

**DISTRIBUTABLE (24)**

**RIOZIM (PRIVATE) LIMITED**

**v**

**(1) FALCON RESOURCES (PRIVATE) LIMITED**

**(2) RUSUNUNGUKO NKULULEKO (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE  
MALABA CJ, UCHENA JA & CHIWESHE AJA  
HARARE, 16 NOVEMBER, 2020**

*T. Mpfu*, for the appellant

*L. Uriri*, for the respondents

**MALABA CJ:** This is an appeal against the judgment of the High Court (“the court *a quo*”) which effectively held that a dispute over which party between the appellant and the first respondent owned certain mining claims registered in the appellant’s name was incapable of resolution on the papers.

At the hearing of the appeal, the Court found that the decision of the court *a quo* was incorrect, for the reason that it failed to appreciate the evidence of registration of the mining claims in the appellant’s name. The appeal was allowed with costs and the judgment of the

court *a quo* set aside. The Court indicated that reasons for the decision would be given in due course. These are they.

## **FACTUAL BACKGROUND**

The facts giving rise to the appeal are largely common cause. They may be summarised as follows.

The appeal revolved around mining claims at Wendale 43 Block situated in Domboshava registered under certificate no. 18007. The parties were all registered companies, having been registered in terms of the company laws of Zimbabwe. In February 2018 the first respondent wrote to the appellant, seeking from it a tribute arrangement in respect of the mining location in issue. The request was rejected. Despite the rejection, on 30 May 2018 the first respondent was observed exploiting minerals at the appellant's mining location. When confronted, the first respondent indicated that it had partnered with the second respondent in a mining venture for the exploration of minerals in the area in dispute.

The appellant contended that it was the registered holder of the said mining claims, as evidenced by a certificate of registration filed of record.

It was alleged by the respondents that the Minister of Mines and Mining Development ("the Minister") had gazetted the area in dispute as a reserved area. They further alleged that the reservation of the area by the Minister had a profound effect on the status of the mining area, in that title over mining claims vested in a party only through the issuance of special grants. It was alleged that the legal status of the mining claims changed as a result of the reservation. As holders of a special grant in the mining area, it was alleged that the respondents were the rightful owners of the mining claims in question.

The appellant approached the court *a quo* in an application for a provisional order, in which it sought an interdict against the respondents, and any person acting under their authority, preventing them from carrying on mining activities on the disputed mining claims. It further sought an order that the respondents, and any person acting under their authority, vacate the mining claims and remove all mining equipment belonging to them. The appellant sought an order declaring it to be the holder of title over the mining claims in dispute.

The respondents raised two points *in limine* in opposing the provisional order sought. The first point was that the Minister had not been joined in the proceedings. The second point was that there was a material dispute of fact. The import of the first objection was not understood, as the respondents were not claiming that they had the right to exploit the mineral resources at the mining location in dispute. Regarding the second preliminary objection, the nature of the dispute was not identified. As such, the court granted a provisional order pending the determination of the matter on the return day whereupon the respondents were called upon to show cause why the appellant should not be declared the rightful holder of title over the mining claims in dispute.

On 15 June 2018 the appellant filed an application for confirmation of the provisional order granted. The respondents opposed the application. They persisted with the two points *in limine*, namely that there was material non-joinder of the Minister, and that there was a material dispute of fact which could not be resolved on the papers.

The court *a quo* upheld the two points *in limine* and dismissed the application. The court *a quo* was of the view that the dispute of fact as to which party was the rightful owner of the mining claims was apparent to the appellant before the application was instituted. It said that it should have been clear to the appellant that the dispute would require the involvement

of the Minister, as it related to title of a mining claim. The court *a quo* said at pp 2-3 of the judgment:

“The Minister of Mines and Mining Development clearly has a direct and substantial interest in the subject matter of this matter because he is the authority responsible for giving title to mining claims including the one in dispute ... . The respondents allege that the mining claim no longer belongs to the applicant because it was forfeited by the Minister responsible for Mines and Mining Development. This dispute of fact as to who holds title cannot be resolved on papers ... . It would also have been clear to the applicant that this dispute would require the involvement of the Minister of Mines and Mining Development to resolve as it pertains to title to a mining claim. It would be untidy to refer the matter to trial on the bulky papers filed and in circumstances where an interested party has not been joined ... . It seems to me that it is appropriate, given that the dispute of fact was obvious, to dismiss the application ... .”

Dissatisfied with the decision of the court *a quo*, the appellant noted the appeal on three grounds, which essentially raised one issue for determination. The issue was whether there was a material dispute of fact. It was argued that the court *a quo* misdirected itself in dismissing the application for the confirmation of the provisional order on the basis that there was a material dispute of fact.

### **THE APPELLANT’S ARGUMENT ON APPEAL**

At the hearing of the appeal, counsel for the appellant submitted that the appellant has held title over the mining claims since 1974, as evidenced by the certificate of registration. It was alleged that the same was inspected by the Minister, who confirmed the ownership of the mining claims by the appellant. It was argued that mineral rights are real rights and once acquired they remain effectual until lost in terms of the Mines and Minerals Act [Chapter 21:05]. The certificate of title was filed of record and it was submitted that it was current. It was also argued that the Ministry of Mines and Mining Development did not reserve the block over which the appellant had mining rights. Therefore, the appellant’s rights were never lost.

The appellant relied on the case of *Chase Mineral (Pvt) Ltd v Madzikita* 2002 (1) ZLR 488 (H) at 490C-E, where the court said:

“It will be seen, therefore, that the applicant, as the holder of the registered claims, has the exclusive rights of mining the claims under dispute. Such rights are protected by section 379 of the Act ... it is thus submitted that the respondent has been, in fact, working on the applicant’s claims, (and) he is therefore guilty of contravening section 379 of the Act. To suggest that the eviction order be suspended or stayed pending appeal ... so as to enable the respondent to continue mining amounts to authorising the contravention of section 379 of the Act. That would create an untenable situation in which this court would not only be condoning but authorising the criminal conduct of the respondent in breach of the provisions of the Act.”

### **THE RESPONDENTS’ ARGUMENT**

Counsel for the respondents submitted that the finding by the court *a quo* that there was a material dispute of fact incapable of resolution on papers was correct. He argued that the area containing the mining claims had been reserved and that title to the mining claims could only be by way of a special grant, which was not granted to the appellant. He also argued that both parties claimed to have obtained title to the mining claims through the Ministry of Mines and Mining Development. The question as to which party held title between the holder of the special grant or the certificate of registration raised a material dispute of fact.

The respondents relied on the case of *Anjin Investments (Pvt) Ltd v Minister of Mines and Mining Development and Ors* HH 228/16, where the court held that no person can claim any right in a mining claim falling under a reserved area without a special grant. It was also held that it was for the Minister to confirm whether the appellant’s title to the area, notwithstanding the reservation and subsequent special grant in favour of the second respondent, still existed. Lastly, counsel for the respondents submitted that the appeal was without merit and ought to be dismissed.

### **THE LAW AND THE FACTS**

The finding by the court *a quo* that there was a material dispute of fact is being tested as a matter of misdirection. It is a settled principle of law that an appellate court will not readily interfere with the findings of fact made by a lower court. In *Beckford v Beckford* 2009 (1) ZLR 271 (S) at 283D, the following was stated:

“In any event, an appellate court would not readily interfere with the findings of fact made by a trial judge.”

It is trite that for an appellate court to interfere with factual findings of a lower court gross misdirection must be alleged and established. This was enunciated in *TM Supermarkets v Mangwiro* 2004 (1) ZLR 186 (S) at 189D, where the following was stated:

“I am also persuaded by the contention that the court *a quo* in this particular respect misinterpreted the evidence before it ... . The evidence makes it clear this was not so. The misdirection of the court is thus evident.”

The grounds on which the finding of the court *a quo* is being challenged have to be looked at from the point of view of the sequence of events.

The first issue that has to be considered relates to the issues that were before the court *a quo*. The main issue was whether there was a dispute of fact. It was the respondents' contention that there was a dispute of fact in respect to which a robust approach could not be adopted for its resolution. The appellant argued that there was conclusive evidence on record to prove that there was no dispute of fact.

What a dispute of fact entails was well articulated in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F where the court said:

“A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

In *Pignons S.A. de Mecanique de Precision v Polaroid Corporation* 657 F 2d 482, the United States Court of Appeals had this to say regarding material disputes of fact:

“A factual dispute is material if it affects the outcome of the litigation and genuine if manifested by substantial evidence going beyond the allegations of the complaint.”

In this regard, the mere allegation of a possible dispute of fact is not conclusive of its existence. From the decided cases, it is evident that a dispute of fact arises where the court is left in a state of reasonable doubt as to which course to take in resolving the matter without further evidence being led.

The alleged dispute of fact in the present case pertained to the ownership of the mining claims where the respondents had commenced mining activities. They averred that they were digging where they had lawful authority to dig, on the basis that a special grant had been given to them by the mining commissioner. They claimed therefore that they had rights over the mining area in dispute. It was the same mining area that the appellant has held title over the mining claims in question since 1974 and has never ceased to hold such title.

The existence of the alleged dispute of fact regarding the ownership of the mining claims was not supported by the evidence on record. The Court was called upon to test what the claim by the respondents entailed. They alleged they had legal title over Wendale Block 43, which was granted to them by the Ministry of Mines and Mining Development through a special grant. It is therefore critical to look at the special grant, as it was a legal document which gave the respondents authority to explore a specific mining area.

Looking closely at the appellant's certificates of registration, it is evident from the record that the appellant was the registered holder of claims that were specifically identified as Wendale 42 Block under registration number 18006 B.M. Darwendale and Wendale 43 Block

under registration number 18007 B.M. Darwendale, issued in 1974. The special grant being referred to by the respondents as proof of title over the mining claims in dispute was identified as relating to “an area situated within RA MSW003 Darwendale” and this area was depicted on the Ministry of Mines and Mining Development map. The mining claims referred to in the special grant clearly differed from the location of the appellant’s mining claims. It is a misrepresentation of fact by the respondents that they had legal rights over Wendale 43 Block under registered certificate number 18007 B.M. Darwendale.

The respondents’ mining activities were encroaching onto the appellant’s claims yet, as the evidence on the map clearly showed, the respondents should have been on a different location on the ground. The court *a quo* failed to appreciate the evidence placed before it. The appellant’s rights were conferred in terms of the law and there was precedent evidence in the record proving that the appellant has always been there since 1974.

The appellant also had a letter dated 22 June 2018, filed of record, from the Ministry of Mines and Mining Development, confirming that it was the rightful owner of the mining claims in dispute. The letter reads as follows in relevant part:

“Please be advised, according to records held by this office, Wendale 43 chrome mine Registration Number 18007 BM is owned by Rio Zim Limited. The block was inspected under Inspection Certificate Number 235014P ...”. (the underlining is for emphasis)

The above documentary evidence is clear and unambiguous. A written proof of title is indispensable evidence as regards proof of ownership. By holding that there was a dispute of fact because of the respondents’ special grant, the location of which was different from the appellant’s mining claims, the court *a quo* undoubtedly misdirected itself.

As further evidence of the appellant's ownership of the said mining claims, the Ministry of Mines and Mining Development continued to collect money from the appellant for the purposes of renewing its certificate of registration. Such payments can only be done by the holder of legal entitlement over a mining location. This means that not only did the appellant get confirmation from the Ministry of Mines and Mining Development that it was the owner of the claims and had the right to mine them, but that its registration was current.

The court *a quo* erred and misdirected itself by failing to appreciate that the letter from the Ministry of Mines and Mining Development was further confirmation of the appellant's legal entitlement to the mining claims. As such, there was no dispute of fact. The ownership of the mining claims was apparent from the evidence adduced before the court *a quo* in the form of receipts showing that the appellant made payments to the Ministry of Mines and Mining Development for the registration of its claims.

The documentary evidence before the court *a quo* pointed to the conclusion that the appellant was legally entitled to the mining claims in question. The court *a quo*'s conclusion that there was a dispute of fact was erroneous. There was no question of ownership of the mining claims being in dispute, as there was evidence to establish such ownership conclusively. Once the Ministry of Mines and Mining Development confirmed that the appellant was the owner of title over the mining claims, the legal effect of that confirmation was that the apparent dispute of fact fell away.

In *Agrifoods v Chiruka and Ors* SC 116/04, the court said the following at p 4 of the judgment:

“The legal position regarding misdirection based on facts is clearly articulated in the case of *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 774 (S) where at p 670A the learned judge observed as follows:

‘For an appellant to avail himself of a misdirection as to the evidence, the nature and circumstances of the case must be such that it is reasonably probable that

the Tribunal would not have determined as it did had there been no misdirection; in other words, that the determination was irrational.’

I am satisfied, on the strength of this *dictum*, which I find to be apposite *in casu*, that the court *a quo* did indeed misdirect itself as to the evidence before it. Had the court not so misdirected itself, I have no doubt in my mind that it might very well have reached a different conclusion. In particular, the court *a quo* may not have reached the conclusion that the order to report for work the following morning would have violated the respondents’ right to one day off per week. The misdirection in question amounts to a misdirection in law.” (the underlining is for emphasis)

Applying the reasoning in the *Agrifoods* case *supra*, it is apparent that if the court *a quo* had taken into account the evidence placed before it, it would not have reached the decision that it did. It would have confirmed the provisional order granted to the appellant.

The failure by the court *a quo* to appreciate the nature of the evidence placed before it warranted interference by the Court.

## **DISPOSITION**

In the result, the Court ordered as follows -

- “1. The appeal hereby succeeds with costs.
2. The decision of the court *a quo* is set aside and substituted with the following order -
  - ‘1. The provisional order be and is hereby confirmed.
  2. It is declared that the applicant is the holder of title over mining claims under Certificate No. 18007BM, being Wendale 43 Block situate in Darwendale.
  3. That the respondents and any person acting under their authority or direction be and are hereby interdicted from conducting mining activities, including the prospecting and extraction of chrome ore, at Wendale 43 Block.
  4. That the respondents and all those claiming occupation through them be and are hereby ordered to evacuate the mining location covered by Block 43 Wendale and shall to that end remove all their mining equipment.

5. The respondents shall cease and desist from interfering with the applicant's mining operations at Wendale 43 Block.
6. Costs of this application shall be borne by the respondents jointly and in *solidum* at the scale of legal practitioner and own client.”

**UCHENA JA: I concur**

**CHIWESHE AJA: I concur**

*Wintertons*, appellant's legal practitioners

*T Pfigu Attorneys*, respondents' legal practitioners