

Fidelity Printers & Refiners (Pvt) Ltd v Min of Mines & Mining Development & Ors

HH 211-21
HC 85/21
Ref Case No HC 810/21

FIDELITY PRINTERS & REFINERS (PVT) LTD
versus
THE MINISTER OF MINES & MINING DEVELOPMENT N.O.
and
THE PROVINCIAL MINING DIRECTOR FOR MIDLANDS PROVINCE N.O.
and
JONA NYEVERA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 April 2021

Date of written judgment: 28 April 2021

Urgent chamber application / opposed application

Adv *T. Zhuwarara*, for the applicant
Ms *C. Sigoza*, for the first and second respondents
Adv *G.R.J. Sithole*, for the third respondent

MAFUSIRE J

[1] By agreement, three interconnected cases were consolidated and argued as one. The central dispute is over the rights, title and interest in a certain gold mine called Mirage 3, situate in Kwe Kwe, in the Midlands Province (“*the mine*”). In a nutshell, two protagonists, Fidelity Printers and Refiners (Pvt) Ltd (“*Fidelity Printers*”), and Jona (or Jonah) Nyevera (“*Nyevera*”) tussle for the right to occupy the mine and to exploit certain gold ore sands piled there. Both claim rights of ownership deriving from their certificates of registration of the mine with the Ministry of Mines and Mining Development (“*the Ministry of Mines*”), through the Provincial Mining Director for the Midlands Province (“*the Provincial Mining Director*”).

[2] At all relevant times the mine was registered in favour of Fidelity Printers under Certificate of Registration No 8132. However, that registration was revoked and the mine forfeited in June 2020. It was relocated to Nyevera under Special Grant No 8202 in July 2020. Fidelity Printers challenge the forfeiture and the relocation as being unlawful for want of compliance with the dictates of the law, particularly the Administrative Justice Act, (*Chapter*

10:28). Fidelity Printers argues that before the purported forfeiture, it was given no notice at all or warning of the intended cancellation of the registration in its name. That is the synopsis of the dispute. Now the details. But first an explanation of the sequence of events, particularly the litigation.

[3] The first of the three cases was issued in this court at Harare on 4 February 2021 under HC 85/21. Fidelity Printers was the applicant. The Minister of Mines and the Provincial Mining Director were the first and second respondents respectively. Nyevera was the third respondent. It was an urgent chamber application for an interdict. In substance, it sought the following orders as interim relief pending the return day:

- the suspension of the operation of the forfeiture order by the Provincial Mining Director;
- the suspension of the operation of the special grant to Nyevera;
- an interdict against Nyevera to restrain him, or his agents, from entering the mine and disturbing or threatening the mining operations by Fidelity Printers.

[4] As final relief on the return day, Fidelity Printers sought the following orders:

- the setting aside of the forfeiture of the mine;
- a declaration of invalidity and nullity of any acts done by the Minister of Mines and the Provincial Director in pursuance of the forfeiture, the effect of which would have been the alienation of the area under the mine.
- costs of suit at the scale of attorney and client against any such of the respondents as would oppose the application.

[5] Nyevera opposed the application. So did the Provincial Mining Director, on behalf of both the Minister of Mines and herself. Unfortunately, her notice of opposition did not make it to the court record on time. The matter was decided on the papers. This was at a time when the country, as was the case with practically the rest of the world, was under severe restrictions of movement as part of efforts to check the spread of the covid-19 global pandemic. Following a Practice Direction by the Chief Justice to guide the operations of the courts during the lockdown period, urgent chamber applications could be determined on the papers without

hearing oral argument. On 17 February 2021 the interim relief sought by Fidelity Printers was granted in its entirety.

[6] The second of the three cases was issued at Bulawayo on 5 March 2021 under HC 55/21 (“*the Bulawayo case*”). Nyevera was the applicant. Fidelity Printers was the first respondent. Three new parties were introduced. One was a Mr Caesar Zvayi (“*Zvayi*”). He was cited as the second respondent. He had featured in the earlier case under HC 85/21, not as a party, but as a witness, through a supporting affidavit. It was said that Fidelity Printers, which at all relevant times was a private company wholly owned by the Government, through the Reserve Bank of Zimbabwe, had agreed to offload its entire interest in the mine to Zvayi, or his company, in a commercial deal deemed strategic.

[7] The rest of the respondents under the Bulawayo case were the Minister of Mines, as the third respondent, and the Provincial Mining Director as the fourth respondent. Two companies, one known as Gold Metal Investments (Pvt) Ltd (“*Gold Metal Investments*”) and the other GMI Red Baron 8 Mine trading as Hardrock Mining (Pvt) Ltd (“*GMI Red Baron*”), were cited as fifth and sixth respondents respectively.

[8] In the Bulawayo case, Nyevera alleged that following the grant of the interdict in HC 85/21, Fidelity Printers and Zvayi went on a looting spree of the gold ore sands at the mine. He said heavy duty 30-tonne trucks contracted from Gold Metal Investments were busy during the day and busy during the night ferrying the gold ore from the mine for processing at a mill owned by GMI Red Baron. He said his appeal to the Provincial Mining Director to order Fidelity Printers and Zvayi to stop the looting was rejected on the ground that such an action would be in contempt of the order of court under HC 85/21 aforesaid.

[9] So, in substance Nyevera sought the following orders as interim relief pending the return day:

- an interdict to restrain Fidelity Printers and Zvayi, their employees, assignees, agents or representatives, from removing the gold ore sands from the mine;
- that he be allowed to put in place his own security personnel at both the mine and GMI Red Baron’s premises to prevent the removal and processing of the gold ore sands;
- an interdict to restrain GMI Red Baron from processing the gold ore sands supplied to it by Fidelity Printers and Zvayi;

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- an interdict to restrain Gold Metal Investments from transporting the gold ore sands from the mine;
- that GMI Red Baron should produce a record of all the gold ore sands that it had received from the mine;
- alternatively, that should it be considered practically impossible to stop the processing of the gold ore sands by GMI Red Baron, then the quantity of the processed gold be recorded in the presence of both parties for safe keeping pending the finalisation of the matter.

[10] As final relief on the return day, Nyevera sought the following orders:

- confirmation of the interim relief;
- a permanent interdict restraining Fidelity Printers and Zvayi from transporting gold ore sands to any other processing plant and restraining their processing at GMI Red Baron pending the finalisation of the Harare case under HC 85/21 aforesaid;
- costs of suit at the scale of attorney and client against Fidelity Printers, Zvayi and Gold Metal Investments.

[11] The Bulawayo case, under the direction of the judge to whom the matter had been allocated, referred it back to Harare on the ground that it was the same matter pending in Harare and that it was in Harare where the main record had been opened. In Harare, upon receipt of the record of the Bulawayo case, a new record was opened for it and given a new case number: HC 810/21. So in reality, the Bulawayo matter under HC 55/21 is the same case re-opened in Harare under HC 810/21. That means, in effect, there were only two matters, not three, that were consolidated and argued as one before me. I reserved judgment. Here now is the judgment.

[12] The facts are these. Fidelity Printers is a duly registered private company. It is wholly owned by the Government, through the Reserve Bank of Zimbabwe. It says the mine was part of such strategic assets as were allocated to Government controlled entities. Over time, it was decided to realign its business operations. It would sell and offload its interest in the mine to a company owned by Zvayi which was the highest bidder. On 8 January 2021 Fidelity Printers wrote to the Provincial Mining Director advising of the sale of the mine to Zvayi. It sought information on any outstanding fees as might be due by it so that the sale process could be done smoothly.

[13] The Provincial Mining Director responded to the letter on 11 January 2021. She said no inspection fee invoice could be issued for a forfeited block. She advised that records indicated that the mine had been forfeited on 5 June 2020 in terms of s 260, as read with s 272, of the Mines and Minerals Act (*Chapter 21:05*). Fidelity Printers' central argument is that it received no prior warning or notice of the intended forfeiture. It avers that there had been an understanding between the Minister of Mines, the Provincial Mining Director and itself that no payments would be necessary. Therefore, it came as a shock to be informed for the first time that its mine had been forfeited.

[14] On 2 February 2021, and through its legal practitioners, Fidelity Printers addressed a letter of demand to the Minister of Mines. It challenged the purported forfeiture on the ground that the procedure violated s 220 (*sic*) of the Mines and Minerals Act, which allegedly provides that before any such forfeiture Fidelity Printers should have been afforded an opportunity to make representations. It was argued that the purported Special Grant (in favour of Nyevera) was invalid. The letter concluded by a demand that the forfeiture be reversed during the course of that week failing which legal proceedings would be instituted. No response was received.

[15] Fidelity Printers says on the same day that its lawyers were writing the letter aforesaid, hooligans acting on Nyevera instructions, invaded the mine. They issued an illegal demand that Fidelity Printers should vacate the mine within forty-eight hours failing which unspecified action would be taken. It says the hooligans declared that Nyevera had been awarded a Special Grant over the mine. In order to protect its rights, Fidelity Printers filed the urgent chamber application under HC 85/21 aforesaid.

[16] Fidelity Printers argues that the Minister of Mines and the Provincial Mining Director believe that the law does not require them to serve a notice of forfeiture on a miner before declaring a mine forfeited. It says they are wrong. It argues that s 260 of the Mines and Minerals Act provides that the failure by a miner to obtain an inspection certificate in respect of a mining block only renders the block liable to forfeiture. The mining block is not automatically forfeited. What the Provincial Mining Director did was merely to pin on the notice board outside her office two forfeiture notices dated 5 June 2021 and 2 July 2020 the preambles of which read:

“The following mining locations have on this 05th day of June 2020 [and 2 day (*sic*) of July 2020] been forfeited in terms of section 260 of the Mines and Minerals Act chapter 21:05 and will, subject to provisions of section 31 and 35 of the said Act, be open to relocation on 10 July 2020 unless revoked on or before 25 June 2020.”

There were numerous mining locations on the list. Mirage 3 was one of them.

[17] Fidelity Printers argues that it was not enough for the Provincial Mining Director to just stick onto her notice board the forfeiture notices like that and hope that somehow by chance the affected miners would stumble upon them. It submits that its administrative right to be heard was abrogated. Section 3(2)(a) to (c) of the Administrative Justice Act provides that for an administrative action to be taken in a fair manner, the administrative authority shall give the affected party adequate notice of the nature of the proposed action and a reasonable opportunity to make representations. Thus, the purported forfeiture is null and void. Since nothing flows from an act that is a nullity, the purported Special Grant to Nyevera is also a nullity.

[18] The case for Nyevera, the Minister of Mines and the Provincial Mining Director can be summarised as follows. The argument by Fidelity Printers is flawed. It wants to read into the Mines and Minerals Act words which are not there. There is no obligation upon the Provincial Mining Director to issue personal notices or to address letters of demand to individual miners who may be in default in regards to the renewal fees in respect of their mining locations. It is impractical. It is unworkable. The Mines and Minerals Act thrusts the obligation on the miner to have his or her mine inspected and his or her registration certificates renewed. This is done on an annual basis. Fidelity Printers may be an entity wholly owned by Government. That does not make it exempt from complying with the law and paying the inspection fees. In its case, it only paid the inspection fees once when the mine had been registered in its name. For the next five years afterwards it paid nothing. It was incumbent upon it, just like any other miner, to initiate the regular inspections of the mine and the payment of the inspection fees. The Provincial Mining Director did nothing wrong. In terms of the Mines and Minerals Act, the notice of forfeiture is posted onto the notice board of the relevant provincial mining director's office. Miners are obliged to inspect such notice boards from time to time.

[19] As said before, Fidelity Printers got an interdict in HC 85/21 to suspend the forfeiture of its rights over the mine, the suspension of the Special Grant in favour of Nyevera and for the right to carry out mining operations unhindered or undisturbed by Nyevera. On his part, in

the wake of Fidelity Printers and Zvayi resuming their mining operations at the mine, Nyevera implored the Provincial Mining Director to stop them. Getting no relief, he rushed to the Bulawayo High Court station for effectively a converse order. He wants Fidelity Printers and Zvayi stopped from carrying out any mining operations until the matters are resolved.

[20] HC 85/21 is pending the return day. HC 810/21 [in effect the Bulawayo case under HC 55/21] is still at the interim relief stage. But in both cases the central dispute is the same: who now is the legitimate owner of the mine? In other words, is the purported forfeiture of the mine by the Provincial Mining Director from Fidelity Printers in June 2020 or July 2020 void or voidable for want of compliance with the Mines and Minerals Act and the Administrative Justice Act? More precisely, was it incumbent upon the Provincial Mining Director to have sent out a letter of demand or some notice or warning to Fidelity Printers prior to the declaration of forfeiture? Is the purported relocation of the mine to Nyevera in July 2020 invalid by reason that the forfeiture is voidable or void *ab initio*? Demonstrably, consolidation of the three [or two] cases was the most obvious and logical step. The piece meal orders sought by the protagonists at different times and at different places would not resolve the central dispute.

[21] A close analysis of the Mines and Minerals Act convinces me that the obligation is thrust on the miner to motivate the annual inspection of his or her mining location after which a renewal fee is paid and an inspection certificate issued. Failure to do so makes the mining location liable to forfeiture. Section 260 and s 272 that feature prominently in the protagonists' arguments are not the start and end of the forfeiture process. They are the tail end. As Ms *Siqoza* argues on behalf of the Minister of Mines and the Provincial Mining Director, the process starts with s 197 to s 199 of the Mines and Minerals Act. The stages are these:

- Sec 197(1): within a period of six months of the registration of a mining block, the holder must apply and obtain the first inspection certificate;
- Sec 197(2): the first inspection certificate protects the mining block from forfeiture for a period of twelve months from the date of registration.
- Sec 198(1): the second inspection certificate must be applied for and obtained by the holder of a mining block within twelve months of the date of the registration of the block;
- Sec 198(2): the second inspection certificate protects the block from forfeiture for twelve months from the date of expiry of the first inspection certificate.

- Sec 199(1): the subsequent inspection certificates must be applied for and obtained by the holder of a mining block each succeeding period of twelve months, beginning from the date of expiry of the first inspection certificate;
- Sec 199(2): such subsequent inspection certificates protect the block from forfeiture for a period of twelve months from the date of expiry of the last inspection certificate.

[22] It is common cause, or uncontroverted, that since obtaining the first inspection certificate when Mirage 3 was registered in its name, Fidelity Printers carried none of the steps outlined above. It did nothing further to have its inspection certificates renewed. It paid nothing more. Somehow someone laboured under the impression that it was exempt. No proper basis has been shown suggesting that it was exempt or why it would be exempt. The Provincial Mining Director on behalf of her office and that of the Minister denies knowledge of any right to such exemption. Instead, she accuses those that control Fidelity Printers of dereliction of duty.

[23] Nyevera and the Provincial Mining Director argue that the mine was forfeited by operation of the law. I see that Part XVI of the Mines and Minerals Act deals with the abandonment and forfeiture of mining locations. Section 260 provides that the failure to obtain an inspection certificate within the period prescribed shall render the block liable to forfeiture, unless a protection certificate has been issued. Fidelity Printers argues that in terms of s 263 of the Act, the Provincial Mining Director was obliged to send it by registered letter a notice to inform it of its failure to obtain an inspection certificate. Such registered letter is to be copied to the Mining Affairs Board. It is such notice that triggers the processes outlined in the rest of that provision. They include the right of the holder to make representations or to be given an opportunity to purge its default. The argument is repeated that the Provincial Mining Director not having sent such registered mail, botched the forfeiture procedure, especially given that s 260 does not provide for an automatic forfeiture, but merely the right to forfeit.

[24] However, plainly s 263 is not applicable. It applies to mining leases. Those provisions dealing with inspection certificates and the renewals thereof, refer to holders of mining blocks and holders of mining leases, suggesting that the legislature sees them as being two different sets of interests. Sections 197 to 199, for example, are consistent in their references to holders of mining blocks and mining leases. But s 263 confines itself to holders of mining leases. I

shall not concern myself with why this is so. Fidelity Printers is or was not a holder of a mining lease. It is or was a holder of mining block.

[25] Section 271(1) provides that subject to s 263, where any mining location is liable to forfeiture in terms of the Act, the mining commissioner may declare such location forfeited. Evidently, the words “*Subject to section two hundred and sixty-three*” in s 271 are in relation to mining leases, because it is them alone that are the subject matter dealt with in s 263. Fidelity Printers’ argument that s 260 and s 271 do not oblige automatic forfeiture is not understood. Section 260 is worded in peremptory terms. It says failure to obtain an inspection certificate “*shall*” render liable to forfeiture the block in respect of which such failure has taken place. The one way to avoid the forfeiture, following such failure, is to obtain a protection certificate in terms of s 217. Fidelity Printers does not say it ever obtained such a protection certificate. Therefore, not having obtained a protection certificate, and having failed to obtain an inspection certificate, its registration of the mine was inevitably liable for forfeiture.

[26] It is my considered view that the Provincial Mining Director acted within her powers to forfeit. Section 271(1) provides for the discretion reposed in the mining commissioner to declare the forfeiture. The discretion is not in the power to forfeit. It is in the power to make a declaration of the forfeiture. The power to forfeit is in s 260. Section 272 of the Act then goes on to provide for the relocation of abandoned, forfeited or cancelled mining locations. It reads:

“272 Relocation of abandoned, forfeited or cancelled locations and reinstatement of forfeited locations

- (1) Lists of registered mining locations which have been abandoned or forfeited in terms of this Act shall from time to time be posted on a board to be exhibited in some conspicuous way outside the office of the mining commissioner, and any such location may be relocated after the expiration of thirty-five clear days from and exclusive of the date of the posting of the notice relating thereto, unless the declaration of forfeiture is revoked in terms of this section or in the said notice it is upon instruction of the Secretary otherwise provided.
- (2) The person who at the date of the declaration of forfeiture was the holder of a block or site which has been declared forfeited in terms of section *two hundred and seventy-one* owing to his failure to obtain the necessary inspection certificate or to pay site rent therefor may apply to the mining commissioner for the revocation of such declaration of forfeiture.
- (3) If—

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- (a) the application under subsection (2) is made within twenty-one days of the date of the posting in terms of subsection (1) of the notice of forfeiture relating to such mining location; and
- (b) the prescribed fee is paid to the mining commissioner; and
- (c) the applicant is granted a protection certificate under section *two hundred and seventeen* or obtains the necessary inspection certificate for such mining location or pays the arrears of site rent, as the case may be, within twenty-one days of the date of the posting in terms of subsection (1) of the notice of forfeiture relating to such mining location;

the mining commissioner shall revoke the declaration of forfeiture and upon such revocation such mining location shall be regarded for all purposes as if no forfeiture thereof had been declared and any approved cultivation scheme which relates to such mining location shall not be affected by such forfeiture.”

[27] Thus in terms of s 272 the forfeiture of a mining location for failure to obtain an inspection certificate is revocable. The holder of the mining location has to take steps to get the forfeiture revoked. He or she applies to the mining commissioner. That application has to be done within twenty-one days of the date of the posting of the notice of forfeiture. A mining location that has been forfeited can be relocated unless the declaration of forfeiture has been revoked. The relocation can only happen after the expiry of thirty-five clear days of the date of posting. Thus, s 272 has a self-contained mechanism for the application of the *audi alteram partem* rule of natural justice for any person aggrieved by the forfeiture of his or her mine.

[28] The *audi alteram partem* rule takes various forms. It encompasses the ‘legitimate expectation’ principle. But in simple terms, a person shall not be condemned without being given a chance to be heard in his or her own defence. A person shall have the right to be heard before decisions adverse to his or her interests are made or implemented. The rule is so basic to jurisprudence: see *Dube v Chairman, Public Service Commission & Anor* 1990 (2) ZLR 181 (H). Fairness is the overriding consideration: see *Health Professions Council v McGowan* 1994 (2) ZLR 392 (S) and *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S).

[29] Thus, administrative decisions such as the one made by the Provincial Mining Director on behalf of the Minister of Mines in the present case are reviewable by this court. An administrative decision made in violation of natural justice can be set aside. The Administrative Justice Act has in some way codified the *audi alteram partem* rule and the legitimate expectation doctrine and facilitated their application. The hallmark of this Act is the injunction

to administrative authorities to act reasonably, fairly and lawfully. One of the ways this may be achieved is the giving of adequate notice of the intended adverse decision and the chance to make representations.

[30] The *audi alteram partem* rule and the legitimate expectation principle are not absolute. There may be situations where a court may not impeach an administrative decision taken in apparent violation of natural justice. For example, where a statute authorises an *ex parte* action by the administrative authority in an emergency, or where there is a sufficient interval between the decision and its implementation during which there is a fair hearing, the administrative decision may not be impugned. In *Sachs v Minister of Justice, Diamond v Minister of Justice* 1934 AD 11, whilst dealing with the statutory exclusion of the *audi alteram partem* rule in certain situations, STRATFORD ACJ said at p 38:

“Sacred though the maxim is held to be, Parliament is free to violate it. In all cases where by judicial interpretation it has to be invoked, this has been justified on the ground that the enactment impliedly incorporated it. When on the interpretation of the Act, the implication is excluded, there is the end of the matter.”

[31] In *McGowan* case above, the Supreme Court noted that a court may accept as sufficient compliance with natural justice a hearing held after the decision has been taken where:

- there is a sufficient interval between the taking of the decision and its implementation to allow a fair hearing;
- the decision maker retains a sufficient open mind to allow himself to be persuaded that he should change his decision;
- the affected individual has not thereby suffered prejudice.

[32] The Administrative Justice Act has itself provisions dealing with the exclusion of the application of the *audi alteram partem* rule. Section 3(3) reads:

- “(3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—
- (a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
 - (b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including—

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- (i) the objects of the applicable enactment or rule of common law;
- (ii) the likely effect of its action;
- (iii) the urgency of the matter or the urgency of acting thereon;
- (iv) the need to promote efficient administration and good governance;
- (v) the need to promote the public interest.”

[33] It is my considered view that the actions of the Provincial Mining Director in forfeiting the rights of Fidelity Printers in Mirage 3 and subsequently granting a Special Grant to Nyevera in respect of that mine was not in violation of the law. There is sufficient scope in the Mines and Minerals Act for any holder of a mining location whose title is liable to forfeiture to make representations or take other action to avoid the final forfeiture. The right to be heard is imbedded in s 271. No right to an individual notice or warning or letter of forfeiture or to a demand for payment of outstanding dues in respect of a mining location is reposed in any holder of a mining location save for such rights as are set out in terms of s 263. Holders of mining locations have the obligation to ensure that they apply for and obtain inspection certificates within the intervals specified in the Act. A notice of the declaration of forfeiture that may be posted onto the notice board outside the office of the mining commissioner is adequate compliance with the law in as far as rights to a notice in respect of any intended forfeiture of a mining location are concerned.

[34] In the circumstances the matters in dispute between Nyevera and Fidelity Printers are decided in favour of Nyevera The following orders are hereby issued:

- i/ The Provisional Order issued by this court in HC 85/21 on 17 February 2021 is hereby discharged.
- ii/ The forfeiture of the Registration Certificate No 18132 in favour of the applicant in HC 85/21 [the first respondent in HC 810/21] over the mine known as Mirage 3 in Kwe Kwe in the Mining District of the Midlands (hereafter referred to as “**the mine**”) on 4 June 2020, is hereby confirmed.
- iii/ The Special Grant No 8202 in favour of the third respondent in HC 85/21 [applicant in HC 810/21] over the mine is hereby confirmed.
- iv/ The applicant in HC 85/21 [first respondent in HC 810/21) and the second respondent in HC 810/21, their employees, assignees, agents or representatives, shall not remove any gold ore sands from the mine.

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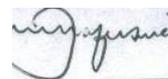
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- v/ The sixth respondent in HC 810/21 is hereby barred from processing any gold ore sands supplied to it by the first respondent [applicant in HC 85/21] and the second respondent.
- vi/ The sixth respondent in HC 810/21 shall within a reasonable period produce a record of all the gold ore sands received by it from the mine at the instance of the first respondent [applicant in HC 85/21] and the second respondent after the grant of the aforesaid Provisional Order in HC 85/21.
- vii/ The costs of suit shall be borne by the applicant in HC 85/21 [first respondent in HC 810/21] jointly and severally with the second respondent in HC 810/21.

28 April 2021



Coghlan, Welsh & Guest, legal practitioners for the applicant
Attorney-General's Office, legal practitioners for the first & second respondents
Mutatu & Partners, legal practitioners for the third respondent