

ALEXIOUS JACHA MUPFUTI

versus

MOLEEN MAKIYI

and

JAMES TEACHER KAMANGA t/a Jimmole Mining Syndicate

and

MINISTER OF MINES AND MINING DEVELOPMENT N.O.

HIGH COURT OF ZIMBABWE

CHINAMORA J

HARARE, 23 February 2022 & 15 February 2023

Court application for a declarator

Ms K Mahere, for the applicant

Mr C Chitekuteku, for the respondent

CHINAMORA J:

This is an opposed court application seeking the cancellation of a mine registration certificate. The applicant avers that, sometime in 1985, he was resettled and allocated a plot measuring five (5) hectares, namely, Plot 19 Village 10, Msengezi Resettlement Area. On p 7 of the record marked Annexure “A” is a letter dated 17 February 2020 from the Department of Agricultural and Extension Services (AGRITEX) which, inter alia, reads:

“We wish to bring to your attention that Mr Mupfuti is truly a beneficiary of our Plot 19 Msengezi Resettlement Scheme, Village 10 since 1985, which is only 5 hectares (5 ha) in extent. This plot has been his source of livelihood since then, and Ms Makiyi has been allocated a gold mine claim on Plot 19 and 20 and this has sparked the dispute”.

The applicant’s concern is that the first and second respondents were issued with a mining registration in respect of the plot that he occupies. The certificate of registration (Number 17118) appears on page 8 of the record marked Annexure “B”. It is the applicant’s contention that, since his plot is only 5 hectares, the mining authorisation ought not to have been given. This submission

is based on s 31 (1) (g) (ii) of the Mines and Minerals Act [*Chapter 21:05*], which provides as follows:

“Save as provided in Parts V and VII, no person shall be entitled to exercise any of his rights under any prospecting licence or any special grant to carry out prospecting operations or any exclusive prospecting order –

(g) except with the consent in writing –

(ii) of the owner or of some person duly authorised thereto by the owner, upon any holding of land which does not exceed one hundred hectares in extent and which is held by such owner under one separate title:

Provided that if such owner has one or more holdings which are contiguous and the total area of such contiguous holdings exceeds one hundred hectares this paragraph shall not apply to such holdings; or

(i) in case of a portion of Communal Land which does not exceed one hundred hectares in extent, of the occupier of such portion”. [**My own emphasis**]

Additionally, the applicant contended that the first and second respondents did not comply with the law by not seeking his consent before they commenced mining operations on his land.

The first and second respondents opposed the application and raised the preliminary point that the applicant had not pursued the mandatory dispute settlement remedies provided by the Mines and Minerals Act before coming to court. They submitted that, failure to engage those mechanisms was fatal to the application. In respect of the merits, they did not dispute that a mining registration had been issued to them which covers the applicant’s piece of land. However, their argument is that the land is not being used for farming purposes and is, therefore, not covered by the provision of the Mines and Minerals Act that he has referred to. The first and second respondents contend that Plot 19, Village 10, Msengezi Resettlement Area, is the applicant’s former mine which was forfeited by the Ministry of Mines and Mining Development. They rely on depositions that the applicant made in an application he filed in the Magistrates’ Court under Case No. CIV 22/20, where he admitted pegging his plot into a mine and attached the certificate of registration (Number 4737) and invoices for renewal of registration for the mine. Let me now examine the respective cases of the disputing parties. The point in *limine* need not detain this court, the existence of domestic remedies does not preclude the jurisdiction of this court. I recently confronted by a similar objection in *Twenty Third Century (Pvt) Ltd v Zimbabwe Manpower Development Fund & Ors* HH 506-22 . I took the view that there is nothing which prevents an applicant who perceives domestic remedies to be inadequate from approaching the

High Court as the applicant has done. For this reason, I dismiss the preliminary point for lack of merit.

The applicant contends that the relief which he seeks ought to be afforded, as the requirements justifying the granting of same are satisfied. His case is that the respondents neither sought nor obtained his written consent before embarking on prospecting or mining operations as required by section 31 of the Act. The relief which he seeks is the following order:

1. The Certificate of Registration Number 17118, issued in favour of the first and second respondents by the third respondent in respect of a mining claim, namely, Shamrock 2A which is situated on Plot 19, Village 10, Msengezi Resettlement Area, be and is hereby declared null and void.
2. The third respondent be and is hereby directed to cancel the Certificate of Registration Number 17118, issued in favour of the first and second respondents in respect of a mining claim, namely, Shamrock 2A which is situated on Plot 19, Village 10, Msengezi Resettlement Area.
3. The first and second respondents are hereby ordered to pay costs of suit on an attorney-client scale.

Central to the resolution of the dispute before me is the answer to the question: Does section 31 of the Act provide for cancellation of a certificate of registration if the prior written consent of the landholder has not been obtained? From a reading of this provision, while it prohibits the carrying out of prospecting or mining activities without first getting an occupier's consent, such failure does not *ipso facto* result in the nullification of the mining registration. Quite clearly, there is nothing in section 31 of the Act that justifies an application to nullify certificate of registration as opposed to compelling the miner to obtain the necessary consent. There is definitely no coherence between the conduct complained of (lack of written consent) and the relief sought (nullification of the mining certificate). In my view, the applicant has utilized the wrong remedy to deal with his dissatisfaction with the intrusion on his land without his written consent. I say so, because in *Mount Grace Farm (Pvt) Ltd v Jumua Metals & Minerals* HH 844-19, the disgruntled landowner applied for an interdict, and this court ordered all mining operations to cease until sections 31 and 38 of the Act were complied with.

As the applicant has approached this court for a declarator relying on section 31 of the Act which does not provide for cancellation of a certificate of registration if a landholder's prior written consent has not been obtained, I cannot grant the relief sought.

In the result, the application is dismissed with costs.

Mutatu & Partners, applicant's legal practitioners

Murambasvina Legal Practice, first and second respondents' legal practitioners

Civil Division of the Attorney General's Office, third respondent's legal practitioners