at 902G–H*. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo Transvaal Collieries Ltd v SA Mutual Life Assurance Soc 1977 (3) SA 631 (T) at 635G–H*. But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by the court of jurisdiction. See *Ex p Nell 1963 (1) SA 754 (A) at 759H–760A*. Nor does the availability of another remedy render the grant of a declaratory order incompetent.”

In *casu* the applicant has shown that it has an interest in the subject matter. The applicant has shown that they bought 2000 loads of gold dump pursuant to an agreement of sale. It is not in dispute that there was an agreement of sale entered by both parties. The law is clear on the enforceability and sanctity of contracts. The doctrine of sanctity of contract is embedded in our legal science. It postulates that men and women, of full legal capacity and competent understanding, are at liberty to contract with one another. When they have so contracted freely and voluntarily, their contracts are held sacred and must be enforced by courts of law. In *casu* the applicant and the first respondent entered into an agreement of sale which is lawful and enforceable and therefore it is valid at law.

The first respondent’s defence that the parties agreed to a refund does not render the agreement invalid. The respondents have received a higher offer for the said gold dump and they want to use the court process to benefit from their greed.

The submission that performance of the contract is impossible is not based on any evidence. The law is settled that performance is the primary remedy where there is a breach of contract. This position is buttressed in *Van der Merwe et al Contract: General Principles 289* where it is stated that the primary remedy to a breach of contract is aimed at performance and counter-performance.

According to I Maja, *The Law of Contract in Zimbabwe, 2015, The Maja Foundation, at p126*:

“The general rule under Roman Dutch Law is that an innocent party has a right – in every case of breach of contract – to a remedy of specific performance unless there are exceptional circumstances which justify refusal of an order for specific performance.”

Also, according to *Farmers Co-operative Society (Reg) v Berry 1912 AD 343 at 350* it was held that:

‘*Prima facie*, every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in *Thompson v Pullinger* the right of the plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt.’

Specific performance is a remedy to which a party is entitled as a right. In the case of *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd 1993(1)21(H)* the court held that specific performance should be granted unless there are compelling reasons to the contrary. There are limited grounds for departing from the settled position of the law, none of which was proved *in casu*.

While the court has a discretion to grant relief other than specific performance, that discretion is not readily exercised in the absence of compelling reasons to deprive a party of the primary remedy, see *Smith and Ors v ZESA 2003(1) ZLR 158(H)*; *Ncube v Mpofu and Ors 2006(2) ZLR 41(H)*

The applicant has asked for costs on the attorney-client scale. These are a punitive order of costs that are granted where there are special reasons such as reprehensible conduct on the part of the affected party. The vexatiousness of frivolous nature of a defence or claim is a valid ground for attorney-client costs to be awarded, see *Zimbabwe Online (Pvt) Ltd v Telecontract (Pvt) Ltd 2012 (1) ZLR197(H) at 200H-201B*; In this case, there is no legally valid defense tendered to the claim. Instead, the first respondent is just trying to wriggle out of his contractual obligations on no good cause. For these reasons, the punitive order of costs is justified. Conclusively the applicant is entitled to the relief that it seeks.

In the result, **IT IS ORDERED THAT:**

1. The application for a declaratur be and is hereby granted.
2. The agreement of sale of 2000 gold dumps entered by applicant and first respondent on 29 October 2024 is valid, subsisting and obligating on the parties.
3. In terms of that agreement, applicant is entitled to access and collect 1384 loads of gold dump from first respondent.
4. The first respondent shall not sell, dispose, corrupt, pollute or otherwise interfere with the quality or quantity of the gold dump in paragraph 3 above.
5. The first respondent shall give applicant full and unrestricted access to allow applicant to collect and remove 1384 loads of gold dump from the same place and dumps where the initial 616 loads of gold dump were collected.

6. Should it become necessary, the second and third respondents stand directed to assist applicant to realize the terms of paragraph 5 above.
7. The first respondent shall pay costs on the scale of legal practitioner and client

ZHOU J:

Samukange Hungwe Attorneys, applicant's legal practitioners

H Tafa and Associates, first respondent's legal practitioners

The sheriff of the high court

Civil Division of the Attorney General, third respondent's legal practitioners