

BASE MINERALS ZIMBABWE PRIVATE LIMITED
and
PETER VALENTINE
versus
CHIROSWA MINERALS (PVT) LTD
and
CHIROSWA SYNDICATE
and
JOHN RICHARD NEEDHAM GROVES

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 23 March 2015 & 13 January 2016

Opposed application

F M Katsande, for the applicants
T Mpofu, for the respondents

MAKONI J: The applicant approached this court seeking an order in the following terms;

“It is ordered that

1. The registration of the tribute agreement dated 13 February 2014 be as is hereby recorded to be in compliance with paragraph 5 of the order by the Honourable Mr Justice Patel in HH261/11.
2. Within 48 (forty eight) of the service of this order on them, the respondents and all those claiming through them be and are hereby directed to permit the applicants, its officers agents successors and assigns to operate under the tribute agreements at Dodge Mine Shamva District Mashonaland central Province subject to the terms of the tribute agreement.
3. Failing compliance the Sheriff or his lawful Deputy, if necessary with the assistance of the Zimbabwe Republic Police be and is hereby directed to take such measures as may be necessary to enable the applicants to operate under the tribute agreement.
4. Each party shall bear its own costs.”

I have recited the terms of the order, in full as these will become relevant later on in the judgement.

The background, relevant to the present proceedings, is that sometime in 2008 the applicants entered into a tribute agreement with the owner of Dodge Mine (the mine) the second respondent represented by the third respondent. The tribute agreement was to run for

a period of 3 years. At the time the parties entered into the agreement, there was an understanding that the then tributor Morris Tendayi Nyakudya and Vambe Mills Pvt Ltd would vacate the mine in May 2008. They resisted vacating the mine. The applicants and the respondents then instituted proceedings against them. The dispute was resolved by Patel J (as he then was) in a judgement HH 261/11 delivered on 15 November 2011. By the time the judgement was delivered the tribute had lapsed. About 8 months after the judgement, the respondents sold the mine to Mabwe Mineral Zimbabwe (Pvt) Ltd. (Mabwe Minerals)

In the meantime, the applicants through a series of litigation to enforce the tribute agreement, managed to have the tribute registered on 13 February 2014.

In February 2014, the applicants entered the mine and commenced operations on the belief that the registration of the tribute agreement in compliance with the HH 261/11 entitled the first applicant to unconditional access to the mine. Mabwe Minerals instituted spoliation proceedings which was granted by Tagu J. The first applicant appealed to the Supreme Court and the order by Tagu J was upheld.

The applicants then instituted fresh proceedings in the High Court seeking to be permitted to enter the mine. The order was granted by Mafusire J on 30 July 2014. On 24 August 2014 the applicants entered the mine and resumed operations.

On 10 October 2014, Mafusire J set aside the default judgement that he had entered in terms of r 449 of the High Court Rules 1979. The applicants appealed to the Supreme Court. The respondent filed an urgent application for the urgent hearing of the appeal in the Supreme Court. The application was granted. The applicants responded by withdrawing the appeal. They immediately filed the present application.

The basis for the application is that the applicants seek the implementation of the order in HH 261/11 in order to observe due process of the law.

The application is opposed and the respondents raise, *in limine*, six points *vis*

- (i) *Lis pendens*
- (ii) Conflict of interest and abuse of court process
- (iii) Dirty hands
- (iv) Nature of applicant
- (v) Material non-disclosure
- (vi) Abuse of process

(1) Lis Pendens

This point was raised by the respondents, in their Notice of Opposition, that the present application is identical in its material respects to HC 5926/14 in which the applicant sought the same relief as in the present matter. The order that was granted, in default, by Mafusire J, was set aside on the basis that the order was granted in error. This meant that the matter should proceed on the merits.

In their Answering Affidavit filed on 5 December 2014 in para 13.1 p 115 the applicants respond to the point as follows;

“This statement bordered on the absurd. The judge who granted to order in HC5926/14 abandoned that judgement of his own initiative. It is ridicule to suggest that the same abandoned judgement is pending.”

The point is persisted with in the appellant’s Heads of Argument filed on 8 December 2014 where it was submitted as follows;

“2.1 The respondent’s papers suggest that HC5926/14 is still pending. Greater misconception on interlocutory and final orders is impossible to imagine. Mafusire J ruling is by no means intermediate.(sic)

Herbeinstein and van Winsen the *Civil Practice of the Superior Courts in South Africa* p 630 where the following appears

“An interlocutory order is an order granted by a court at an intermediate stage in the course of litigation setting or giving directions in regard to some procedural question which has arisen in the dispute between the parties. Such an order may be either purely interlocutory or may be an interlocutory order having final or definitive effect.”

2.2 His lordship’s order has final definitive effect. He raised the error *mero motu*. He set aside the order. He did not set out any conditions ancillary or consequential to the revocation of HC 5926/14 which made HH 599/15 a final judgement. Mafusire J is functus officio in HC 5926/14. The matter cannot be re enrolled before either Mafusire J or any other judge of the High Court for that matter.

2.3 Mindful of the need to follow due process the 1st respondent brought the present application.”

On 12 December 2014 the respondents filed their heads of argument where they argue the point. On 7 January 2015, a Notice of Withdrawal of 5926/14 finds its way on the file as Annexure 9. It is not accompanied by a supplementary affidavit. As a result, the respondents did not persist with the point.

Although the notice of withdrawal came in a bit late, it was the proper course for the applicants to take. The relief that the applicants seek in the present proceedings is ostensibly

the same as they sought in HC 5926/14. The setting aside of the order by Mafusire J did not dispose of the matter. That order did not have a final and definitive effect on the main matter. The respondents were then supposed to file their notice of opposition and the matter proceeded in terms of the rules.

It will not be necessary for me to make a determination of the point but the matter might be relevant in determining the issues of costs.

(2) Conflict of Interest

Mr *Mpofu* contended that the founding affidavit be struck out as it was done in breach of fundamental tenets of the law. He submitted that it was not in dispute that Mr *Katsande* was at some point a director of the first respondent. Not only was he a director but he represented the first respondent. He now intends to enforce the order he obtained for the first respondent against the first respondent. He also, in HC 5208/13, filed papers, on behalf of the first respondent without instructions from the first respondent in respect of the contempt of court proceedings against the Minister of Mines.

Mr *Katsande* submitted that he resigned from the directorship of the first respondent. He further submitted that the issue of conflict of interest were raised before Chigumba J and was dismissed. It cannot be raised again.

He further submitted that its not a hard and fast rule that one cannot act against a former client. There is no confidential information that has been used against the respondents. The third respondent gave instruction, acting in collaboration with the applicants, to obtain a tribute. There cannot be any prejudice arising from seeking that the applicants operate under the tribute agreement. The third respondent even wrote a letter dated 23 June 2010 to the Commissioner of Mines seeking registration of the tribute.

He further contended that Mr *Mushoriwa*, the instructing attorney to the respondents, is also conflicted. In HC 10576/14 he brought an application on behalf of Mabwe Minerals against the present applicants and the respondents were cited as co-respondents. He adopted the same approach in HC 6679/13.

In *Pertsilis v Calcaterra & Anor* 1999 (1) ZLR 70 Smith J (as he then was) had occasion to examine a long line of authorities dealing with the issue of the ethical conduct of a legal practitioner and conflict of interest. At p 74 read B-G he had this to say;

- “B. Legal practitioners owe their clients a duty of loyalty. They are duty bound to advance and defend their client’s interests. A legal practitioner is expected to devote

- his or her energy, intelligence, skill and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client. – See Modern Law Ethics by Charles W Wolfram, 1986 C.ed p 578 at 10.3.1. A legal
- C. practitioner who represents the adversary of his own client in litigation would clearly be violating his or her duty of loyalty and the common law rules against conflict of interests. Nearly 150 years ago, in the American case of *Stockton v Ford* 52 US (11 How) 232, 247; 13 L Ed 676 (1850) the fundamental and important point of the place and role of legal practitioners was made in the following words:
- D. “there are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honourably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it”
- E. The same point is made slightly differently by Julian Disney et al in *Lawyers* (Sweet and Maxwell, London) at p 616 as follows:
- “Representation of one whose interests diverge from those of a former client is generally recognised to be improper. The divergence might inhibit the lawyer's exercise of judgment on behalf of his current client. It might also impair the obligation of loyalty owed by the lawyer to his former client. Thus the lawyer might divulge or utilise the secrets and confidences of his former client for the benefit of the current client.”
- F The Guide to The Professional Conduct of Solicitors issued by the Council of the Law Society of England states at p9:
- “..... where a solicitor acts for one client and is asked to act for another client whose interests conflict or appear likely to conflict with those of the first client, he must refuse to act for the second client. On the basis of the principle that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’, a solicitor must decline or cease to act not only where the interests of a client are prejudiced if the solicitor continues to act for the other client but also where that client's interests might appear to be prejudiced.”
- G

He then went on to consider whether an employee of a law firm could act for a former client where the partner would have withdrawn from the matter for ethical reasons. He concluded by stating the following at p 77 G-H and 78 A.

“In this case, the position adopted by Mr Ventuars is entirely proper and ethical. As he rightly point out, he could not act for any of the parties in litigation inter se. Furthermore, I consider that the position he adopted must extend to any partners or employee of his. Justice must not only be done; it must manifestly and undoubtedly be seen to be done. It would be no consolation, in my opinion, for a litigant to be told that the legal practitioner who is appearing for his opponent is not the legal practitioner who formerly acted for him, it is only his partner or his employee. If one member or employee of a legal firm has appeared for a litigant, the litigant would be fully justified, I feel, in fearing that his interest would be prejudiced if another member or employee of the same firm acted for an opponent of his in any litigation.”

He however found special circumstances such as the fact that the opposing side did not take issue with the papers filed by the employee of the law firm, the matter was filed on a

certificate of urgency and that there was no allegation that the lawyer had acquired information from the papers in the possession of his law firm which could be used to the disadvantage of the former client. He allowed the employee from the law firm to appear against the former client.

In casu Mr *Katsande*'s foot prints are all over. He does not dispute that at one point he was a director of the first respondent. There is a letter of resignation by Mr *Katsande*, dated 19 September 2011 which is attached as Annexure F to the Answering Affidavit. There is no reference made, in the Answering Affidavit to the annexure and it is not clear how it found its way on file. As it is, it is not clear whether he resigned.

The respondents contend that he is still a director as s 187 (4) of the Companies Act [Chapter 24:03] was not complied with. The section provides for the notification of the Registrar of Companies of the resignation of a director within one month of such resignation Mr *Katsande* submitted that the fact that the company has not notified the Registrar of his resignation was not his problem. This argument cannot be sustained in view of the provisions of s 187 (7) of the Act which places an obligation on the director to ensure that the company complies with s 187 (4).

Not only was he a director of the first respondent, he also represented it in HH 261/11 wherein the first respondent obtained a judgement in its favour. A dispute has now developed between the first respondent and the first applicant relating to that judgement. Mr *Katsande* chose to represent the first applicant as against the second respondent.

It is not in dispute that in pursuit of the applicant's interests Mr *Katsande* filed contempt of court proceedings on behalf of the first respondent without the first respondent's knowledge and instructions. On this point Mr *Katsande* contends that the first respondent should not complain as the applicants are seeking to enforce a judgement they obtained in solidarity with the first respondent. No prejudice would be suffered by his endeavours to implement what the respondent sought in the first place.

This is a poor attempt to defend the indefensible. It is clear that there is a dispute between the parties regarding the validity of the tribute regarding its life span. The letter of the June 2010 does not assist Mr *Katsande*. It was written by the first respondent at a time when, according to its position, the tribute was still valid.

Mr *Katsande* did not challenge the averments that he might have acquired knowledge during his tenure of directorship and as legal representative of the first respondent which might be prejudicial to the respondents. His main argument is that no prejudice can arise in

seeking the courts assistance to enforce the joint judgment obtained by the first respondent and the applicants.

Mr *Katsande* further contended that Mr Mushoriwa must also confess to unethical conduct as he has filed proceedings for Mabwe Minerals in HC 10576/14 and HC 6679/13 wherein he cites his present clients as respondents. This factor was only brought up in supplementary Heads of Argument. The factual issues were not addressed in the Answering Affidavit. In any event, HC 10576 was a procedural application for joinder whereby Mabwe Minerals sought to be joined in proceedings in HC5208/13. No ethical issues would arise.

Mr *Katsande* further submitted that there are special circumstances warranting that he be permitted to act against the respondents. These are that the third respondent craved the registration of the tribute agreement which has since been registered. As I have already alluded to there is a dispute between the parties which needs determination as to the validity of the tribute at the time that it was registered.

I would have thought that Mr *Katsande*, after the issue of conflict of interest had been raised in the opposing papers, would have reconsidered his position seeing that he has been deeply involved in this matter. To the contrary, until the end, Mr *Katsande* has not come to reconcile himself between the apparent conflicting interest of the parties in this matter.

Considering all the above, it is my view that I cannot allow the founding papers in this matter to stand.

Assuming I am wrong I will proceed to consider the next issue.

(3) Dirty Hands

Mr *Mpofu* submitted that there is an extant an order by Tagu J interdicting the applicants from entering or disrupting the operations at the mine. In para 13.2 of the Answering Affidavit the applicants concedes that their guards are still on the mine. He urged the court to decline jurisdiction until the applicants have purged their contempt of a court order.

The applicants in para 5.1 of the Answering Affidavit respond to this point as follows:
“The temporary interdict ordered by Tagu J in HH 119/14 and upheld by the Supreme Court in SC 136/14 was an integral part of the spoliation order. It does not have a life of its own.
....”

The issue was not addressed in applicants’ Heads of Argument. Mr *Katsande*, at the hearing, submitted that there was no return date to the provisional order granted by Tagu J.

The starting point in determining this point is the Provisional Order granted by Tagu
J. The order reads as follows;

“TERMS OF FINAL ORDER SOUGHT:

That you show cause to the Honourable Court why a final order should not be made in the following terms-

1. That respondents, their agents and assigns be and are hereby interdicted from entering the applicant’s mine at Dodge Mine or in any other manner interfering with operations of the mine.
2. That the respondents jointly and severally, the one paying the other to be absolved, pay the costs of this application on a legal practitioner and client scale

INTERIM RELIEF GRANTED

1. That respondents, their agents and assigns be and are hereby interdicted from entering the applicant’s mine at Dodge Mine in Shamva within 24 hours of this order.
2. That respondents, their agents and assigns be and are hereby interdicted from entering into or disrupting operations at applicant’s mine called Dodge mine in Shamva.
3. That respondents pay the costs of suit jointly and severally, the one paying the other to be absolved, on the higher scale of legal practitioner and client only in the event that they oppose this application.

SERVICE OF PROVISIONAL ORDER

This provisional order be served on the respondents by the Deputy Sheriff or by applicant’s legal practitioners.”

It is not in dispute that the interim relief granted in the provisional order was in three parts, i.e. spoliation, interdict and costs of suit. The Provisional Order was confirmed by the Supreme Court. The applicants’ contention is that the interdict did not have a life of its own independent from the order of spoliation. It is their argument that once the spoliation order had been complied with then the interdict fell away.

Provisional orders are granted in terms of r 246 (2) which provides:

“Where an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case shall grant a provisional order either in terms of the draft filed or varied”.

A provisional order provides interim relief the purpose of which is the preservation of the *status quo ante* or the restoring thereof pending the final determination of parties rights. See *MacNel and Anor v Haskins* 2003 (2) ZLR 334(H) at 339 D.

With this in mind, one then fails to follow Mr *Katsande*’s argument that the Provisional Order did not have a return day. There is a difference between a Provisional Order and a Rule *Nisi* which has a return date. The provisional order once granted is served

upon a respondent who must respond within the time specified in the provisional order if he opposes the relief. See r 247 (1) (c). Thereafter the matter proceeds in terms of rr 231 and 240 regarding hearing and enrolment of the matter.

The second argument by the applicants on this point, that the interdict did not have a life of its own is unfathomable. The interim order, is in two parts restoring the premises back to the applicants and an interdict against the applicant from entering or disrupting the operations at the mine. The interdict was granted to protect future disturbances by the applicants. There would have been no need to grant the interdict. If it was not intended to outline the spoliation order.

From the above analysis, it is clear that the applicants are in open defiance of the interdict granted by this court. Their guards are still on the mine.

It is trite that court orders are valid until set aside or overturned on appeal or review. I will do no better than to quote, in *extensor* what Ndou J (as he then was) said in *Majina v Gaibie & Ors* HB 134/11

“As alluded to above, the order required the applicant to vacate the premises within 48 hours. The order was served on the applicant by the Assistant Deputy Sheriff on 19 August 2011. This application was only filed on 31 August 2011. Despite having known as at 19 August 2011 of the order granted under HC 2187/11 demanding that he vacates his premises within 48 hours, the applicant defiantly did not vacate. The applicant’s hands are dirty and he cannot be heard. The issue was clearly stated by Chidyausiku CJ in *Assd Newspapers of Zim (Pvt) Ltd v Min of State for Information & Publicity & Ors* 2004 (1) 2004 (1) ZLR 538 (S). At page 548 B-E the Chief Justice stated:

“This court is a court of law, and as such, cannot connive at or condone the applicant’s open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards....”

This rule applies to the facts of this case- see also *S v Neil* 1982 (12) ZLR 142 (H) and *S v Nkosi* 1963 (4) SA 87 (T). the court will not grant relief to a litigant with dirty hands in the absence of good cause, being shown or until such defiance or contempt has been purged- *Hoffman La Roche v Secretary of State for Trade & Industry* [1975] AC 295; [1974 2 ALLER 1128 (HL). *In casu*, the applicant has neither shown good cause nor purges the defiance or contempt. In the result the point taken *in limine* succeeds. The applicant is in defiance of the order of this court and this court will only hear applicant on the merits and the other issue raised once the applicant has submitted himself to the law.’

In casu, there is no order setting aside or overturning the order granted by Tagu J and confirmed by the Supreme Court. It is therefore clear that the applicants’ hands are dirty and I decline my jurisdiction until such defiance or contempt has been purged.

Assuming I am wrong on the point I will proceed to consider the other points.

(4) Nature of application

Mr *Mpofu* submitted that the applicants' wants to enforce the order in HH 261/11. They are saying they are beneficiaries of that order and they seek to enforce it against a fellow plaintiff.

The order deals with personal rights in respect of the agreement. The agreement lapsed in 2012. If the order were to be granted, this court would not be enforcing but expanding the order. The applicants remedy is a claim for damages against the entity which stopped it from operating.

In response Mr *Katsande* submitted that the applicants seek to enforce what Patel J granted. They are asking this court to allow then to move in. Put differently, the applicants are seeking the leave of the court to access the mine in terms of the court order already issued which is extant. The respondents filed an application in which they seek the setting side of the tribute agreement which is pending. There would have been no need to file the application if the agreement had lapsed.

The issue is whether the order that the applicants seek is competent in the circumstances of this matter. The position of the law on this point was stated in *Matanhire v B.P.Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 145 at 146 C-H where it was stated:

“The basis upon which Mavangira J’ s order was sought, according to the appellant’s counsel, was that the High Court has jurisdiction to interpret its judgement. It is a submission, as Prof Ncube correctly submitted , which find no support in law. The law on this point is very clear, in that once a matter has been finalised by a court, that court becomes *functus officio*. It has no authority to adjudicate on the matter again. The only jurisdiction that a court has is to make incidental or consequential corrections. The position was stated as follows in the case of *Kassim v Kassim* 1989 (3) ZLR 234 (H) at p 242 C-D where it was stated that:

“The general principle, now well established in our law, is that, once a court has duly pronounced a final judgement or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.”

In *Firestone supra* at p 306, the court further stated that:

“The principal judgement or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgement debt which the court overlooked or inadvertently omitted to grant.”

Further on at 307 C-G, the court went to say:

“The court may correct a clerical, arithmetical or other error in its judgement or order so as to give effect to its true intention.... The exception is confined to the mere

correction of an error in expressing the judgement or order; it does not extend to altering its intended sense or substance.”

In casu, in HH 261/11 matter, the first applicant and the first respondent were fighting in one corner as the plaintiffs against the defendants who are no longer in the picture. They obtained, as the plaintiffs, *inter alia*, an order against the Minister of Mines, to register the tribute agreement in question. The tribute was registered in 2013 after the applicants had instituted contempt of court proceedings against the Minister of Mines. The Tribute was entered into in 2008. It was valid for three years. It expired in 2011. By the time it was registered it had expired.

In these proceedings, in para 1 of the Draft Order the applicants seek that it be ordered that;

“The registration of the tribute agreement dated 13 February 2014 be and is hereby recorded to be in compliance with para 5 of the order by Hon Mr Justice Patel in HH 261/11.”

Thereafter in paras 2 and 3 the applicants seek to be given access to the mine and operate under the tribute agreement.

What the applicants are asking this court to do is to say that when Patel J granted the order, he meant that the agreement will be enforced even after 2011 as long as it ran for 3 years. As Mr *Mpofu* correctly points out, the applicants are asking that I expand the order by Patel J regarding the life span of the tribute which I cannot do. This court became *functus officio* when Patel J issued the order. Of note is the fact that the order was made in November 2011 when it was apparent that the tribute expires at the end of 2011 and it is silent on the life of the tribute.

If the applicants have an order which they want to enforce they must take out a writ. Otherwise adopting the present approach would be tantamount to asking the court to re-new the tribute agreement for them.

I would agree that the order being sought is incompetent as this court is *functus officio* and has no authority to adjudicate on the matter again.

Assuming I am wrong, I will do on to consider the next point.

(5) Material Non- Disclosure

Mr *Mpofu* submitted that currently it is an entity called Mabwe Minerals which is in occupation of the Mine. This was confirmed by an order by Tagu J which was later

confirmed by the Supreme Court. The applicants did not disclose this fact in their founding papers. The owner and occupier of the mine is Mabwe Minerals. They should have been cited as these are fresh proceedings. It was further contended that the principle of *res litigiosa* does not apply in this matter. The mine was sold to Mabwe Minerals eight months after the lapse of the tribute agreement.

The applicants did not also disclose that the tribute agreement expired in 2011. They tried to mislead the court by attaching an incomplete copy of the agreement.

Mr *Katsande* submitted that the principle *res-litigiosa* applied. Mabwe Minerals is a surrogate claimant with the respondent. There is no need to institute proceedings against Mabwe Minerals. It received the res pending litigation to register the tribute.

The law on the issue of material non-disclosure was aptly put by Bere J in *Central (Pvt) Ltd v Moyas Anor* HH 57/12 where he stated

“It is this total absence of candidness or deliberate act of non-disclosure of material information by the applicant’s counsel that I wish to deal with first.

It is accepted position that courts detested or frown on those litigants or legal practitioners who desire to derive the sympathy of the Court by deliberately withholding vital information which has a bearing on the very matter that the Court is called upon to determine.

My brother Judge, Ndou J, after considering a number of decisions from other jurisdictions summed up the correct legal position on this issue when he stated as follows: “This Courts should, in my view, discourage urgent applications, whether *ex parte* or not, which are characterised by material non-disclosures, mala fides, or dishonesty.

Depending on the circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. In this case, the applicants attempted to mislead the Court by not only withholding material information but also making untruthful statements in the founding affidavit. The applicant’s non-disclosure relates to the question of urgency. In the circumstances, I find that the application is not urgent and dismiss the application on that basis.”

I would not agree more with the ratio well laid down by the learned Judge. I would extend the position further and say the need to disclose material information should in fact be extended to cover any matter that is brought before the Court, be it on urgent basis nor not. Courts have no capacity to reward dishonesty on the part of litigants.”

See also *Ncube v Mpofu & Anor* HB 121/11 and *Mashongwa v Bhadhu & Ors* HH 8/12.

In casu, the position pertaining on the ground is that Mabwe Minerals is in occupation of the mine. It allegedly bought the mine from the first respondent. The applicants contend that the sale took place whilst there was pending litigation. It appears there is a dispute

whether the sale to Mabwe Minerals is valid or not. That is not for me to determine. The issue is whether the applicants failed to disclose a material fact.

My view is that there was material non-disclosure of facts by the applicants and would go so far as to say there was non-joinder of a third party. This would have been an opportunity for the applicant to have the issue of *res litigiosa* ventilated and determined. The applicants could choose which respondents to cite in order to have all issues between the parties determined. As I have already alluded to earlier on in the judgement, the applicants are not seeking to enforce the judgement through a writ. They should have therefore disclosed all the facts and cited all interested parties as these are fresh proceedings.

The effect of dishonesty and material non-disclosure in the above cited cases was that the court declined to hear the matters. The present application is no different and must suffer the same fate.

Abuse of process

Mr *Mpofu* submitted that the applicants abused the court by filing multiple spurious applications. In para 56 of the first respondent's notice of opposition, the respondents make reference to 12 High Court matters, three Supreme Court matters and one matter filed in the Bindura Magistrates Courts. Mr *Mpofu* also made reference to the Mafusire J matter. After the Judge had recalled to his original order, parties could proceed to argue the matter. Instead the applicants filed the present application.

Mr *Katsande* contended that there was no multiplicity of cases. After the Tagu J judgement, the applicants decided to follow due process and filed the Mafusire J matter. When Mafusire J recalled his order, the applicants, in the heat of the moment, appealed to the Supreme Court. They later reflected on the matter and withdrew the appeal. They then filed the present application. Mafusire J matter was formally withdrawn.

He further submitted that in three of the 12 cases referred to by the respondents, judgement was entered in favour of the applicants. They were all made in a bid to enforce the judgement HH 261/11.

There have been raging battles between the parties in this court. These battles appear set to continue as long as what I perceive to be the issue has not been resolved which is: Whether or not the tribute which expired in 2011 can be enforced. The applicants in my view, are skirting the main issue on no wonder why the *plethora* of cases that they have filed. I want to agree with the respondents that the applicants are abusing court process.

A good example of that is the Mafusire J matter. When he recalled his order, the parties would have proceeded to file Heads of Arguments and set down the matter. Instead, the present application was filed. The issue of *lis pendens* was raised and the applicants defended their position. They only withdrew the matter just before the set down date in the present matter.

It was the duty of Mr *Katsande* to properly advise his clients regarding the course of action to take. Instead, and through his own admission, the applicants filed an appeal against Mafusire J recalling his order, “in the heat of the moment”. Without due regard to the rules, Mr *Katsande* advised his clients to file a fresh application wherein they sought the same relief as in the Mafusire J matter.

It cannot be over-emphasised that a lawyer has a duty to advise his clients properly regarding the law as well as procedure. A Lawyer owes a duty to the court not to be complicit in instituting proceedings which amount to abuse of the court process. See *Ndlovu v Murandu* 1999 (2) ZLR 341 (H) at 350-351.

As I have already alluded to earlier on, this issue is not fatal to the applicant’s case but will be taken into account in determining the question of costs.

Whichever way one might approach this matter, the applicant cannot succeed.

The respondent prayed for a special order of costs. Mr *Mpofu* contended that Mr *Katsande* should bear the costs and on a legal practitioner client scale *debonis propriis*. He further contended that the work the he did for the applicant should not attract a charge from him.

Mr *Katsande* submitted that the prayer that he bears the costs has no substance whatsoever. It is the attitude of the respondent that has caused the plethora of cases.

The authors Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*-5th Ed p986 said

“Generally speaking, costs *de bonis propriis* will be ordered against attorneys only in reasonably serious cases.”

In *Matamisa v Mutare City Council & Anor* 1998 (2) ZLR 439 (S) at 447 E-F the following was stated.

“Costs *de bonis propriis* will be awarded against a lawyer as an exceptional measure and in order to penalise him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself : *Omarsha v Karasa* 1996 (1) ZLR 584 (H) at 591 per Gillespie J. Such costs are only awarded in reasonably grave circumstances. Generally speaking, dishonesty, *mala fides*, wilfulness or professional negligence of a high degree fall into this category: *Techniquip (Pvt) Ltd v Allan Cameron Engineering (Pvt) Ltd*

1994 (1) ZLR 246 (S) at 248 G per Gubbay CJ. I consider that Mr Hwacha's conduct falls into the category of mala fides and his behaviour highly reprehensible."

The question to ask is whether the conduct of Mr Katsande in circumstances of this matter is reasonably serious or grave. My view is that the conduct of Mr *Katsande* is reasonably serious to warrant censure. He has exhibited *malafides*. He wilfully abused his professional position and abused the process of the court. There is also the ethical question involved in this matter. At p 44 D-F 6 in the *Matamisa* case *supra*, the court had occasion to comment on this issue.

"In this matter, an important ethical question needs to be dealt with. To what extent should a legal practitioner pursue a case in which he personally is deeply involved? Mr Hwacha has submitted the heads of argument in this application. Although the affidavit in support of this application is in the name of Matamisa, it is clear that Mr Hwacha must have been deeply involved in its preparation. Indeed, it would, in my view, have been far more appropriate for Mr Hwacha to have sworn an affidavit in his own name, and for him to have left it to another practitioner to submit argument in support of this application, as Mr Biti did. For Hwacha to have acted as he has done in this application, as Mr Biti did. For Mr Hwacha to have acted as he has done in this application runs previously close to him overlooking his duty to the court, which is every bit as important as his duty to his client. The legal practitioner's duty to the court requires him to adopt a disinterested attitude. He should be in a position to give impartial, objective advice to his client. It is difficult to see how Mr Hwacha could, in the circumstances, have discharged this duty. Because of his closeness to the matter, he should unquestionably have sought the views of another practitioner less involved in the case. Had he done so, I doubt whether this application would have been proceeded with."

As I have alluded to earlier in the judgement, Mr *Katsande* is deeply and intimately involved in this matter both as director/former director and legal practitioner to the litigants. Upon the raising of the ethical question, Mr *Katsande* should have sought the views of another legal practitioner who is impartial and disinterested in the matter. This matter might have taken a different course altogether. This is because legal practitioners are officers of the court. They owe a duty to the court to adopt a disinterested attitude and not to abuse court process.. They also owe a duty to fellow legal practitioners to be honest and candid.

I agree with the respondents' concluding paragraph in their Head of Argument that Mr *Katsande*

"has literally trampled almost every single ethical duty which she (*sic*) swore to uphold to this honourable court and fellow legal practitioners."

For the above reasons I will make an order for costs *de bonis propriis* and on attorney client scale against Mr *Katsande*. I will also make an order that he forfeits his fees by reason of the fact that the founding papers that he drafted were struck off the record.

In the result I will make the following order:

- 1) The application is dismissed.
- 2) Costs on a legal practitioner and client scale to be paid *de bonis propriis* by Mr *Katsande*.
- 3) Mr *Katsande* to forfeit his fees for this matter.

F.M. Katsande & Partners, applicants' legal practitioners
Mawere & Sibanda, respondents' legal practitioners