2011 136 – M DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

BETWEEN:

In the matter of an application by **JOAN AVAHNELLE CHANG** represented herein by her duly constituted Attorney **MARK ANDREW CHANG** under Power of Attorney No. 3040 of 2006 executed and registered in the Deeds Registry on the 3rd May, 2006 for Writs of Certiorari and Prohibition.

Ms. A. Wong-Inniss for Applicant
Mr. H. Ramkarran SC for the first respondent
Mr. D. James & Mr. S. Lewis for Isseneru Village Council, the second respondent

Following the oral decision given on the 17th January 2013 from draft handwritten notes, the Court now delivers its written decision:

On a Notice of Motion filed on the 5th December 2011, an order or Rule Nisi of Certiorari was granted directed to Anthony Paul, purported Mines Officer and a rule nisi of prohibition was granted directed to the Isseneru Village Council of the Amerindian Village of Isseneru, in the following terms:

> ***(a) An Order or Rule nisi of Certiorari directed to ANTHONY PAUL, purported Mines Officer of Mining District No. 3 quashing his decision (or act) in issuing Cease Work Order dated the 24th November, 2011 ordering PLATINUM MINING INCORPORATED and mining dredge S.D #8270 to cease working on mining claims FAR EYE purportedly made under Regulation 98 of the Mining Regulations on the grounds that the said decision was***

made arbitrarily, unreasonably, unlawfully, unfairly, in breach of the rules of natural justice, was based on improper or irrelevant considerations, and was ultra vires Regulation 98 of the Mining Regulations, null and void and of no legal effect unless cause is shown why the said Order or Rule nisi of Certiorari should not be made absolute.

(b) ***An Order or Rule nisi Prohibition directed to the ISSENERU VILLAGE COUNCIL of the Amerindian village of Isseneru, prohibiting the said Council, its servants or agents from exercising any form of control over mining operations being carried out or to be carried out on the FAR EYE claims in Mining District No. 3 on the grounds the said FAR EYE claims were the subject of grants of licence made prior to the coming into operation of the Amerindian Act 2006 and were expressly excluded and excepted in the instrument of State Land Grant to the said village Council made pursuant to the provisions of the Act and therefore are outside of the application of the provisions of the said Act unless cause is shown why the said Order or Rule nisi should not be made absolute.***

The Respondents, the mines officer, Anthony Paul, and the Isseneru Village Council (the IVC) were asked to show cause why the aforesaid orders nisi should not be made absolute.

The preliminary issue was raised by the Respondent the IVC that the IVC was not amenable to Judicial Review.

In Judicial Remedies in Public Law by Clive Lewis it is stated that a prohibiting order is used to restrain a public body from acting unlawfully. The remedy was initially used to ensure that inferior courts and Tribunals did not exceed their jurisdiction. In modern times it has been issued to prevent any public body from exceeding its statutory or other public law powers, or from abusing those powers. The scope of a prohibiting order is virtually identical to that of a quashing order, and the same definition of public law power applies.

In R v Preston 1985 WLR 836 the House of Lords held:

> ***"that the Inland Revenue Commissioners were amenable to the process of judicial review and a taxpayer could challenge ,a decision taken by the Commissioners in exercising their statutory powers and duties if he could show that they had failed to discharge their statutory duty towards him or that they had abused their powers or acted ultra vires; that unfairness in the purported exercise of a power could amount to an abuse or excess of power if it could be shown that the Commissioners had been guilty of conduct equivalent to a breach of contract or breach of representation."***

Thus where the rights of a person are affected by a statutory body in the exercise of their functions then judicial review can properly be allowed to quash the decision of that statutory body where that body acts unfairly, without reasonable cause or ultra vires its powers granted under the Act from which it derives its powers.

In R v Liverpool corp. exp. Taxi Fleet (1972) 2 Q B 299 the CA held that:

> ***"though the determination as to the number of taxicab licences to be issued was a policy decision to be made by the council in the exercise of its statutory powers under***

> ***the Act of 1847 and the court could not interfere with such a policy decision, the court could and should intervene to ensure that the council acted fairly in deciding that policy after due regard to conflicting interests."***

Having regard to the aforesaid authorities the court finds that judicial review lies against the IVC who stated that they are vested with statutory authority. The term "Village Council" has been defined in section 2 of the Amerindian Act 2006 as "a Village Council established under the authority of the Amerindian Act" and under section 10(2) it is stated as a body corporate.

Further, the IVC has been given powers under the Amerindian Act of 2006 and the functions of the Village Council are outlined under S. 13 (1) of the Act and includes the following:

(d) hold for the benefit and use of the Village all rights, titles and interests in or over Village lands (e) manage and regulate the use and occupation of Village lands and (f) promote the sustainable use, protection and conservation of Village lands and the resources on those lands.

In R v GLC exp. Blackburn I WIR 599 the CA stated

> ***"The prerogative writ of prohibition has, in the past, usually been exercised so as to prohibit judicial tribunals from exceeding their jurisdiction. But just as the scope of certiorari has been extended to administrative authorities, so also with prohibition. It is available to prohibit administrative authorities from exceeding their powers or misusing them."***

In Rex v Electricity Commissioners (1924) 1 KB 171 at page 205 the court of Appeal stated:

> ***"The operation of the writs has extended to control the proceedings of bodies which do not claim to be, and***

> ***would not be recognised as, courts of justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs."***

Since the Isseneru Village Council is purporting to exercise control over lands which are held by a claim holder and which are excluded by the State Grant and which would have the consequences of affecting legitimate rights of the claim holder, then their actions would therefore be amenable to judicial review.

A second preliminary point was made on behalf of the first respondent, Anthony Paul, a purported mines officer of the Guyana Geology and Mines Commission (GGMC) that the facts were disputed and that there should be cross examination on the affidavits.

I find that the material facts, including the holder of the Far Eye 1-17 claim licences, the dates the claims were issued by GGMC and their location were not in dispute. The issue revolves around the applicable law and not as to any facts that need clarification. As to who is the owner is also not in dispute since the applicant obtained the lands by virtue of the will of the deceased, Ivor Lennox Chang, the original owner, and this fact is not disputed either. The will of the deceased was submitted as an exhibit to the Applicant's affidavit in support of Motion. The IVC stated at paragraph 4 of their Affidavit in Answer that this fact is not within their knowledge. The IVC did not deny this fact. The mines officer, Anthony Paul admitted under paragraph 7 of his Affidavit in Answer that "the Applicant held directly or through the estate of the deceased Ivor Chang a licence permitting mining activities."

In any event cross-examination is only allowed in special or exceptional circumstances.

In R v Stokesley (1956) 1 WLR 254 Lord Goddard CJ. Stated:

> ***"For something like 50 to 60 years no order had been made on the Crown side for the cross – examination of a***

deponent. It was enough to add that such an order was not likely to be made except in very special circumstances, and that no such special circumstances had been shown in the present case."

I find that the Respondents have not shown this Court that there are any special circumstances that would enable this court to exercise its discretion to allow cross examination on the affidavits.

The facts

In this case Anthony Paul of Mining District No. 3 whilst purporting to be a Mines Officer, issued a cease work order ordering that all work by mining dredge SD# 8270 and Platinum Mining Incorporated on the Far Eye claims cease,in the purported exercise of powers conferred on him as a Mines Officer under Regulation 98 of the Mining Regulations.

The applicant contends that his principal Joan Avahnelle Chang had granted him powers under Power of Attorney No. 3040/2006 and that by an Act of Substitution he had granted power to Wayne Heber of Lot 13, 6th Avenue Bartica to manage and work the claims at Far Eye on behalf of his principal. The applicant also stated that the said dredge SD# 8270 is owned by Wayne Heber in his personal capacity and not by Platinum Mining Incorporated.

Wayne Heber claims that he met with opposition from the Toshao of the Amerindian Village of Isseneru who alleged that the Far eye Claims 1-17 were located in the Isseneru Village area, therefore permission from the Isseneru Village Council had to be first obtained before mining operations could be carried out thereon.

The Far Eye 1-17 claims were held under claim licence by Ivor Chang, deceased, who was the brother of Joan Avahnelle Chang, who bequeathed all his real and personal property to Joan Avahnelle Chang for her own use and benefit, as evidenced by the last will and testament of Ivor Chang exhibited to the Affidavit in support of the Notice of Motion.

CERTIORARI

On 24th November, 2011 the first respondent Anthony Paul issued a cease work order under Regulation 98 of the Mining Act ordering

"that all work cease by:
Platinum Mining Inc.
SD # 8270".

The respondent Anthony Paul stated in his affidavit that a wages book and a register with the name Platinum Mining Inc. on the covers was shown to him by the General Manager and further deposed that Platinum Mining Inc. was "the declared owner" and no more.
On the other hand, the Applicant stated in her affidavit that Platinum Mining Inc. was never engaged in mining operations on the said claims and went further to produce to the Court a receipt from GGMC showing that Wayne Heber was the owner of the dredge SD # 8270.

Having regard to the receipt submitted, which was not denied by the respondents, there was nothing to show that Platinum Mining Inc. was a person who was mining on the land. Therefore I find that the respondent did not establish that Platinum Mining Inc. was operating on the IVC's land.

Additionally, the cease work order was also issued to SD # 7280. Regulation 98 does not contemplate issuing a cease work order on dredges. The cease work order is intended to be directed to a person or claim, in this case either the applicant or the estate of the deceased. Therefore the issue of the cease work order was misconceived and is a nullity in so far as it ordered a specific person, a company, which was not carrying on mining operations on the said claims to cease working thereon and in so far as it purported to have been issued against a mining dredge in contradistinction to a specific person or persons in general as specified in the said Regulation.

The said cease work order under Regulation 98 of the Mining Act was issued on the following grounds:

"Within proximity of GPS location 6.35230 & 60.36871 (.....degrees)

1. Conflict with claim, namely Far Eye and Isseneru Reservation
2. Permission from GGMC
3. No retort
4. No safety gears."

Regulation 98 states:

> ***"the commissioner, officer appointed by him or the mines officer may, where it appears to him absolutely necessary to do so for the maintenance of the public peace or for the protection of the interests of the state or of private persons, order that all work shall cease on a claim, either generally or by any particular person or persons and thereupon work shall be discontinued accordingly."***

The respondent mines officer Anthony Paul wrote that one of the grounds for the issue of the cease work order was due to "Conflict with claim, namely Far Eye and Isseneru."

The word "conflict" does not suggest that there was either a breach of the public peace or that the protection of the interests of the state or of a private person was an issue.

In paragraph 6 of his affidavit in answer in which he swore on behalf of himself and GGMC, the respondent deposed that he was advised by his "Attorneys-at-Law and verily believe that permission is required from the Isseneru Village Council to enter lands pursuant to section 5 of the Amerindian Act 2006 and neither the applicant nor Max Weber, nor Platinum Mining Incorporated had obtained such permission which was required as they, or either of them or their agents, had to traverse village lands in order to get to the claims FAR EYE 1-17."

In paragraph 10 of the affidavit in answer, he further deposed "that neither Platinum Mining Incorporated, nor the Applicant or her representatives or agents, had any lawful authority to be present on Isseneru village lands in violating of section 5(1) of the Amerindian Act and it was absolutely necessary to immediately issue an Order to cease

Work on the claim to prevent to continuing commission of a criminal offence as provided by section 5 (2) of the Amerindian Act, to maintain public peace in the Isseneru community in the interest of the state and to protect the interest of the residents of Isseneru Village."

Section 5 of the Amerindian Act 2006 states as follows:

> ***"a person … who wishes to enter Village Lands shall apply for and obtain the permission of the Village Council."***

Section 2 of the Amerindian Act 2006 states that ""Village lands" means lands owned communally by a Village under title granted to a Village Council to hold for the benefit of the Village."

Based on the aforesaid definition, the permission refers to titled lands and in this case to the State Grant No. 7865 which was granted in 2009 to the IVC subject to "s***ave and except all lands legally held."*** (dealt with below).

Since the Far Eye claims were held prior to the issue of the State Grant No. 7865, they would have been excluded under the words "save and except all lands legally held" and since the Far Eye claims were held prior to the commencement of the Amerindian Act 2006, section 5 of the Amerindian Act could not apply to the Far Eye claims.; therefore the respondent mines officer did not show cause why the order nisi of certiorari should not be made absolute.

Additionally, there is no authority for the issue of a cease work order under Regulation 98 of the Mining Act based on a breach of section 5 of the Amerindian Act 2006. In fact, the Amerindian Act 2006 imposes under section 5 (2) its own penalty for a breach of section 5(1) under paragraph (a) of the First Schedule and the penalty is a fine of not more than ten thousand dollars.

Furthermore the Amerindian Act 2006 does not state that permission is required from persons who acquired mining claims prior to the commencement of the Act.

This Court is of the view that this section can only apply to persons who now wish to enter village Lands for the purpose of Mining those Lands, to carry out scientific research, and who are now doing so for the first time, and does not refer to persons who already hold claim licences and have already been on the land prior to the Amerindian Act 2006.

With regard to the second ground for the issue of the cease work order, the first respondent also contended that the applicant was required to obtain permission from GGMC. The respondent Anthony Paul did not specify what were the particulars of the "permission" required from GGMC and did not make any mention of this in his affidavit in answer. Furthermore, this ground does not suggest that there was either a breach of the public peace or that the protection of the interests of the state or of a private person was an issue.

With regard to the third and fourth grounds, the respondent Anthony Paul did not refer to these grounds in his Affidavit in Answer; therefore he did not show cause, which he was required to do according to the nisi order granted on 7th December 2011.

Further, the respondent Anthony Paul did not show cause in his said affidavit in answer how these grounds established that it was "absolutely necessary" to order a cease work order.

Therefore on the cease work order itself, the first respondent failed to show that he had good cause to issue the cease work order on the aforesaid grounds.

The cease work order was badly issued and was not procedurally correct, since the cease work order that was made by the respondent Anthony Paul on 24th November, 2011 did not fall within Regulation 98 of the Mining Regulations.

PROHIBITION

The second respondent, the IVC, was directed to show cause why the order nisi of prohibition should not be made absolute which order prohibited the IVC from exercising

any form of control over mining operations on the FAR EYE 1-17 claims issued before the Amerindian Act 2006 came into operation.

The Applicant stated in her affidavit in support of Notice of Motion at paragraphs 8 and 9 that the Far Eye claims were the subject of a grant which existed before the Amerindian Act 2006 came into operation and that the grant of State Land No. 7865 which is registered in the name of the IVC expressly excludes all land legally held; therefore the Far Eye claims did not form part of the Amerindian titled areas held by the IVC because they were saved and excepted under the clause in the State Grant "save and except all lands legally held".

In response the IVC stated in their affidavit in answer that paragraph 8 is not admitted and they denied paragraph 9 but did not rebut the Applicant's assertions by stating anything to the contrary.

Under State Grant No. 7865 dated 22nd January 2009 of village land to Isseneru Amerindian Village it states specifically **"save and except all lands legally held."** The Grant states as follows:-

> *"Whereas the Amerindian Community of Isseneru Amerindian Village has from time immemorial been in occupation of a tract of land shown on a Plan dated 30th May 2008 and prepared in accordance with the Land Surveyors Act Cap 97:01 and Surveys (Special Provision) Act No. 29 of 1970, by R. Duesbury, Manager of Surveys and recorded at the Guyana Lands and Surveys Commission, as Plan No. 41344 a duplicate of which plan together with a duplicate of this grant are on record in the Guyana Lands & Surveys Commission, Georgetown, Demerara.*
>
> *AND WHEREAS in the aforesaid plan no. 41344 the said tract of land is described as follows:*
>
> *TRACT A The area commences ... point of commencement.*
>
> ***Save and except all lands legally held.***
>
> *TRACT B The area commences … point of commencement.*
>
> ***Save and except all lands legally held."***

"Isseneru Amerindian Village Council absolutely and forever the said tract of State Land hereinbefore described, all and singular the appurtenances and privileges thereto belonging and appertaining for and on behalf of the Amerindian Community occupying the said tract of land.

***PROVIDED** that this grant shall not confer on the grantee the right to any gold, silver, or other metals, ores, bauxite, gems, or precious stones, rocks, coal, mineral oil or uranium all of which shall remain vested in the state."*

In the case of "Application by Daniel Dazell No. 158 M – 2008, Chang J.A (Chief Justice (ag) dealt with the meaning of the words "save and except all lands legally held" in a State Grant and had this to say at page 17:

> **"Such words in such grants clearly indicate the State's respect for private occupational rights and its intention not to derogate from them outside of breach of any factual conditions or legal requirement which may attend them. Indeed any such derogation would invite constitutional challenge for breach of Article 142 which protects property rights."**

In the said Application by Daniel Dazell (Supra), Chang J.A (Chief Justice (ag) also found that the words "save and except all lands legally held" applies to claims or other occupational and transferrable rights over lands" but does not apply to prospecting permits. The Chief Justice (ag) quoted from **Dr Ramsahoye** in *The Development of Land Law in British Guiana"* and stated:

> ***"Taken alone the right to seek locations is nothing but a mere licence. However, the prospecting licence would appear to be possessed of a right which is sui generis being convertible and capable of spontaneous graduation from a mere personal right of a licencee into an interest in immovable property from the moment he has located his claim."***

The Respondent mines officer, has admitted in paragraph 7 of his Affidavit in Answer that the Applicant holds a mining licence for the said claims, while the second respondent did not deny that the applicant held claims licences.

The applicant stated in the affidavit in support that the Far Eye claim licences were held since 1989 and this was not denied by the second named respondent. The first respondent who issued the said claim licences, denied in paragraph 13 of the affidavit in answer that the Far Eye claim licence was issued in 1989, but admitted the claim licence in paragraph 7 of the said affidavit.

In the circumstances, the second respondent did not show cause that the Far Eye mining licences were not held since 1989 or prior to the coming into operation of the Amerindian Act 2006, nor have they shown cause that the said Far Eye claims were not excluded under the "save and except all lands legally held" clause in the State Grant No. 7865; therefore the IVC cannot exercise control over the Far eye mining claims.

The second respondent further stated in paragraph 8 of the affidavit in answer that they hold "Certificates of Title Number 421 of 2010 and 423 of 2010 which does not exclude lands on Block 121 214 and 721 217." The said respondent did not disclose how the Certificates of Title related to the Far Eye mining claims or state the relevance of the "Block".

The second respondent also went on to state at paragraph 11 of the affidavit in answer that the IVC "is the holder of Certificates of Title for village lands a portion of which is the subject matter of this Motion" and stated that the said certificates were attached to the affidavit.

Although the second respondent deposed that copies of the Certificates of Title were attached to the affidavit, no Certificates of Title were exhibited.

Even if the Far Eye claims were within the Certificates of Title, the certificates of title were issued in 2010 after the mining licence and State Grant and therefore the Far Eye claims would have been excluded by the State Grant. In any event, the Certificates of Title only give title to LAND and not mineral rights.

The second respondent further deposed that the IVC "lands are defined and demarcated on Plan No. 47027" and stated that the said plan was attached to the affidavit. However, they failed to exhibit same.

Having regard to the above, I do not find that the second respondent showed cause that the State Grant, the purported Certificates of Title to Land or the undisclosed plan referred to in their affidavit in answer in any way excluded the rights of the applicant to the Far Eye Mining Claims.

It is to be noted that the Applicant in not asserting ownership of village lands. The Applicant has stated in her affidavit that she has a claim licence and a claim licence relates to the right to mine the minerals found in the lands known as the Far Eye claims.

As Chief Justice Ian Chang stated in Application by Daniel Dazell (supra) the claim licence gives the holder a property interest which cannot be taken away by the State or the Amerindian Act. It is a property right guaranteed by the Constitution of Guyana.

The IVC contended that the applicant was required to obtain permission from them to carry out mining activities on the Far Eye claims under section 48.

Section 48 (1***) of the Amerindian Act states:***

> ***"a miner who wishes to carry out mining activities on Village Lands or in any river, creek, stream, or other source of water within the boundaries of Village lands shall***
>
> ***(a) Obtain any necessary permissions and comply with the requirements of the applicable written laws."***

This section refers to "anyone who wishes to carry out mining activities "ie persons who do not already have a claim licence, and who are now applying for a licence, such as a prospecting licence or permit, etc or who already have such prospecting permit or licence, which do not confer any interest in property as the claim licence does. However the GGMC has the power under the Mining Act as well as the Amerindian Act to ensure that the terms and conditions of the permit, etc are not breached.

Based on the aforesaid definition of Village lands, the permission refers to titled lands and in this case to the State Grant No. 7865 which was granted in 2009 subject to "s***ave and except all lands legally held.***"

Since the Far Eye claims were held prior to the issue of the State Grant No. 7865, they would have been excluded under the words "save and except all lands legally held" and since the Far Eye claims were held prior to the commencement of the Amerindian Act 2006, section 48 of the Amerindian Act could not apply to the Far Eye claims.; therefore the IVC did not show cause why the order nisi of prohibition should not be made absolute.

The issue as to which types of licences were caught under the Amerindian Act 2006 was dealt with by the Chief Justice Ian Chang JA in the following application.

IIn **Application by the Guyana Gold and Diamond Miners Association** No. 30/CM of 2012, Chang JA (Chief Justice ag) noted at page 10:

> **"If the application for extension of the village area were to succeed, it would mean that the applicant, not being the holder of a pre-existing claim, or mining licence, would become subject to certain obligations imposed by the Amerindian Act in respect of his prospecting operations."**

In the above case the GGMC had refused to renew the applicant's prospecting permits on the ground that the applicant's lands for which he held medium scale mining permits were within the boundaries of the proposed Amerindian titled lands for the Amerindian villages of Tesserine and Kangaruma. The Chief Justice held that the GGMC had no authority to refuse to renew the said mining permits.

In this case (supra) the Chief Justice concluded that persons who have only prospecting permits, and therefore " **not being the holder of a pre-existing claim, or mining licence would become subject to certain obligations imposed by the Amerindian Act in respect of his prospecting operations."**

Therefore a person who has a existing mining claim or licence prior to 2006 cannot be ordered to cease their operations on the ground that the claim is within the boundaries of the Amerindian titled lands issued subsequent to their acquiring title, and which specifically excluded all mining claims by virtue of the clause **"save and except all lands legally held"** as stated in the grant. In this case the Isseneru Village Council has no authority under the Act to cause the working of the Far Eye claims to be stopped.

The Isseneru Village Council stated in their affidavit that the applicant was obligated to comply with sections 48, 49 and 51 of the Amerindian Act 2006. It appears that these sections would apply only if the applicant had acquired the claims after 2006 and the claims also fell within the Amerindian titled areas.

Assuming a person obtains a claim licence after 2006 and which was situated within the Amerindian titled lands then the Isseneru Village Council would have authority to negotiate with the claimant or claim holder under section 48 and under section 48 (2) the GGMC may facilitate the consultation to be held under subsection (1) but may not take part in any negotiations, and to enter into an agreement under section 49 and the payment of tribute under section 51.

It therefore means that the GGMC has a nominal role and has not been given any authority under the Amerindian Act 2006 or the Mining Act to order a cease work order for breach of sections 48, 49 and 51. Instead a penalty is provided under the Amerindian Act 2006 for breach of section 48. In any event, lack of permission from the second respondent is not stated as a ground for the issue of a CWO by a mines officer.

Under Regulation 23 of the Mining Act, the terms and conditions of the mining licence are set out thereunder and these terms do not include any terms relating to permission from the Amerindians; therefore the aforesaid ground of "Isseneru reservation" does not constitute a ground to issue a CWO under Regulation 98 of the Mining Regulations and further, assuming but not admitting section 48 of the Amerindian Act requires a written agreement, the absence of such an agreement does not constitute a ground under Regulation 98 to issue a CWO.

It is to be noted that the mines officer Anthony Paul seems to contradict the IVC since in his Affidavit in Answer at paragraph 8 he seems to be saying that the Far Eye Claims were not within the lands held by the IVC but instead that the applicant was traversing the Amerindian titled lands to get to the Far Eye Claims and stated that the Applicant was required "to produce a permission from the Isseneru Village Council to enter and traverse their lands to reach the claims Far Eye 1-17".

Chang JA (Chief Justice ag) dealt with section 53 of the Amerindian Act 2006 and stated the following which supports the contention that the Amerindian Act 2006 does not apply to claim licences obtained before 2006.

Section 53 of the Amerindian Act provides:

> ***"subject to the other provisions of this part, if the Guyana Geology and Mines Commission <u>intends</u> to issue a permit concession, licence or other permission over or in***
>
> ***(a) Any part of any village lands***
> ***(b) Any lands contiguous with village lands, or***
> ***(c) Any rivers, creeks, waterways which pass through village lands or any lands contiguous with village lands.***
>
> ***The Geology and Mines Commissions shall first –***
>
> ***(1) Notify the village***
> ***(2) Satisfy itself that the impact of mining on the village will not be harmful.***

In the said application supra (**<u>Application by the Guyana Gold and Diamond Miners Association</u>** No. 30/CM of 2012) Chang CJ had this to say:

> **"Section 53 of the Amerindian Act relates to lands, rivers, creeks and waterways in respect of which the GGMC has not already issued a permit, concession, licence or other**

permissions. It has no application to any village lands or lands contiguous with Village Lands in respect of which the GGMC had already issued a permit, concession licence or other permission."

Section 53 therefore does not apply to a person who already has a pre-existing claim.

The GGMC has authority to ensure that the Amerindian Act is complied with in relation to those lands that form part of title lands, but where in this case the applicant has a lawful pre-existing claim licence for lands that are legally held and are caught under the clause "save and except all lands legally held" stated in the State Grant neither the GGMC nor the Amerindian Village Council can prevent the claimant form mining the lands. The licence creates an interest in the land which is excluded by the grant.

Thus the Applicant would have acquired an interest in immovable property from the moment the claim was located, and that is what the Applicant possesses, an interest that cannot be taken away under any provision of the Amerindian Act, nor under the Mining Act. for if this was so then "such derogation would invite constitutional challenge for breach of Article 142 which protects property rights." (Application by Daniel Dazell (Supra).

In such a case the lands would not be part of the Isseneru Amerindian Village since they would have been excepted under the words "save and except all lands legally held" in the State grant of lands to the Isseneru Amerindian Village.

It is rather unfortunate that the Guyana Geology and Mines Commission had granted the Far eye claim licences before the second respondent was awarded their title. It is obvious that the drafters of the State Grant took this into consideration when they included the words "save and except all lands legally held." It may appear to be manifestly unfair to the Isseneru Villagers but the Constitution of Guyana, by virtue of Article 142 has guaranteed all persons the right to property lawfully held.

For the reasons stated above, the court hereby makes absolute the nisi orders of certiorari and prohibition granted on 7/12/2011.

There will be costs to the applicant in the sum of $25,000.

……..
Diana F. Insanally

Dated this 17th day of January, 2013