

ANTECH LABORATORIES (PVT) LTD

Versus

**PERMANENT SECRETARY FOR MINES
& MINING DEVELOPMENT**

And

PROVINCIAL MINING DIRECTOR, MIDLANDS PROVINCE

And

KHAN & MAWADZI MILLING SYNDICATE

IN THE HIGH COURT OF ZIMBABWE

KABASA J

BULAWAYO 23 JANUARY 2020 & 27 FEBRUARY 2020

Opposed Application

E. Sarimana, with R.M. Smithwick for the applicant

No appearance for the 1st and 2nd respondents

S. T. Farai for the 3rd respondent

KABASA J: This is an opposed application wherein the applicant seeks the confirmation of a provisional order which was granted by MABHIKWA J on 7th November 2018.

The interim relief granted on 7th November 2018 was to the following effect:

“Pending the final determination of this matter,

It is ordered:

1. That third respondent be and is hereby ordered not to conduct any work, or commence, or continue, any mining operations under or in terms of the provisions of Special Grant 6899 issued on 27 August 2018 by first respondent, on or at the area identified therein, situated upon applicant’s property being Purdown Farm of Aspdale held under Deed of Transfer number 2586/90.
2. That, pending the granting of a final order in this suit, first and second respondents be and are hereby ordered –

- (i) Not to approve the appointment of a competent mine manager for the mining operations contemplated by third respondent under Special Grant 6899;
 - (ii) Not to approve or permit the approval of, any siting of works plan that may be submitted to them or either of them by third respondent, or any official within the Ministry of Mines and Mining Development in terms of the provisions of section 234 of the Mines and Minerals Act (Chapter 21:05).
3. The Sheriff or his deputy be and is hereby granted leave to serve the application and provisional order on the 3rd respondent's security guard at the premises of the special grant at Purdown Farm of Aspdale held under Deed of Transfer number 2586/90"

The final order sought in this opposed application is in the following terms:

"That you show cause to this honourable court why a final order should not be made in the following terms:

- 1. That Special Grant 6899 issued by the Secretary for Mines and Mining Development on 27th August 2018, be and is hereby set aside and declared null and void.
- 2. That in the event third respondent again submits an application for a Special Grant over Purdown Farm of Aspdale held under Deed of Transfer number 2586/90, or any part of it, before granting the application and issuing a special grant, first respondent is hereby ordered to –
 - (i) submit a copy thereof to applicant
 - (ii) permit applicant the right to respond to such application
 - (iii) consider and take into account in his deliberations, the response of applicant to the application
- 3. That in the event that third respondent decides to pursue an application for a special grant, third respondent be and is hereby ordered to apply for a certificate under the provisions of section 97 of the Environmental Management Act (Chapter 20:27) before commencing any operations.
- 4. That first respondent be and is hereby ordered to pay the cost of suit on the attorney and client basis."

The background to this matter is this. The applicant is the owner of a piece of land, namely Purdown Farm, held under Title Deed No. 2586/90.

The applicant applied for and was issued with a special grant to operate a stamp mill on part of Purdown Farm, which special grant number 5011 lapsed in 2007. The Special Grant was not renewed by the Ministry of Mines and Mining development. A Mr. Arnold Mandaba subsequently applied for one and was issued with Special Grant 4854 over the same area which applicant's Special grant 5011 covered. When Mr. Mandaba commenced work on that piece of

land applicant sought and obtained an interdict against him. A provisional order was granted on 7th January 2008 which stopped any preparatory work Mr. Mandaba had started in pursuance of the authority granted to him by virtue of Special grant 4854. It is not clear whether the provisional order was subsequently confirmed. Arnold Mandaba eventually died and it would appear Special Grant 4854 eventually lapsed just as Special Grant 5011 which preceded it.

On 6th December 2017 the 3rd respondent submitted an application to utilize 6 hectares within the reserved area number 900, the same portion of land in Purdown Farm for which Special grant 5011 and Special Grant 4845 previously covered. The application was granted and Special Grant 6899 came into being. When the 3rd respondent started overtures to commence work at that reserved area within applicant's land, the applicant wrote to the City of Kwekwe and to the 1st and 2nd respondent objecting to the 3rd respondent's application. The Special Grant 6899 was however issued on 27th August 2018 by the 1st respondent.

The applicant then sought and obtained the provisional order which it now seeks confirmation of.

The 3rd respondent opposed the application. In opposing the confirmation of the provisional order 3rd respondent raised points *in limine*. The court decided to let the parties argue on both the points *in limine* and the merits and determine the issues all at once. The first point *in limine* was abandoned at the hearing of the application and rightly so as it was on urgency and urgency had already been decided on with the granting of the provisional order by MABHIKWA J.

I propose to dispose of the preliminary points first in this judgment and that is as it should be, as points *in limine* ought to be considered and decided on first before dealing with the merits.

The first point *in limine* having been abandoned, the next preliminary point was on the inappropriate use of form 29B. *Mr. Farai* for the 3rd respondent contended that in terms of the rules of the court form 29B was supposed to be used with appropriate modifications. Counsel referred to annexure 'A' on page 73 of the record as the appropriate form the applicant ought to have used. The failure to comply with the rules of court renders the application fatally defective

and there is therefore no application before the court. The lack of form makes it difficult to know what the applicant is seeking, a declaratur, review or an interdict as the grounds upon which the application is being made do not appear *ex facie* the application, so *Mr. Farai* argued.

Ms Sarimana for the applicant acknowledged the lack of form and sought the court's indulgence. Counsel further submitted that there was substantial compliance with the rules of court and so the non compliance is not fatal.

Counsel referred to MATHONSI J's (as he then was) remarks in *Telecel Zimbabwe (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) and 3 Others* HH-446-15 where at page 6 thereof the learned judge had this to say:

"I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not designed to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in form 29B when they are set out in abundance on the body of the application, is to worry about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by r4C of the High Court Rules, I condone the omission."

Granted it is convenient to have the grounds set out *ex facie* form 29B but where that is not done but the grounds appear in the body of the application, is arguing over form not a sterile argument which does not achieve much except to unnecessarily detain not only the court but the litigants themselves? I think it is.

I will be the first one to accept that the deponent to the founding affidavit in which is set out the basis for the complaint came up with the longest affidavit I have ever set eyes on. It reads like a short story novel, but the grounds can easily be gleaned therein.

What prejudice has the 3rd respondent suffered as a result of the lack of compliance with the rules of court? Counsel for the 3rd respondent kept referring to the application as a "nameless application" and that fishing for the grounds for the application was a mammoth task. A reading

of the notice of opposition and the opposing affidavit however appears to tell a different story. The 3rd respondent was able to respond to the application in a manner that showed that it had understood the grounds upon which the applicant grounded its application.

In *Zimbabwe Open University v Dr O. Mazombwe* HH43-2009, HLATSHWAYO J (as he then was) pointed out that a judge has a discretion to condone departures from the rules. In that case a wrong form had been used and the learned judge observed that the applicant's error was not in using one form instead of another but of using a completely different format from the authorised one.

The format used by the applicant did not contain "... the plethora of procedural rights that the respondent is alerted to in form 29 nor the summary of the grounds of the application required in form 29B. Can this substantial departure from the rules be condoned under Rule 4C ..."

The learned judge made the point that the applicant had not bothered to seek condonation even after such non-compliance had been drawn to its attention.

"In my considered view, where the errant party has not applied for condonation in spite of its awareness of its non-compliance, it suffices for the objecting party merely to point out the non-compliance for the application to be struck off. Furthermore the applicant's failure to even recognise the need to apply for condonation shows a cavalier approach to compliance with rules of court which must be discouraged by an exemplary order of costs."

In casu, counsel for the applicant acknowledged the error and sought the court's indulgence. The failure to state the summary of the grounds of the application is not, in my view, a substantial departure from the rules that cannot be condoned in terms of rule 4C.

In *Sekard Learning Development Solution (Pvt) Limited v Routhy World Education Adventure and Another* HH-247-17 ZHOU J had occasion to warn legal practitioners who fail to observe the requirements of the rules of court. In that case the draft order in an application for an interdict was not in form 29C and the legal practitioner had created his own "form" totally disregarding the rules.

The learned judge had this to say:

“There is reckless disregard of the requirements of the rules relating to the use of the appropriate form which has become a common practice by the litigants and the legal profession. The court expects litigants, especially those who are legally represented, to comply with the requirements of the rules. In future the court will consider penalising legal practitioners who ignore basic requirements of the rules relating to the use of appropriate forms through the making of appropriate orders for costs.”

However, what is important to note is that the learned judge just like MATHONSI J did not consider such disregard of the rules as fatal and proceeded to determine the matter on the merits.

Mr. Farai was adamant that the lack of form rendered the application fatally defective and cited a judgment by MANGOTA J, *Engen Petroleum Zimbabwe (Pvt) Ltd v Mudhawini Enterprises (Pvt) Ltd and Another* HH345-19. Whilst the learned judge castigated counsel in that matter for filing an application for contempt of court through the urgent chamber book and observed that this was in violation of the rules of court and was therefore incurably defective, the matter was determined on merits and not struck off for failure to observe the rules of court.

In casu, I do not hold that the non-compliance with the rules of court exhibited by non-compliance with the requirements of form 29B renders the application fatally defective.

In the exercise of the court’s discretion I will condone the non-compliance as there is no demonstrable prejudice to the 3rd respondent.

The point *in limine* is accordingly dismissed.

I turn now to yet another point *in limine*. The point being that the applicant lacks the requisite *locus standi* to institute the proceedings and there is therefore no application before the court. This contention is premised on the fact that the applicant’s case rests on its ownership of the portion of land upon which the 3rd respondent was issued a special grant. In proving such ownership the applicant attached a Deed of Transfer but the Deed is in the name of Orpheus Mining (Pvt) Ltd, so it is Orpheus Mining (Pvt) Ltd which ought to have instituted the proceedings and not the applicant, so counsel argued.

In response, *Ms Sarimana* submitted that Orpheus Mining (Pvt) Ltd changed its name to Antech Laboratories (Pvt) Ltd and the mere change of name did not have the effect of divesting Antech Laboratories of ownership of the land.

In his answering affidavit the applicant's director referred to the founding affidavit wherein it was clearly stated that Orpheus Mining (Pvt) Ltd changed its name on 8 February 2008 to Antech. The certificate of change of name was attached to the answering affidavit (Annexure L). Rule 234 of the High Court Rules, 1971, permits the filing of an answering affidavit which may be accompanied by supporting affidavits.

It is clear such filing, coming as it does, after the filing of the notice of opposition and opposing affidavit is meant to answer to whatever would have come out of the opposing papers. The filing of the certificate of change of name does not, in my view, offend the provisions of r234 as that document speaks for itself just as an affidavit does. I would say an official document whose authenticity is not in doubt speaks even better than an affidavit.

There is therefore no merit in the argument that the applicant lacks *locus standi*. *Ms Sarimana* hit the nail on the head when counsel gave the example of an individual who changes their name, whatever property that such individual owned before that change of name remains their property. So it is with the applicant. This point *in limine* equally lacks merit and is dismissed.

The last point *in limine* relates to the order sought. *Mr. Farai's* contention is that the order sought is incompetent as the applicant seeks a certain procedure to be followed in the event that the special grant is declared null and void. Such procedure is not provided for and so the applicant cannot seek to have a procedure adopted especially for its sake. Equally the Environmental Management Agency certificate is a preserve of the authorities established to ensure compliance and not for the court to order such compliance.

The order sought therefore seeks to usurp the 1st and 2nd respondents' functions. The applicant ought to have sought a review if it was unhappy with the procedure adopted by the 1st respondent or appeal if it was unhappy with the decision, so *Mr. Farai* argued.

In response, *Ms Sarimana* submitted that the court is not being asked to usurp the 1st and 2nd respondent's powers but to ensure there is compliance with the provisions of the law. The EMA certificate is a prerequisite to the issuing of the special grant and its absence affects the validity of the special grant. Counsel further submitted that section 14 of the High Court Act reposes in the court the power to determine any existing, future or contingent rights or obligations even where no consequential relief is sought. Applicant owns the farm and will be affected if people are issued with a special grant to mine at its farm when the correct procedure has not been followed. A declaratur is therefore appropriate and can be granted, so counsel submitted.

Both counsel referred the court to decided cases in support of their respective arguments.

It cannot be disputed that the applicant as the owner of Purdown Farm has an interest on what happens within that land. Whatever activities that occur therein for which it has no control can affect its own operations. The applicant operates a laboratory which is internationally accredited and provides assaying services to the mining community. It also has plans for the future use of the land and is desirous to ensure the land is protected from any activities that will impact negatively on its operations.

The applicant is therefore seeking an authoritative pronouncement by the court relating to whether the issuance of the special grant to the 3rd respondent was done in accordance with the law. The rest of the applicant's prayer will flow naturally from such pronouncement, that is if a case has been made for such a declaratur. I say so because if the court holds that the law was not followed it means the 1st and 2nd respondent's issuance of the special grant is vitiated by the lack of observance of the law. To my mind the court can make such a pronouncement and this is what a declaratur is all about.

In *Tendai Mukuruva v Honourable Ms E. Maganyani (Arbitrator) and Another* HH-87-17, DUBE J cited with approval, the decision in *Johnson v AFC* 1995 (1) ZLR 65 (H) on the requirements of a declaratory order:

“Firstly the applicant must satisfy the court that he is a person interested in an existing future or contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the exercise of the discretion conferred on it.”

The applicant *in casu* has a direct and substantial interest in the matter. The present and future operations of its laboratory and the planned future use of its land make it imperative that the land use does not impact negatively on the applicant’s interests. Such assurance is to be found in a certificate from the Environmental Management Agency.

The issue here is not that this court is being asked to supplant itself as the issuing authority thereby usurping the power reposed in the 1st respondent to issue special grants. All that is being said is the 1st respondent must follow the law in doing so, that is certainly not a usurpation of the 1st respondent’s powers.

In *Associated Newspapers of Zimbabwe and Media and Information Commission v Minister of Information and Publicity* HH-29-07 GOWORA J (as she then was) pronounced herself on the extent to which a court can go in interfering with administrative functions. In that case the applicant was seeking an order seeking it to be registered as a mass media service in terms of s66 of the Access to Information and Protection of Privacy Act (Chapter 10:27) and for the court to order the first respondent to issue the applicant with a certificate of registration as a mass media service in terms of s66 of AIPPA.

In declining to grant the order, the learned judge, among other things, observed that the court could not assume unto itself the mantle thrust upon the administrative authority and impose its own discretion.

In casu the applicant is not asking the court to usurp the authority of the 1st respondent. The 1st respondent has the administrative authority to issue special grants but must do so in accordance with the law. Where it is not done in accordance with the law there is no usurpation of the 1st respondent’s powers if the court orders that the law ought to be followed and consequently declares that which was done outside of the provisions of the law, null and void.

Mr. Farai in his submissions had this to say:

“I can only concede that 3rd respondent be not allowed to mine until EMA certificate has been obtained. That will then do justice to the case if applicant is acting in good faith.”

Is this not what MATHONSI J (as he then was) likened to “trying to close the gate after the horse has bolted” in the case of *Debshan (Pvt) Ltd v The Provincial Mining Director, Matabeleland South Province and the Provincial Mining Director, Matabeleland North Province and 2 Others* HB-11-17? I think it is.

In that case the applicant sought a declaratur against the mining authorities to the effect that its issuance of mining licences, permits or certificates to prospective miners without the prior issuance of an Environmental Impact Assessment Certificate rendered the licenses and permits null and void and of no force or effect.

The facts *in casu* are almost on all fours with the *Debshan* case (*supra*) and *Mr. Farai's* concession appears to acknowledge that such EMA certificate ought to have been obtained before the 1st respondent granted the special grant. I fail to see the purpose of granting it and then seeking the EMA certificate afterwards. What if the EMA certificate is not granted, does it mean the special grant will then be cancelled? If that is so, what is the purpose of doing things in reverse?

That said, the order sought herein cannot be said to be incompetent in the circumstances and there is also no usurpation of the 1st and 2nd respondent's administrative powers.

The point *in limine* therefore lacks merit and like the ones before it, must also fail.

I move now to the merits. It is clear that in looking at the points *in limine* the court inevitably looked at the merits of the order sought.

What the applicant is essentially saying is that “we were not heard, had we been heard we could have ventilated our concerns and fears regarding the issuance of the special grant and the 1st and 2nd respondent would have ensured the law was observed in deciding whether to issue the special grant or not.”

I should point out that the applicant's objections would not necessarily translate to the non issuance of the special grant.

Mr. Farai's argument was that the applicant was heard because it wrote letters to Kwekwe City and to the 1st and 2nd respondent in anticipation of the 3rd respondent's application. The point is such letters were not acknowledged and for all we know they probably were not seen by those who were supposed to have seen them.

Ms Sarimana referred to s3 of the Environmental Management Act (Chapter 20:27) which provides that:

- “(1) Except where it is expressly provided to the contrary, this Act shall be construed as being in addition to and not in substitution for any other law which is not in conflict or inconsistent with this Act.
- (2) If any other law is in conflict or inconsistent with this Act, this Act shall prevail.”

S97 of the same Act provides that:

- “(1) The projects listed in the first schedule are projects which must not be implemented unless in each case, subject to this Part –
- (a) the Director General has issued a certificate in respect of the project in terms of section one hundred, following the submission of an environmental impact assessment report in terms of section ninety-nine and
- (b) the certificate remains valid and
- (c) any conditions imposed by the Director General in regard to the issue of the certificate are complied with.”

The First Schedule thereof lists, among other projects,

- “7. Mining and quarrying –

- (a) mineral prospecting
- (b) mineral mining
- (c) ore processing and concentrating
- (d) quarrying”

It cannot be disputed that the project 3rd respondent intends to embark on, on this land that is within the applicant’s farm falls under the Third Schedule and so ought to comply with s3 of the Act.

The 1st and 2nd respondent did not oppose the application seeking the confirmation of the provisional order. One can read that to mean they are not contesting the applicant’s averments that it was not heard and as a result its objections were not considered, which objections are directly linked to the preservation of the environment, an issue which the Environmental Management certificate would have adequately addressed.

Long winded as the applicant’s director’s founding affidavit undoubtedly is, the basis for the relief sought was crystal clear. It matters not that the applicant once had a similar special grant and that Mr. Mandaba subsequently also held one for the same reserved area. The law does not say “provided that where a certificate in terms of s97 was previously issued, notwithstanding the period of such issuance, subsequent projects listed in the First Schedule shall be implemented without an environmental impact assessment report.” Were that the case the applicant’s complaint would not hold water.

The final question to be asked is –

“Was the issuance of the special grant 6899 done in accordance with the law?”

The answer from the foregoing is, NO. If it was not, is this court empowered to grant the declaratur sought by the applicant? I think it is so empowered. The court is making an authoritative pronouncement and the rest of what the applicant seeks, i.e. the manner in which the application ought to be filed, the issuance of the certificate by EMA are a direct consequence of such a declaratur.

The law does not say the 1st respondent should serve the applicant with the application. I therefore see no scope in making such an order. Like I stated earlier the exercise of administrative functions ought not to be arbitrary. The principles of natural justice enjoin those who exercise such powers to respect the *audi alteram partem* rule and hear those who are likely to be affected by the exercise of their powers. (*Health Practitioners Council v McGowan* 1994 (2) ZLR 329 (SC)).

In *Taylor v Minister of Higher Education and Another* 1996 (2) ZLR 772 (S) GUBBAY CJ had this to say:

“The maxim *audi alteram partem* expresses a flexible tenet of natural justice that has resounded through the ages. The *audi* principle applies both where a person’s existing rights are adversely affected and where he has a legitimate expectation that he will be heard from before a decision is taken that affects some substantive benefit, advantage or privilege that he expects to acquire or retain and which it would be unfair to deprive him of without first consulting with him. The application of the legitimate expectation doctrine is not confined to situations where the person affected can show that there is an established practice to grant a hearing or an express undertaking to grant a hearing, it applies in circumstances where there is a legitimate expectation that the person will be consulted before the decision is taken.”

Section 31 of the Mines and Minerals Act Chapter 21:05 provides that:

- “(1) Save 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 –
- ...
 (g) except with the consent in writing –
 (i) of the owner or some other person authorized thereto by the owner, upon any holding of land which does not exceed one hundred hectares in extent and which is held by such owner under one separate title.”

The parties argued on the meaning of the provision, with *Mr. Farai* submitting that the applicant’s land, being over 100 hectares is not covered by this provision.

I do not propose to unduly exercise my mind on this issue. This is so because I am of the considered view that the principles of natural justice I referred to earlier and the decision in *Taylor (supra)* espouse the position that even where there is no express provision allowing for one to be heard, a person likely to be adversely affected by a decision must be heard.

This is not to suggest some formal hearing, written representations suffice. Again such written representations are not a guarantee that the decision will then be in that person's favour, being heard does not mean a decision goes your way, it can still go against you. The applicant is aware of that and the order sought clearly shows that it is aware that the decision can still go against it.

Further my decision is greatly influenced by the lack of the Environmental Management Authority certificate. Such certificate's issuance will inevitably address the applicant's concerns. The applicant's intended use of the property are issues within the purview of the 1st respondent who can issue the special grant notwithstanding the applicant's objections.

With that said I come to the conclusion that the applicant has made a case for the relief it seeks. I however am not persuaded to grant the order as per the draft order but with amendments to speak to the issues already highlighted in this judgment.

As regards costs, *Ms Sarimana* sought punitive costs and that counsel for the 3rd respondent meets such costs. Counsel argued that this is so because opposition was expected from the 1st and 2nd respondent as it was really their conduct the applicant was taking issue with. The 1st and 2nd respondent did not oppose the application, an indication that they accepted they did not do that which they ought to have done. The 3rd respondent's opposition was therefore unwarranted and the court was unnecessarily detained on numerous points *in limine*.

Costs are in the discretion of the court. Whilst *Ms Sarimana's* argument has some merit, sight should not be lost of the fact that it is 3rd respondent who stands to be affected by the order sought and not the 1st and 2nd respondent. The 3rd respondent's opposition should therefore be looked at in that light.

Punitive costs ought to be awarded in cases where there is need for censure due to a litigant's conduct.

I am not persuaded to hold that the 3rd respondent's conduct deserves censure. It did what it was expected to by applying for the special grant. It was granted that special grant and the fact that the 1st and 2nd respondent failed to observe the law in doing so cannot be visited on 3rd respondent.

The 3rd respondent's opposition was a spirited attempt to secure a benefit it believed it had obtained lawfully.

Whilst the applicant is entitled to costs, such costs will be on the ordinary scale. The applicant need not be reminded that its failure to observe the rules of court did not earn it censure, the 3rd respondent's conduct equally is not deserving of censure.

In the result I make the following order:

The provisional order be and is hereby confirmed as a final order of this court on the following terms:

1. Special grant 6899 issued by the Secretary for Mines and Mining Development on 27th August 2018 be and is hereby set aside and declared null and void.
2. In the event that third respondent again submits an application for a special grant over Purdown Farm of Aspdale held under Deed of Transfer number 2586/90 or any part of it, before granting the application and issuing a special grant, first respondent is hereby ordered to permit the applicant the right to respond to such application.
3. The provisions of section 97 of the Environmental Management Act (chapter 20:27) are to be complied with before the issuance of any future Special Grants.
4. Third respondent is hereby ordered to pay costs on the ordinary scale.

Coglan & Welsh, applicant's legal practitioners

Messrs Farai & Associates Law Chambers c/o Tanaka Law Chambers 3rd respondent's legal practitioners