FREDSON MABHENA
versus
ADONIS CHIPWANYIRA
and
COLLET MADZVAMUSE
and
CM MINING SYNDICATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 9 November 2023 & 5 April 2024

Civil Trial – Plea of Prescription

G Madzoka, for the plaintiff
B Dube with W T Davira, for the 1st & 2nd defendants

CHITAPI J: The parties to this action are Fredson Mabhena as plaintiff. He is described as a male adult whose address is given as that of his legal practitioners. Such description of the plaintiff does not accord with r 13(a) of the High Court Rules which states *inter alia* that the declaration "…shall state truly and concisely –

(a) the name and description of the party suing and his or her place of residence or place of business."

Subrule 1 (c) provides that the same declaration "… shall state truly and concisely –

(c) the name of the defendant and his or her place of residence or place of business……"

The quoted rule is very clear. The declaration must provide the place of residence or business of the both the plaintiff and the defendant. In the declaration in this matter, the declaration did not provide the name and description of the places of business or residences of the defendants.

The declaration named the first defendant as Adonis Chipwanyira a male adult whose address for service is Number 5 Silver Oaks, 5th Street, Gweru, the second defendant as Collet Madzamutse, a male adult whose address for service is Number 83 Ridge Road, Harben Park, Gweru and the third defendant as C M Mining Syndicate whose address for service is 5 Silver

Oaks, 5th Street, Gweru. In the case of the third defendant there is yet another omission in that the declaration does not describe the third defendant and its character and capacity to sue.

It must be noted r 13 does not require that the declaration should state the address for service. The declaration should state the residential or business address of both the plaintiff and the defendant. The declaration herein is non-compliant.

If the declaration is non complaint with r 13 in the respects which I have alluded to, the summons is worse. In relation to a summons and its containments, r 12 of the High Court Rules 2021 is instructive. The rule has 22 subrules. A reading of them shows that they are almost all couched in peremptory wordings. I randomly pick upon subrule 5 which reads as follows:

> "(5) Before issue, every summons shall set forth –
>
> (a) the surname and first names or initials of the defendant by which the defendant is known to the plaintiff, the defendant's residence or place of business and, where known, the defendant's occupation and employment address and if the defendant is sued in any representative capacity, the capacity in which the defendant is sued;
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> (b) the full names, sex (if the plaintiff is a natural person), occupation and the residence or place of business of the plaintiff, and if the plaintiff sues in a representative capacity, the capacity in which the plaintiff is suing;
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> (c) the plaintiff's e-mail address, facsimile, telephone or cellular phone number and those of the defendant or the defendant's legal practitioner if known;
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> (d) a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action; and
>
> (e) the date of issue."

The contents of a summons by juxtaposition with those required to be stated in a declaration are more detailed. The details of containments of a summons and declarations surpass those which were required under the repealed rules 1971. Litigants and legal practitioners must take note and graduate to the new requirements as set out in the current rules. The rules prescribe the parameters for engagement of parties to litigation and must not be flagrantly disregarded especially so where the rules are clear. Rule 7 of the court rules which provides for the court's discretion to condone, direct or authorise a departure from any provision of the rules should not be used by parties as a scapegoat to a non-observance of the rules and in any event the party who is errant in following the rules would need to explain why the rules were not followed. Where a clear rule is flouted because the pleader simply put pen to paper without engaging the rules first, the court would be unlikely to be sympathetic or come to that party's aid through the invocation of r 7. Rule 7 must not be invoked by the court to undermine its rules but

should be invoked in exceptional circumstances for proven good cause and in the interests of justice.

In relation to the need for litigants to follow the rules, it was stated by MAKARAU JCC in the case *Lizwe Museredza* & 385 *Ors* v *Minister of Agriculture, Lands, Water and Rural Resettlement & 10 Ors* CCZ 11/21 at p 11 of the cyclostyled judgement as follows:-

> "It is a rule of common law and an entrenched part of our practice and procedure that matters are to be brought before the court in accordance with rules of that court. The remarks of PATEL JCC in *Marx Mupingu* v *The Minister of Agriculture, Lands, Water and Rural Resettlement & Ors* CCZ 7/21 are opt.
>
> He wrote:-
>
> > 'One cannot institute an action or application in the High Court, or any other court, without due observance of and compliance with the Rules of that court. The rules inform a litigant of what is required of him to access the court concerned. If he fails to observe or comply with those rules, he will inevitably be non-suited.'"

Her Ladyship in reference to the importance of following rules of procedure then gave an advisory and warning that litigants and legal practitioners must acquaint with nuances in the rules.

I must note that the defendant herein did not raise the issue of the non-compliance of the rules pertaining to the defective summons and declaration. The defendants did not object by exception to the form of the two pleadings. I am aware that the non-objection means that the parties did not engage the anomalies seen by the court and thus as between them, no issue arose therefrom. Ordinarily in civil litigation the court engages issues raised by the parties for the court's determination. The court does not create its own issues for the parties to engage on such. See generally *Nzara & 3 Ors* v *Kashumba C & 3 Ors* SC 18/2018. The issue I have raised however is a point of law noted by the court in writing judgement. It pertains to the non compliance with rules of this court. The court cannot be estopped from raising a non compliance with its rules on the basis that the parties did not raise the issue.

It is not intended that this litigation is resolved on the rule non compliance issue noted by the court. It would be unfair and unjust to do so as the court did not engage the parties on its observation. The non compliance being an issue of concern was in the view of the court, one to which the parties attention and indeed the attention of litigants and legal practitioners should be drawn for posterity. Parties and litigants are therefore warned that because the rules of court

should be obeyed, it is within the power of the court to strike out any pleading including a summons or defence/plea for non compliance with its rules even where parties have not made issue of the non compliance. The power is to be exercised subject to the rider that the court would need to require parties to address it on the non compliance first before deciding on the dismissal or striking out as the case maybe. The court cannot be bound to relate to or engage rule non compliance pleadings on the basis that parties did not raise the issue for the further reason that the court must consider whether its jurisdiction is not being called to deal with rule non compliant pleadings.

I revert to the substance of this action. The plaintiff claimed in the declaration that in or about 2014 the plaintiff and first and second defendants orally agreed to acquire mining rights in Connemara area, Midlands Province. The terms of the oral agreement were listed by the plaintiff as:

> "(a) Plaintiff was to fund the acquisition of the mining claims which he had identified in the Connemara area.
> (b) The claims would be registered in the name of the second defendant an employee of the first defendant.
> (c) Plaintiff would fund the maintenance of title in the mining claims.
> (d) The claims would be beneficially owned by the plaintiff."

The plaintiff further pleaded that consequent on the oral agreement, he funded the acquisition of mining claims, paid for maintenance of title and appointed a pegger to assist in applying for mining title over the claims. Plaintiff pleaded that in October 2014 claim numbers Zabola North 16168 BM; Great Zabola 16167 BM and Great Zabola 1030348 were registered by the relevant Ministry in the name of the second defendant.

It was the plaintiff's further contention that in 2017, the three parties entered into yet another oral agreement in terms of which they agreed as follows as pleaded in para 9 of the declaration:

> "(a) They would register a company in which they would all hold shares.
> (b) The mining claims would be transferred to the company in which the parties hold shares.
> (c) They would either sell or exploit the mining claims through the company."

The plaintiff pleaded that consequent on the second oral agreement as quoted, the plaintiff then incorporated a company called Environ Mining (Private) Limited wherein shares were allocated as follows: 50% to the plaintiff; 20% to the first defendant; 5% to the second

defendant and 25% to an agreed third party, namely Lawrence Nyabonde. The plaintiff pleaded that the first and second defendants breached the oral agreement by refusing to transfer the mining claims in issue to the newly incorporated company, Environ Mining (Private) Limited but had instead incorporated another entity, namely, the third defendant to which they then transferred the mining claims. Neither the dates of incorporation of the third defendant, the date of refusal and/or neglect to transfer the mining claims to Environ Mining (Private) Limited or the date of transfer of the mining claims to the third defendant were pleaded.

The plaintiff made a further claim against the defendants for payment of US$225 000 as his share from the proceeds of US$300 000 said to have been paid to the defendants by Caledonia Mining as payment for an option and a non circumvention agreement concluded in 2020 between the defendants and Caledonia Mining. The plaintiff pleaded that there were further negotiations between the plaintiff and the defendant (sic) in 2021 regarding the sharing of the proceeds of the option and non circumvention agreement. The plaintiff pleaded that pursuant to the negotiations, an agreement was reached that the plaintiff would be paid US$225 000 of the US$300 000 since the plaintiff was the "beneficial owner of the claims." The plaintiff pleaded that the defendants had despite demands made by the plaintiff and mediation efforts initiated by the defendants, failed to reverse the transfer of title on the claims, or to pay the plaintiff the US$225 000. The details including dates of the demands made and also of the mediation efforts were not pleaded.

In the prayer to the summons and declaration, the plaintiff pleaded as follows:

"WHEREFORE, plaintiff prays for:

a) An order declaring the transfer of three (3) mining claims, being claim number Zabola North 16168BM, Great Zabola 16167BM, and Great Zabola 10 30348 from the 2nd Defendant to the 3rd Defendant to be a breach of the agreement entered into between the Plaintiff, and the 1st and 2nd Defendant.

b) An order for the setting aside of the mining certificates registered in favour of the 3rd Defendant in respect of three claims previously registered in favour of the 2nd Defendant as claims number Zabola North 16168BM, Great Zabola 16167BM, and Great Zabola 10 30348 on the basis that the transfer of the same claims under the oral agreement entered into between the Plaintiff on the one hand, and 1st and 2nd Defendants on the other hand.

c) Payment of the sum of US$ 225,000.00 to the Plaintiff being proceeds the Plaintiff's share of money received from Caledonia Mining (Private) Limited as non-refundable option fee in respect of the claims mentioned in paragraphs 1, and 2 above, which money is payable to the Plaintiff in terms of an oral agreement between the Plaintiff on the one hand, and the 1st and 2nd Defendant on the other hand.

d) An order directing the Defendants to refrain from alienating the mining claims in question.
c) Costs on a legal practitioner and client scale."

The first defendant pleaded a plea in bar. The details of the plea are captured as follows:

"1ST DEFENDANTS PLEA IN ABATEMENT
The first defendant pleads in abatement that:
1. The plaintiff claims ought to be dismissed as they have prescribed. In terms of the plaintiff's declaration the breach is alleged to have occurred on 2017.
2. The consequent obligations allegedly owed to the plaintiff by the defendants were extinguished after a lapse of more than three (3) years by reason of section 2, section 14 and 15 of the Prescription Act [*Chapter 8:11*]
3. The defence raised in paragraph 1 above is one of substance which does not involve going in to the merits of the case and which, if allowed, will dispose of the case."

In response to the plea in abatement, the plaintiff responded that the breach of contract on which he sues was not committed in 2017 because the year 2017 marked the year in which the contract between the parties was concluded. Further the plaintiff responded that there was no time limit for performance provided for in the agreement.

The plaintiff further averred that prescription could only have begun to run from 2021 when the plaintiff discovered the facts on which he bases his claim. The plaintiff also averred that when the dispute arose in 2021, the parties engaged in mediation and that it was only in 2022 that the plaintiff placed the defendants *in mora* after the plaintiff had become aware of the defendant's refusal to transfer the claims to the newly incorporated company.

The defendants upon filing the special plea on 27 July 2023 also filed heads of argument. The heads of argument were filed before the plaintiff had filed a response to the special plea. The plaintiff's response which was headed "plaintiff's replication to the defendant's special plea" was accompanied on the same date which was 22 August 2022 with heads of argument. The procedure for filing the special plea is provided for under rules 42(8) and (9). The two subrules provide as follows:

"(8) A party filing an exception, special plea or an application to strike out shall at the time of filing it, file heads of argument in support of the exception, special plea or application to strike out.
(9) Where the other party is represented by a legal practitioner, he or she (sic) within ten days of receipt of the exception, special plea or application to strike out and the heads of argument accompanying it, file his or her replication and heads of argument and whereupon the register shall give such party a set down within a month from the date of filing."

The quoted subrules present problems for a defendant or respondent who pleads the special plea of prescription or indeed any special pleas which require extraneous evidence to establish or prove the special plea. It is trite that where the defendant or respondent pleads prescription, the special plea of prescription must be resolved through the holding of a mini trial to deal with that plea. In the case of *Jennifer Nan Brooker* v *Richard Mudhanda & Ors* SC 5/18, the court held that the defendant bears the onus to prove prescription although the burden shifts to the plaintiff if the plaintiff pleads interruption or waiver. It was stated that the onus placed an evidentiary burden on the defendant which basically meant that evidence had to be adduced on the issue. The court in the *Van Brooker* case quoted the case of *Doelson (Pvt) Ltd* v *Pichanick & Ors* 1999 (1) ZLR 390 (H) at 396 B – F wherein GILLESPIE J stated:

> "The purpose of a special plea is to permit a defendant to achieve prompt resolution of a factual issue which founds a legal argument that disposes of the plaintiff's claim. Special pleas are there in kind … Since a special plea involves the averment of a new fact, it is susceptible of replication and of a hearing at which evidence of this new fact alone may be led."

It follows in my view that with the law on how a plea of prescription should be disposed of which is by leading evidence to establish the facts relative to prescription, it is with respect illogical to require that the parties file heads of argument upon filing the special plea or the replication as the case may be when the plea or replication to which the heads of argument relate has to be disposed of by evidence or a mini trial as I have guardedly referred to it as. The end result is that the parties will again present argument after evidence has been led. I venture therefore to suggest that the subrules are revisited by the rule maker if it is inclined to do so, and I suggest this without in anyway directing a change to the rules, that the rule maker may in its wisdom and discretion revisit the sub-rules and tinker around with them so that they are fine tuned to recognise that special pleas are varied and that some of them like prescription require that the special plea is disposed of by evidence. It therefore makes it logical that heads of argument or submissions are filed or made at the end of the hearing of evidence on prescription.

In casu, the special plea of prescription was dealt with by the litigants leading evidence and closing their cases after which they filed written submissions. The heads of argument filed together with the special plea and replication did not serve any useful purpose in the determination of the special plea since they did not relate to the actual evidence led by the parties.

The evidence in relation to the special plea was led from the first and second defendants and from the plaintiff. The parties had also filed summaries of evidence. The first defendant testified that the plaintiff's claim happened in 2018. He outlined the background to the case as that he developed an interest to mine in the Connemora area in 2017 and identified a mining claim which belonged to the second defendant. He negotiated with the second defendant and the two agreed to work together. The two formed a syndicate and named it CM Mining Syndicate derived from their surnames Chapawanya and Madzvamuse in 2018. The syndicate commenced mining and erected beacons over the claim in 2018.

The first defendant further testified that in the same year 2018, he was approached by the plaintiff who offered to work with the syndicate after introducing himself as a proxy for S.B Moyo, the late Minister in Government. The first defendant referred the matter to his legal practitioners who advised him that the offer was a mine grab after which the first defendant then refused the offer. He stated that it was at this time that he was shown papers pertaining to a company which it was proposed would take over the mining. He stated further that he only knew of the other details of the company after this case was filed.

In cross examination the first defendant stated that he believed that the cause of action arose in 2017 because the summons and para 9 of the declaration referred to a wrong committed in 2017. When referred to para 9 and was advised that there was no reference to any breach therein, the first defendant stated that he believed that there was a breach committed in 2017 because that was when the plaintiff had sought to have the claims registered in the name of the alleged joint venture company and the defendants had refused to do so. The first defendant also averred that he did not notify the plaintiff of the transfer of the claims in issue from the second defendant to the third defendant because the defendants were not working with the plaintiff.

The first defendant was asked whether he knew as to when the plaintiff had knowledge of the transfer of the claims to the third defendant. He responded that it was in 2018 because the plaintiff claimed to have been the one paying charges due on the maintenance of the claims and should have noted that the certificates of registration had changed. The first defendant also stated that the plaintiff knew because the plaintiff had averred that he was getting payments from the money, a statement denied by the plaintiff's counsel as arising from the declaration and also noted by the court not to be alleged in the declaration. The first defendant further stated that the

plaintiff must have known about the registration of the mining claims into the third defendant's names because the process is not done secretly but transfers of the claims are posted on the notice board and that the process was done in 2018. The first defendant also referred to para 8 of the declaration in which the plaintiff averred *inter alia* that he paid for maintenance of titles in the claims. The first defendant denied that the plaintiff paid dues for the mining certificates and averred that he paid for them from his own pocket.

In relation to the claim for US$225 000 arising from an alleged share of the plaintiff on a payment of US$300 000 paid for an option and non circumvention agreement by Caledonia Mining, the first defendant agreed that the agreement took place in 2020. When asked whether three years lapsed to the date of commencing this action, the first defendant averred that the agreement in issue did not involve the plaintiff but only the defendants. The first defendants denied that there was agreement in 2021 that the plaintiff be paid US$225 000 as alleged.

The first defendant generally gave his evidence well and his evidence was not difficult to follow. He did testify to a matter not arising from the declaration like that the plaintiff had stated that he benefitted from the mining activities. This did not in my view detract from the veracity of his testimony which was a simple narration that there was no agreement for the plaintiff and the defendants to work together nor to register and transfer the claims in issue to the company Environs (Pvt) Ltd. It followed in the first defendant's view that if there was any claim by the defendant, the cause of action must have occurred in 2018 when the plaintiff's attempts to partner with the first and second defendants failed.

The second defendant also testified and gave the background of how he acquired the mining claims in question after they had been forfeited. He said that he commenced mining after registering the claims in his name in 2014. He stated that he would sell the proceeds to Fidelity Printers. He teamed up with the first defendant that same year after the first defendant promised to get investors. The second defendant produced a letter dated 5 August 2018 addressed to the Ministry of Mines requesting a transfer of the claims to the third defendant. A certificate of registration dated 9 October 2018 was issued in which the third defendant became the registered owner. The third defendant's exists as per the registration certificates to date.

The witness testified that the first defendant advised him that the plaintiff had called to indicate that he had investors. He stated that the first defendant was in charge of issues of

investment whilst the second defendant was on the ground doing operations. The second defendant averred that he did not personally meet with the plaintiff whom he was seeing for the first time physically in the court. He further testified that he did not discuss or enter any agreements with the plaintiff. The second defendant denied that the plaintiff paid for certificates and registration processes in relation to the claims and stated that he used his own funds to pay for everything connected with the mine. The second defendant denied that there was an agreement involving him and the plaintiff for the incorporation of a company into which the claims in issue were supposed to be transferred.

The second defendant was hardly cross examined. The second defendant gave his evidence with confidence and the evidence was clear. In summation, the second defendant's evidence was to the effect that he was the sole owner of the claims upon their registration in 2014 into his name after which he accepted to work with the first defendant as partners or co-owners. On teaming up with the first defendant, the claims were in 2018 then transferred into a syndicate being the third defendant. The second defendant denied having had dealings with the first defendant. He was not controverted on this assertion. The evidence of the second defendant was not only clear but it was credible with the second defendant's demeanor being calm and collected. The second defendant closed his case.

The plaintiff also testified in evidence. He testified that he was a lawyer working for the Ministry of Labour and Social Welfare. He noted that he knew the first defendant as his "best friend". He testified that he was a beneficial owner of the claims in issue in this action. The plaintiff testified that in 2014 he developed an interest to register the claims and agreement was reached with the first defendant to register the claims in the name of the second defendant whom the plaintiff described as an employee of the first defendant. He testified that he could not at the time register any mine as he would be compromised since he worked then for the Ministry of Mines before he left on 11 July 2014.

The plaintiff's evidence was that he worked with the first defendant and had the claims registered in the second defendant's name in October 2014. He stated that in 2016, the first defendant asked for a shareholding. It was agreed that the second defendant be given a 12 percent shareholding in the claims. He did not quite explain what became of the shareholding and instead spoke about problems with the registrations. He stated that him and the second

defendant knew each other well. He also spoke of threats of takeover of the claims by the Prisons and Correctional Services body and stated that S.B Moyo saved the claims from takeover in 2016 – 17. He claimed that during this period, agreement was reached to form an investment company.

The plaintiff claimed to have made inspection payments. He produced as annexure 3(a) a cash deposit slip showing a deposit of $500 made on 26 July 2016 in the Nedbank account of the first defendant with MBCA Bank. Notably the purpose of the deposit was left blank and the depositor was not the plaintiff. The plaintiff stated that the depositor was Manyangadza, his clerk. The deposit as the court noted was not put to either of the defendants for comment. The plaintiff further produced as annexure 3(b) a CBZ Bank advise note to the plaintiff advising that a transfer of ZWL2000 had been made into a BANC ABC account number 22106000187 by RTGS transfer. The advice note did not show the holder of the receiving account. The plaintiff did not explain or give evidence on the gap hence leaving the transfer a floating one.

The plaintiff agreed that the issue of the shareholding envisaged by the parties was being handled by the legal practitioners. He also stated that during negotiations he compromised his shareholding and agreed to accept 50 percent on the claims. He stated that communications on the shareholdings were made by phone. The plaintiff produced WhatsApp conversations or chats between him and the legal practitioners for the first defendant. I say for the first defendant because there appears to be no reference by the legal practitioners to the second defendant. A run through the WhatsApp chats which extend from 24 July 2020 to 4 April 2022 shows in summary that the plaintiff was in negotiations for the resolution of not so clearly defined dispute over the mining claims. It was not clear as to why the cutoff date for the start of the disclosed conversation was 24 July 2020 as it appeared that the issue dealt with in the produced chats started much earlier judging by the content of the chats produced. Draft agreements were made but never finalized. There was no chat indicating that either of the three defendants had acknowledged the plaintiff's claims concerning the dispute. There is nothing in the chats to indicate or suggest that either of the three defendants acknowledged the plaintiff's claims. The chats do not refer to the claim for payment of US$225 000.

The plaintiff testified that he only came to know about the Caledonia option and non circumvention agreement in December 2020 and the transfer of the claims to the third defendant

in May/June 2021. He also testified that in relation to the formation of the company Environ Mining Company (Pvt) Ltd, he saw to its incorporation and obtained details of the directors from the first defendant. A run through of the company documents produced by the plaintiff shows that the date of incorporation of the company was 8 May 2017 as per the certificate of incorporation reference company number 3018/2017.

The applicant also attached a draft CR 14 form for the company signed by the company secretary on 3 February 2018. The applicant is not listed as a director. The directors are listed as one |Simbarashe Makado, first defendant and the third defendant. The appointments dates – the first defendant and Simbarashe Makado were appointed as directors on the date of registration of the company being 8 May 2017. The CR 14 form was not lodged for registration. It remained a draft. The second defendant was appointed a director on 8 January 2018. To the company records was attached unsigned share certificates which allocated Simbarashe Makado 50 shares, one Lawrence Nyabonde 25 shares, second defendant 5 shares and first defendant 10 shares. The share certificates were therefore not issued in as much as they were not signed. The plaintiff testified that the certificates were drafts but that the signed ones were available. They were not produced. It was the plaintiff's evidence that the first and second defendants agreed with him to transfer the claims in dispute to this company, hence its incorporation. It is common cause that the claims were not transferred to this company contrary to what the plaintiff purports to have been the agreement of the parties.

In cross examination and pointedly so, the plaintiff was asked by the defendants' counsel as follows:

"Q. What was the purpose of Environs Mining Company?
A. To hold claims.
Q. When was it supposed to hold claims?
A. 2017
Q. Are you aware that any alienation of rights must be done within 60 days in terms of section 275 of Mines and Minerals Act?
A. Yes
Q. By failure to register you were outside the prescription period?
A. There was an internal arrangement."

The plaintiff was at this stage reminded by his counsel to answer the question after which he answered:

"A. No answer."

The he was asked:

"Q. Your claims have prescribed on your own papers?
A. I defer to my counsel to address that."

The plaintiff admitted that the company Environs was formed for a specific purpose to transfer claims into it so that the plaintiff's rights are protected. The purpose was not carried out in 2017 and has still not been achieved. He was asked as to when the purpose failed to which he responded that it was in 2017. When asked as to when he realised that nothing had happened, the plaintiff responded that it was in March 2022. The plaintiff did not elaborate as to why this was so.

The plaintiff admitted that the registration of the claims in the name of the third defendant was a breach of the agreement he had with the first and second defendants. It is common cause that the registration was done in 2018. Plaintiff admitted to having a serious interest in the claims and that he was making statutory payments due. When asked as to what he did in 2017 – 2018, he responded that he was talking to the first defendant about the obligation to make the transfers to Environ Mining Company and that promises were made. The plaintiff did not give evidence on the details of the promises allegedly made to him, save those of at least engaging in unended discussions with the first defendant's legal practitioners.

In respect of the plaintiff's credibility and demeanors there was nothing noteworthy to fault. He did of course stammer here and there like when he was asked on the impact of s 275 of the Mines and Minerals Act. He tried to avoid the question but his counsel advised him to answer the question. He said that he had no answer before he then said he would defer to his counsel to deal with that question or issue. His evidence was otherwise clear. Whether or not the evidence established that his claims were not prescribed is a different issue to be determined taking into account all the other evidence led in the matter.

I therefore proceed to analyse the evidence and the parties' submissions and to answer the question whether or not the plaintiff's claim is prescribed as pleaded by the defendants. The second claim is premised on the first claim. If the first claim fails, then outside of the plaintiff having pleaded a different basis for it other than that it arises from or was a consequence of an

alleged contractual relationship between the parties as envisaged on the first claim, the second claim falls away.

The plaintiff claimed to have been the beneficial owner of the claims which were registered in 2014. The claims were never registered in his name. He claimed that it was in 2016 that the first and second defendant were made shareholders. In my understanding of the plaintiff's evidence the claims were his and the idea to form a syndicate to include the first and second defendants was intended so that it then holds the registered titles over the mining claims for the benefit of the plaintiff and first and second defendant and another as then appeared in the company records for Environ Mines (Pvt) Ltd. In this respect there appears to be an error in the pleadings wherein the company is referred to in the declarations as Environs Mining (sic) Pvt Ltd but in the company records as Environs Mines (Pvt) Ltd. The error is not material in view of the issue to be determined.

The plaintiff admitted that the company was formed for the specific purpose of *inter alia* holding his shares or interest in the claim. There can be no argument therefore that the rights of the plaintiffs were never registered in his name. It is clear that according to his evidence he was taking steps which included the formation of the Environ Mines (Private) Ltd and writing correspondences. Time was ticking without his procurement and/or registration of his claims. The alleged acquisition of the claims according to the plaintiff's evidence took place in or about 2014. There is no evidence that the registered holder of the claims being the second defendant at anytime acknowledged or admitted that the plaintiff had an interest in them nor did the second defendant admit that he held the claims in trust for the benefit of any third party including the plaintiff. There was no evidence led to establish that the claims belonged to the first defendant at anytime prior to the incorporation of the third defendant as before that there was some arrangement whereby the first defendant worked with the second defendant albeit, it appears, informally.

On the evidence presented to the court, the plaintiff's claim appeared nor to have been properly thought out because the first defendant was on the periphery yet he was made the key defendant. This assertion is made upon a consideration of the paper trial. If the plaintiff's evidence is accepted that the transfer of the claims which he claimed to be his were in the name of the second defendant and not the first defendant who only came into the picture formally and

on paper through the registration of the third defendant as the new registered holder in 2018, then the plaintiff's cause of action arose when he tried to have the claims registered in the company name Environ Mines (Pvt) Ltd and failed to do so in 2017. The prescription period was running and in the absence of undertakings and/or for acknowledgment of the plaintiffs claimed rights, the plaintiff took a calculated risk in not following his rights timeously.

Another angle to the matter arose. This concerned the introduction of the effects of the provisions of s 275 of the Mines and Minerals Act. The defendants' legal practitioner in cross examining the plaintiff put it to the plaintiff that going by his account his claim could not succeed because as the claimed owner, he ought to have ensured that the alienation of the claims and his consequent claimed acquisition should have been registered within sixty days from the event. As already noted the plaintiff admitted that this was so. The plaintiff by himself or by counsel did not object to being questioned and giving answer to the question. In his answer he did not proffer any legal excuse for the failure to comply with s 275.

The defendants' legal practitioner submitted that because the special plea was not pleaded upon the basis of a breach of the provisions of s 275 of the Mines and Minerals Act, the ground of objection based on s 275 could not be raised at that late stage. However, since the plaintiff did not object to that evidence being solicited through cross examination and the issue raised being a point of law, the court being a court of law cannot disregard the point. In my view the plaintiff cannot raise objection to evidence which he has already dealt with without objection. The doctrine of estoppel must apply in such a scenario.

Counsel for the plaintiff further submitted that in any event, s 275 aforesaid applied to the seller of the registered claims and did not apply in this case to the plaintiff. The reasoning is faulty in my view. Section 275(1) reads as follows:

> "(1) When any registered mining location or any interest therein is sold or otherwise alienated in any manner whatsoever, the seller or person who alienates shall notify the mining commissions of the transaction within sixty days of the date of such transaction and shall inform of the name of the person to whom such location or interest is sold or otherwise alienated and of the amount of the valuable consideration, if any, agreed upon, and the date of the transaction."

Firstly the legislation as quoted considers the transaction first. In other words there must be an alienation by sale or otherwise of a registered mining location. There has to be a sale first

which is a contract involving the buyer and seller. It is that sale involving the seller and purchaser which gives rise to the obligation imposed on the seller to notify the Mining Commissioner of the alienation. That notification perfects the sale. Without the registration the sale is non-compliant and breaches s 275. The section does not provide that the transaction which is not compliant with s 275 on account of the failure of the seller to register is enforceable at the instance of the purchaser. It seems to me that the purchaser has an interest to ensure that for the validity of the sale, there has to be procured the registration envisaged in s 275. Section 275 is a general provision which applies to all alienations as envisaged therein. The alleged alienation was not registered and it ends there. A serious breach of s 275 occurred. That breach remains uncorrected. The court has no power to and cannot condone the omission to comply with s 275. The court cannot recognise the sale transaction as binding. The plaintiff did not prove that the alienation of the rights in the claims to him were registered within the statutory period or at all.

Thus, the plaintiff cannot escape the finding on a balance of probabilities that its claim for a declaratur of invalidity of the transfer of the claims to the third defendant and consequential relief was prescribed at the time that process in this *lis* was instituted on 6 July 2023. The prescription plea succeeds. The claim can also not be enforced on the ground of breach of s 275 of the Mines and Minerals Act in that even accepting the plaintiff's evidence of acquisition, the person from whom the plaintiff acquired the claim did not perfect it by the failure to comply with s 275. There was and there is no valid acquisition of the claims by the plaintiff at law. The plaintiff has no title or right to challenge the transfer of the title of the claims from the second to the third defendant which took place after the expiry of the period within which the alleged purchase of the claims by the plaintiff ought to have been perfected by compliance with s 275 of the Mines and Minerals Act. From a legal perspective the plaintiff never lawfully acquired the three claims and cannot therefore impugn the devolution of the rights and titles of the second defendant in the claims to the third defendant. The second claim for payment of $225 000 as already noted falls away as it is dependant on the answer to the validity of the first claim.

The last issue pertains to costs. As has become customary practice with legal practitioners, costs are claimed by the plaintiff on the legal practitioner and client scale and by the defendants on their special plea on the same scale. Costs on any other scale other than party and party scale are deemed specially sought. They must be specially justified. There was no

evidence led to justify the grant of special costs. In the closing submissions Mr *Dube* ended his submissions with the following sentence. "WHEREFORE the Defendants pray for the upholding of the special plea with costs on a higher scale."

Not to be outdone, Mr *Madzoka* ended his submissions with the following sentence:

> "24. On the whole, the special plea is completely without merit. It should never have been taken at all. The Plaintiff accordingly prays for the dismissal of the special plea with costs on a legal practitioner and client scale."

When a party seeks costs on a special scale, such party must be mindful that the court will always ask "why?" Litigants should therefore be guided in seeking costs on the special scale to address the question "why" and if they do that the court will then have material or factors before it to consider and exercise its judicious discretion to determine the incidence and scale of costs. The parties herein did not make any attempt to justify their claimed scale of costs. In the absence of justification for a special order of costs as claimed having been advanced, the court must still consider whether costs should be granted. The court in this regard is inclined to follow the general rule that costs follow the event subject to the court's discretion to award them or not. There is no reason in this matter to depart from the general rule that costs follow the event. The defendants are entitled to their costs.

It is accordingly ordered that:

1. The special plea is upheld and the plaintiff's claim be and is hereby dismissed with costs.

Hatinahama & Associates, plaintiff's legal practitioners
Gunda Dube & Pamacheche Legal Practitioners, first & third defendants' legal practitioners
Matutu and Mandipa Legal Practice, second defendant's legal practitioners