RIOZIM LIMITED
versus
THE PROVINCIAL MINING DIRECTOR MASHONALAND WEST N.O
and
THE MINISTER OF MINES & MINING DEVELOPMENT N.O
and
NORTH RAND (PRIVATE) LIMITED
and
BRECKRIDGE INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 16 January, 2025 and 12 March 2025.

T W NYAMAKURA, for the applicant.
T ZHUWARARA, for the 4th Respondent.
No appearance for the 1st-3rd Respondents.

DEME J: The applicants approached this court seeking an order couched in the following manner:

> "1. The 1st Respondent be and is hereby compelled to allow the Applicant access to inspect and make copies of all the documents contained within the files of the following mining claims:

Name	**Registration No.**	**In Respect of**	**No. of Claims**	**Situated**
Bono	14860	Gold	9	Kadoma
Bono 2	14770	Gold	9	Kadoma
Bono 3	14771	Gold	10	Kadoma
Blue Streak	12918	Gold	10	Kadoma
Blue Streak 2	12989	Gold	10	Kadoma
Blue Streak 8	14132	Gold	10	Kadoma
Blue Streak 9	14145	Gold	10	Kadoma
Blue Streak 10	14146	Gold	8	Kadoma
Blue Streak 11	14259	Gold	6	Kadoma
Blue Streak 12	14260	Gold	10	Kadoma
Blue Streak 13	14261	Gold	10	Kadoma
Concession Hill (w Portion)	319B	Gold	5	Kadoma
Duchess 2	13938	Gold	10	Kadoma

Hilldene M	14144	Gold	7	Kadoma
Homelands 2	14143	Gold	10	Kadoma
Pickstone North	14037	Gold	10	Kadoma
Peerless	8034	Gold	10	Kadoma
Venning	9315	Gold	10	Kadoma
Warren 2	14772	Gold	10	Kadoma
Duchess 3	6436	Gold	11	Kadoma

For use in the trial under case number HC 2587/18.

2. In the event that the 1st Respondent does not comply, the 2nd Respondent be and is hereby compelled to instruct the 1st Respondent to allow the Applicant access to inspect and make copies of all the documents contained within the files listed in paragraph one of this Order for use in the trial under case number HC2587/18.

3. In the event that the 1st and 2nd Respondents do not comply, the Sheriff of the High Court of Zimbabwe be and is hereby granted the authority of this honourable court to attend to the 1st Respondent's office and to facilitate access to the Applicant to inspect and make copies of all the documents contained within the files listed in paragraph one of this Order for use in the trial under case number HC2587/18.

4. Each party to bear its own costs."

Sometime in 1996, the Applicant concluded an agreement in terms of which the Applicant transferred some mining claims identified in para 1 of its draft order to the third Respondent. The Applicant alleged that the third Respondent breached the agreement which forced the Applicant to approach this court under HC4945/18 seeking the cancellation of the agreement. This court confirmed the cancellation of the agreement.

When the Applicant attempted to enforce the order of this court, it discovered that the fourth Respondent was now claiming ownership of the mining claims. The fourth Respondent then successfully sought the rescission of the order for the cancellation of the mining claims in terms of Rule 449 of the High Court Rules, 1971, now Rule 29 of the High Court Rules, 2021.

The Applicant, in preparation for trial under HC2587/18, approached the first Respondent with a view to access the records for the mining claims. The Applicant claimed that the first Respondent referred it to the second Respondent. According to the Applicant, it later wrote to the second Respondent seeking access to the records for the mining claims but failed to get the response up to the time of the filing of this matter.

The matter was opposed by the fourth Respondent which raised numerous points *in limine.* Firstly, the fourth Respondent alleged that the Founding affidavit's deponent did not attach resolution to the founding affidavit confirming the authority from the Applicant. For

this reason, the fourth Respondent alleged that the application is improperly before the court. This was eventually abandoned after it was pointed out that the founding affidavit is accompanied by the resolution. Reference was made to p 10 of the record.

The second point *in limine* raised by the fourth Respondent is that the Applicant is barred in the main action under HC2587/18 having failed to file replication therein. Adv *Nyamakura* referred the court to the judgment under HH524/24 where the bar operating against the Applicant was removed. Adv *Zhuwarara* insisted that at the time of filing the present application, the bar was still operational and hence the application ought not to have been filed in light of the bar.

Thirdly, the third Respondent argued that the Applicant ought to have proceeded in terms of Rule 47 instead of filing a fresh application. For this reason, the fourth Respondent averred that the present application was prematurely filed. In its fourth point *in limine*, the fourth Respondent alleged that this court can only assume its jurisdiction in terms of Rule 47(10). For this reason, the fourth Respondent claimed that this court does not have jurisdiction to hear this matter.

Fifthly, by way of a further point *in limine*, the fourth Respondent maintained that the first Respondent, who was ruled to be a non-existent statutory officer by some decisions of this court, cannot be competently ordered to perform a certain function in the mining area. After being referred to the case of *Stonezim Granite (Pvt) Ltd* v *The Provincial Mining Director Mashonaland East and Ors*[1], Adv T *Zhuwarara* dumped this point *in limine.*

Lastly, the fourth Respondent argued that the correct official to be sued must be the Permanent Secretary of the Ministry of Mines and Mining Development. Reference was made to the appropriate provisions of the Access to Information and Protection of Privacy Act [*Chapter 10:27*]. This point *in limine* was ditched by the counsel for the fourth Respondent upon being advised by the court that the Act relied upon was repealed by s 41 of the Freedom of Information Act [*Chapter 10:33]*.

Only three points *in limine,* the second, third and fourth points in *limine,* are still outstanding. Turning to the second point *in limine*, the point *in limine* has been overtaken by the judgment under case number HH524/24 which uplifted the bar. The issue of bar is now moot, in my view. Assuming that I am wrong in this respect, it is apparent that the present

[1] SC01/24.

application has been instituted in terms of s 62 of the Constitution. This section establishes the right for access to information which must be enjoyed by all persons including natural and juristic persons. Section 62(1) of the Constitution provides as follows:

> "Every Zimbabwean citizen or permanent resident, including juristic person and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level in so far as the information is required in interest of public accountability."

In casu, the Applicant, being a juristic person, is equally entitled to this right of access to information. Where this right is breached by any government official, every person is entitled to take action in order to enforce this right. Section 62(1) of the Constitution creates an unfettered right of access to information. The Rules of this court are subject to the Constitution. Where the Rules appear to be in conflict with the Constitution, the Constitution must prevail. Section 2 of the Constitution provides that the Constitution is the supreme law and that any law inconsistent with it shall be void to the extent of its inconsistency. To this end, the second point *in limine* lacks merit and is accordingly dismissed.

Moving to the third point *in* limine, as correctly argued by the Applicant's counsel, the remedy available in terms of Rule 47 is only available where all parties are contesting the dispute before the court. It has not been disputed that the second Respondent in this matter did not oppose the matter under HC2587/18. Rule 47 provides for the discovery, inspection and production of documents for purposes of trial. Rule 47(10) of the High Court Rules, 2021, provides as follows:

> "If a party fails to make discovery under this rule or, having been served with a notice under subrule (5) fails to give notice of a time for inspection or fails to permit inspection as required by that subrule, the party desiring discovery or inspection may make a chamber application for an order compelling such discovery or inspection and the judge may grant or refuse the order as he considers appropriate."

It is apparent that this provision can only be activated against an active party to the proceedings. This cannot be enforced against an inactive party to the proceedings. Further, Adv *Nyamakura* argued that the first Respondent is not a party to the main matter being HC2587/18 and hence the remedy in terms of Rule 47 cannot be applied against him. I do agree with this reasoning. Accordingly, the third point *in limine* is hereby dismissed.

Turning to the question of this court's jurisdiction, counsel for the Applicant correctly referred to Section 13 of the High Court Act [*Chapter 7:06*] which provides as follows:

> "Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe."

The question of this court's civil jurisdiction is also entrenched in the Constitution. Section 171 (1)(a) of the Constitution provides as follows:

> "The High Court—
> (a)Has original jurisdiction over all civil and criminal matters throughout Zimbabwe;".

In the absence of a specific piece of legislation that takes away this court's jurisdiction to hear this matter, I am unable to find merit in this point *in limine*. Rule 47 relied upon does not specifically take away the jurisdiction of this court. It only provides a remedy for active parties to the dispute.

Further, it is apparent that the High Court Rules are promulgated in terms of s 56 of the High Court Act. Hence, the High Court Rules are regarded as a subsidiary piece of legislation of the High Court Act. It is an established principle in our jurisdiction that any subsidiary legislation must not be *ultra vires* the enabling Act. Put differently, such piece of legislation must be compliant with the parent Act of Parliament. Thus, the argument that Rule 47 takes away the jurisdiction of this court automatically means that Rule 47 is *ultra vires* s 13 of the High Court Act which is the enabling Act of the High Court Rules. The purpose of the High Court Rules can only be construed as an attempt to elaborate the manner in which the High Court may perform its functions. Rule 47 cannot revisit the question of the High Court's jurisdiction which is ostentatiously clarified by s 13 of the High Court Act as read with Section 171(1)(a) of the Constitution. For these reasons, I consequently dismiss the fourth point *in limine*.

On the merits, the fourth Respondent affirmed that the mining claims were sold to the third Respondent in 1997 before being finally transferred to the third Respondent in 1998. Thus, according to the fourth Respondent, the order for the cancellation of 1996 agreement under HC4945/18 is of no consequence as the 1997 agreement remains extant. This point was vehemently resisted by the Applicant which dismissed this reasoning for want of evidence of the 1997 agreement alleged by the fourth Respondent.

Adv *Zhuwarara* submitted that the fourth Respondent is prejudiced by the present application which seeks to extract private information from the fourth Respondent. Countering this argument, Adv *Nyamakura* claimed that the fourth Respondent ought to have filed a counter application seeking the limitation of information which it believes to be personal information. He further argued that the information for the mining claims constitutes public documents and hence the public must have access to such information.

Adv *Zhuwarara* also argued that the Applicant has available remedy in terms of s 7 of the Freedom of Information Act [*Chapter 10:33*] and in terms of Section 4 of the Administrative Justice Act [*Chapter 10:28*]. In terms of s 7 of the Freedom of Information Act, Adv *Zhuwarara* argued that the Applicant ought to have approached the appropriate information officer for access to the information.

The sole question that emerges for determination is whether the Applicant may be entitled to the relief prayed for. The present application is an application for mandatory interdict. The requirements for mandatory interdict have been well established in our jurisdiction. Reference is made to the cases of *Tribac (Pvt) Ltd* v *Tobacco Marketing Board*[2], *Lipschitz v Wattrus N.O*[3] and *Kaputuaza and Anor* v *Executive Committee of Administration of Hereros and Ors*[4]. The following are the requirements of the mandatory interdict:

(a) A clear right.
(b) An injury actually committed or reasonably apprehended.
(c) The Applicant must establish that the officer concerned does have a positive duty to perform the duty prayed for.
(d) The absence of similar protection.

The Applicant, in my view, does have a clear right by virtue of its claim over the disputed mining claims. The Applicant's clear right is also established in terms of s 62 of the Constitution which creates access to information as a right. Thus, the first requirement of the present application is met.

[2] 1996 (2) ZLR 52 (S).

[3] 1980 (1) SA 662 (T).

[4] 1984 (4) SA 295 (SWA).

Turning to the second requirement, the Applicant is labouring under reasonable apprehension that its failure to access the information for the disputed mining claims may prejudice its right to a fair trial established in terms of s 69 of the Constitution. Thus, the second requirement is satisfied to this extent, in my view.

The first and second Respondents have a positive duty to release information to the deserving persons. This obligation is created in terms of s 62 of the Constitution. This positive duty was further elaborated by the appropriate provisions of the Freedom of Information Act. Therefore, the third requirement is satisfied in this regard.

In my view, the present application is the most appropriate remedy through which the Applicant may enforce its right of access to information. Section 7 of the Freedom of Information Act may not be the appropriate remedy at this point given that subsection (1) thereof requires the regulations for it to be fully operational. Section 7(1) of the Freedom of Information Act provides as follows:

> "Any person who wishes to request access to information from any public entity, public commercial entity or the holder of a statutory office in accordance with the rights granted under this Act may apply in writing in a prescribed manner to an information officer of the public entity, public commercial entity or holder of a statutory office concerned."

Section 40(1) of the Freedom of Information Act clearly spells out the authority which prescribes anything which may be required to be prescribed in terms of the Act. It provides as follows:

> "The Commission, after consultation with the Minister, may make regulations providing for all matters which by this Act are required or permitted to be prescribed or which, in the Commission's opinion, are necessary or convenient to be prescribed in order to carry out or give effect to this Act."

Thus, it is apparent that the manner in which any person may approach the appropriate entity in terms of s 7(1) of the Freedom of Information Act for access to information has to be prescribed by way of regulations. No set of regulations were brought before my attention which prescribes the manner in which the application for access to information may be made to the information officer. In the absence of such regulations, the present application may remain the most appropriate remedy available to the Applicant.

In my opinion, the remedy available in terms of s of the Administrative Justice Act is not the best remedy. The present application remains the most appropriate remedy given that the Applicant is trying to enforce its constitutional right. Adv *Zhuwarara* did not point out the appropriate remedy from s 4 (2) of the Administrative Justice Act given that there are multiple remedies specified therein. Section 4 of the Administrative Justice Act is as follows:

> "(1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section 3 may apply to the High Court for relief.
>
> (2) Upon an application been made to it in terms of subsection (1), the High Court May, as may be appropriate—
>
> (a) confirm or set aside the decision concerned;
>
> (b) refer the matter back to the administrative authority concerned for consideration or reconsideration;
>
> (c) direct the administrative authority to take administrative action within the relevant period specified by the law or, if no such period is specified, within a period fixed by the High Court;
>
> (d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by the law or, if no such period is specified, within a period fixed by the High Court.
>
> (e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section 3.
>
> (3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provisions.
>
> (4) The High Court may at any time vary or revoke any order or direction given in terms of subsection (2)."

What is apparent from the provisions of s 4 of the Administrative Justice Act is that this Act does not take away this court's jurisdiction to deal with the omissions and commissions made by the administrative authority in terms of any other existing law. Section 4(1) of the Administrative Justice Act subjects itself to any other law. Thus, the remedy available in terms of s 4 of the Administrative Justice Act is not the sole remedy available. Section 62 as read with the Freedom of Information Act provides other available remedies of enforcing the right of access to information. I am unable to deny this remedy derived from the existing law. Our courts recognise mandatory interdict as one of the available remedies at law to compel officials to release information which is in their custody.

Assuming that I am wrong in this respect, I am of the further view that the present application resembles the relief available to a party in terms of s 4(2)(c) of the Administrative Justice Act. In terms of this provision, this court may direct the administrative authority to perform certain functions. To this end, the present application also falls squarely within the appropriate provisions of the Administrative Justice Act.

The counsel for the fourth Respondent additionally argued that the information sought to be obtained is fourth Respondent's personal information. Reference was made to the repealed law of the Access to Information and Protection of Privacy Act. Legal Practitioners undertook to file additional submissions referring to the new law for the protection of privacy. By the time of writing this judgment, no submissions were filed. In light of this, I will imply that the argument pursued by Adv *Zhuwarara* was forsaken.

In the original draft order, the Applicant prayed for an order that there shall be no order as to costs. After the fourth Respondent demonstrated its resistance to the present application, the Applicant prayed for punitive costs on an attorney and client scale against the fourth Respondent. No sufficient justification was advanced by the Applicant. I have no reason to punish the fourth Respondent with an order of costs for purely opposing the present application. Punishing the fourth Respondent under such circumstances may be regarded as a flagrant affront to the fourth Respondent's right of access to justice. In light of this, I am of the view that the Applicant is entitled to the relief as originally prayed for.

In the result, it is ordered as follows:

(A) The first Respondent be and is hereby compelled to allow the Applicant access to inspect and make copies of all the documents contained within the files of the following mining claims:

Name	**Registration No.**	**In Respect of**	**No. of Claims**	**Situated**
Bono	14860	Gold	9	Kadoma
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Bono 3	14771	Gold	10	Kadoma
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Warren 2	14772	Gold	10	Kadoma
Duchess 3	6436	Gold	11	Kadoma

For use in the trial under case number HC 2587/18.

(B) In the event that the first Respondent does not comply with paragraph (A), the second Respondent be and is hereby compelled to instruct the first Respondent to allow the Applicant access to inspect and make copies of all the documents contained within the files listed in paragraph (A) of this Order for use in the trial under case number HC2587/18.

(C) In the event that the first and second Respondents do not comply with paragraphs (A) and (B), the Sheriff of the High Court of Zimbabwe be and is hereby granted the authority of this honourable court to attend to the first Respondent's office and to facilitate access to the Applicant to inspect and make copies of all the documents contained within the files listed in paragraph (A) of this Order for use in the trial under case number HC2587/18.

(D) Each party to bear its own costs.

DEME J:……

Coghlan, Welsh and Guest, Applicant's Legal Practitioners.
Lunga Mazikana Attorneys, fourth Respondent's Legal Practitioners.