

SIDE ELECTRICAL (PRIVATE) LIMITED
versus
MINISTER OF MINES & MINING DEVELOPMENT N.O.

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 27 June and 19 July 2023

Court Application for Review

A Saunyama, for the applicant
D Machingauta, for the respondent

CHITAPI J: Prior to 7 June 2021, the applicant Side Electrical (Pvt) Limited a registered company in accordance with the laws of Zimbabwe was the registered holder of four mining certificates in relation to mining claims situated in an area called Maponga Siding in Bindura, Mashonaland Central Province. The certificates then held bare the registration numbers 46035, 46036, 46037 AND 46038. The mining blocks which are represented by the listed certificates of registration were called Botha 1 – Botha 4.

By letter dated 28 June, 2019, the Provincial Mining Director (“The Director”) for Mashonaland Central Province, M Muzemo N.O. issued to the applicant, a notice of intention to cancel the four mining claims Botha 1 – Botha 4. The Director noted in the letter that there had been mounted an operation on 21 December 2018 to rid the area of Kitsiyatota of illegal mining activities and that the operation had resulted in the closure of the mining activities of the applicant on the said blocks because of what were termed breaches. The breaches were not individually or collectively articulated save that reference was made to “Ref, MCENTRAL/Z/620/628/18” – without further details. The Director indicated that the continued illegal mining activities were affecting key infrastructure in the vicinity of the mining claims. In consequence thereof the Director indicated that a survey had been conducted on 21 and 22 May 2019 “to establish boundaries of existing mining title in relation key infrastructure in the area.

The Director indicated that the survey had shown that the applicant’s four claims encompassed a primary school called Downridge as well as railway infrastructure and further

encroached private premises within the surveyed limits of Bindura Town in violation of s 31(c) of the Mines and Minerals Act, [*Chapter 21:05*]. For purposes of context s 31 (c) of the said Act, reads as follows:

“31 ground not given to prospecting

(1) save as provided in part v and vii, no person shall be entitled to exercise any of his rights under any prospecting because or any special grant to carry out prospecting operations or any exclusive prospecting order –

(a)

(b)

(c) within the surveyed limits of any city, town, township or village, or upon a belt fifty metres in width outside such limits:

(d) – (h)

The Director indicated in the notice that the applicants’ blocks fell within the survey limits of boundaries of Bindura Town Council area and that the Town Council had not consented to the application of the applicant to peg the blocks. It was further stated by the Director that the applicant’s method of pegging of the claims did not comply with the provisions of the Act. The provisions violated or/not complied with were not articulated nor were the details of the non-compliance.

The Director then stated as follows in the notice:

“Your blocks of mining claims were therefore registered in error and as such the certificates of registration of the four blocks of mining claims should be cancelled in terms of section 50(a) and (b) of the Mine and Minerals Act [*Chapter 21:05*].”

The Director then gave notice that it was intended to cancel the certificates of registration and that the applicant could appeal to the respondent herein, the Minister of Mines and Mining Development by 28 July 2019. The letter was copied to the Permanent Secretary O M Moyo and the Chief Director – Technical Services Engineer CS Tanha. The Director stated on the last paragraph of the notice:

“Attached hereto is the survey diagram showing the position of your blocks of mining claims in relation to existing infrastructure and other mining titles.”

The applicant was advised to note the appeal and did so on 20 July 2019 in the following wording:

“Our ref: MNZ/mm

Your ref: MCENTRAL/Z/619/500/19

26 July 2019

THE MINISTRY OF MINES AND MINING DEVELOPMENT
6th Floor, Zimre Centre
Cnr L Takawira Ave/Kwame Nkrumah

HARARE

ATTENTION: THE HONOURABLE MINISTER

Dear Sirs,

RE: NOTICE OF APPEAL AGAINST NOTICE OF INTENTION TO CANCEL CERTIFICATE OF REGISTRATION OF FOUR BLOCKS OF MINING CLAIMS, BOTH 1 TO 4 REGISTRATION NUMBERS 46035 TO 46038 HELD BY SIDE ISSUED IN FAVOUR OF SIDE ELECTRICAL MINING (PVT) LTD

We refer to the above matter wherein we address you on behalf of Side Electrical Mining (Pvt) Ltd herein after called “the Appellant”.

We have been instructed to note an appeal, as we hereby do, against the Notice of Intention to cancel the above mining claims, which Notice was issued by the Provincial Mining Director for Mashonaland Central Province on 28 June 2019 (herein after called “the notice”. A copy of the Notice is attached hereto.

The grounds of appeal which shall be substantiated at the hearing as follows:

1. The Appellants’ block of mining claims aforementioned do not encompass Downridge Primary School, railway infrastructure and “other private premises” within the surveyed limits of Bindura Town referred to in the Notice, hence there is no violation of section 31 (c) of the Mines and Minerals Act.
2. In my case, the application for registration of the said claims had clear conditions which placed Downridge Primary School, the Railway infrastructure and all private premises outside the boundaries of the blocks of claims.
3. Bindura Town Council consented to the application for pegging of the said blocks of mining claims.
4. The blocks of mining claims in questions were not registered in error.
5. In any case, for provisions of the Mines and Minerals Act relating to the method of pegging of blocks of mining claims were substantially complied with.

Relief sought

- a. Appellants prays that the Notice be cancelled.
- b. Alternatively, Appellant prays that the necessary adjustments be made to place the boundaries of the blocks of claims in question within the confines of the law.

Yours faithfully

DUBE – BANDA, NZARAYAPENGA & PARTNERS

The applicant attached copy of the letter written by the Permanent Secretary to the applicant’s legal practitioners which referred to the pending appeal before the respondent. The letter is dated 27 November 2020. The contents of the letter read as follows:

“27 November 2020

Dube-Banda Nzarayapenga & Partners
19 Windsor Close
Mount Pleasant
Harare

RE: NOTICE OF APPEAL AGAINST THE NOTICE OF INTENTION TO CANCEL
CERTIFICATE OF REGISTRATION OF FOUR BLOCKS OF MINING CLAIMS
BOTH 1 TO 4 (SIDE ELECTRICAL (PVT) LTD)

Reference is made to your letter dated 7 October 2020 wherein you raised an appeal against the decision made by the Provincial Mining Director to cancel your client’s certificate of registration.

Please be advised that the Disputes Appeals Committee sat and deliberated on your matter on the 29th of October 2020 and is yet to conclude the matter as they still need the survey diagram, survey report and claims map from the Provincial Mining Director Mashonaland Central, which we are still to obtain.

You will be notified on the outcome of your appeal in due course.

O.M. Moyo
SECRETARY FOR MINES AND MINING DEVELOPMENT
c.c. Provincial Mining Director – Mashonaland Central

The applicant’s legal practitioners by letter dated 9 December 2020 responded to the letter by the Permanent Secretary. It is I think advised to copy the letter. It reads as follows:

“Our ref: MNZ/mm
Your ref: B/15/10

09 December 2020

The Ministry of Mines & Mining Development
6th Floor, Zimre Centre
Cnr L. Takawira Ave/Kwame Nkrumah Street
HARARE

Attention: The Permanent Secretary for Mines & Mining Developments

Dear Sirs

**RE: NOTICE OF APPEAL AGAINST NOSTICE OF INTENTION TO CANCEL
CERTIFICATES OF REGISTRATION OF FOUR (4) BLOCKS OF MINING
CLAIMS BOTH 1 TO 4 (SIDE ELECTRICAL (PVT) LTD.**

The above matter refers.

We write to confirm that we are in receipt of your letter dated the 27th of November 2020.

1. We have noted the contents of your letter and wish to advise that the Provincial Mining Director for Mashonaland Central has already furnished you office with the survey report and claims map.
2. With regards to the survey diagram, the Provincial Mining Director needs permission from your office to send a surveyor on site to prepare the survey diagram.
3. We kindly request that our office expedite the above process given the urgency of the matter.

Should there be any need for further clarification, please do not hesitate to contact our office.

Yours faithfully

DUBE – BANDA, NZARAYAPENGA & PARTNERS

Cc The Honourable Minister of Mines & Mining Development
Cc client (Side Electrical (Private) Limited)”

What is significant from the letter is that the applicant advised the Permanent Secretary that there was no survey diagram yet in place. The applicant requested for its preparation. The applicant averred that the survey diagram was never availed to it despite the request that it be prepared.

The applicant’s appeal was determined by the respondent as per the Minister’s determination dated 7 June 2021 and date stamped 16 June 2021. The appeal had been filed on 26 July 2019 a month shy of two years. The decision on appeal was in the following wording:

“7 June 2021

The Director
Side Electrical Mining (Pvt) Ltd
No. 1 Robert Mugabe

Bindura

Attention: Mr S Nyenza

**RE: APPEAL AGAINST THE CANCELLATION OF CERTIFICATES OF
REGISTRATION FOR BOTHA 1 TO 4 REGISTRATION NUMBERS 46035-8:
MASHONALAND CENTRAL**

After having received an Appeal in this matter in terms of Section 50 of the Mines and Minerals Act [*Chapter 21:05*] and taking into consideration all the relevant facts, I as the Honourable Minister of Mines and Mining Development have made the following decision:

1. The decision made by the Provincial Mining Director to cancel the Certificates of Registration for Side Electrical (Pvt) Ltd Botha 1 to 4 Registration Number 46035-8 on the basis that it was pegged on ground that was not open to prospecting and pegging in terms of section 31(c) and Section 50(a) and (b) of the Mines and Minerals Act is hereby upheld.

The Certificate of Registration for Side Electrical (Pvt) Ltd Botha 1 – 4 Registration Numbers 46035 to 46038 is therefore cancelled.

Hon W. Chitando

MINISTER OF MINES AND MINING DEVELOPMENT

The applicant was not satisfied with the decision of the respondent to uphold the decision of the Provincial Mining Director and to cancel the certificates of registration in question. The applicant then filed this application for review in which it claims the following relief as set out in the draft order to its application:

“IT IS ORDERED THAT:

1. The application for review is granted.
2. The decision by the Respondent dated 7 June 2021 and stamped 16 June 2021 to cancel the Applicant’s Certificates of Registration number 46035-46038 commonly known as Botha Mine 1 to 4 be and is hereby set aside; and
3. The Respondent shall pay costs of suit of this application.”

The applicant set out four grounds of review as follows:

“This application is made on the grounds that:

1. The decision by the Respondent to cancel the Applicant’s certificates of registration number 46035 to 46038 commonly known as Botha Mine 1 to 4 is procedurally unfair in that the Respondent did not provide reasons for his decision to cancel such certificates of registration.
2. The decision by the Respondent to cancel the Applicant’s certificates of registration number 46035 to 46038 commonly known as Botha Mine 1 to 4 is vitiated by gross irregularity in proceedings in that the Applicant was not informed of the outcome and the survey process done on 28 May 2021 and was not given an opportunity to be heard on such outcome which survey process was important and was used to inform the Respondent’s decision to confirm the cancellation of the Applicant’s certificates of registration.
3. The decision by the Respondent to cancel the Applicant’s certificates of registration number 46035 to 46038 commonly known as Botha Mine 1 to 4 amounts to gross

irregularity in decision in that there is no reasonable foundation to the decision of the Respondent to cancel the Applicant's certificate of registration.

4. The decision by the Respondent to cancel the Applicant's certificates of registration number 46035 to 46038 commonly known known as Botha Mine 1 to 4 amounts to gross irregularity in decision in that his decision is irrational and grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion."

In relation to the first ground of review to the effect that the respondent did not give reasons for his decision, the applicant contended that the respondent merely stated that the ground for cancellation of the applicant's certificate was that there was "an infringement of s 31(1) (c) of the Mines and Minerals Act but did not provide any reasons to substantiate this". In response the respondent averred that he only upheld what the Provincial Mining Director had stated in the notice of intention to cancel. The respondent further contended that by quoting s 31(1) (c), his reason was clear. He contended that the applicant was pretending that no reasons had been given, yet the reasons "were written in black and white".

The paper trail of events was that the Provincial Mining Director in the notice of intention to cancel (*supra*) indicated that the applicant's mining claims "encompassed" a primary school, encroached a private premises within surveyed limits of Bindura Town. It was also contended in the notice that the encroachments violated s 31(c) of the Act. It was further contended in the notice that Bindura Town Council had not consented to the application by the applicant to peg the blocks. Further still but without giving detail, it was contended in the notice that the method of pegging the claims were not substantially complied with.

It appears to me that the respondent gave reasons for cancellation of the certificates. The reasons were however not detailed. The crux of the matter was that the Provincial Mining Director indicated in the notice that he had attached the survey diagram which "showed the position of your (applicant's) block of mining claims in relation to existing infrastructure and other mining titles. There is no doubt that the survey diagram would show the encroachments and their extent. This would enable the applicant to appreciate the alleged violations of encroachments. In the letter of appeal to the respondent, the applicant in clear terms averred that its mining blocks neither encompass the primary school, railway infrastructure and "other private premises" nor were "the surveyed limits" of Bindura town Council encroached. The applicant persisted that there was no violation of s 31(c) of the Act. Significantly, the applicant contended that its application for registration had clear co-

ordinates which placed the primary school, railway infrastructure and private premises outside of the block of claims. The applicant also contended that Bindura Town Council had consented to the pegging of the claims.

The analysis of the grounds of appeal shows that the applicant put into issue the factual findings of the Provincial Mining Director. The respondent was required to individually address the grounds of appeal. The first respondents' decision does not show or suggest that he considered the grounds and dismissed them for reasons given as he was expected to. The respondent stated that he had considered "the relevant facts" and thereafter taken a decision to uphold the decision of the Provincial Mining Director. The respondent stated the basis for his decision as that the applicant's claims were pegged on ground not open to prospecting and pegging. He proceeded to cancel the registration certificates. The respondent did not indicate anywhere in his determination that he had considered the grounds of appeal let alone state that he did not find them to be without merit. Simply put, the first respondent faced with contrary allegations of fact on whether there was a violation of s 31(c) of the Act did not indicate the facts which he relied upon to dismiss the applicants' grounds of appeal. The factual dispute should have been resolved by the respondent. The resolution could not have been resolved by a simple pronouncement that the respondent had considered "relevant facts" in coming to a decision. The question "what relevant facts" remained unaddressed.

It was stated in the case of *State v Makawa and Another* 1991(1) ZLR 142(SC) in relation to the need for an adjudicating authority to give reasons for a reason as follows at p 146(D-E):

a "Although there are indications in this case that the Magistrate may have considered the case
to large portion of those considerations remained stored in this mind instead of being committed
is paper. In the circumstances, this amounts to as omission to consider and give reasons. There
gross in the proceedings.... see *R v Jokonya* 1964 RLR 236....."

Reasons for a decision must be related to in detail on paper in the decision disposing of the dispute, appeal of review as the case may be. See generally *Gwamadzimba N.O Eurta AG SC 10/15* and *Minister of Home Affairs and Director of Prisons v Austin and Harper* 1986(1) ZLR 240 (SC) referred to in the applicants' heads of argument. It follows that I am not persuaded by the respondent counsel's argument that reasons were given because the decision of the Mining Director which had reasons was uphold. The legal sterility of the argument is manifest in a failure to appreciate that in an appeal, what is at play are grounds of appeal when cannot be addressed and answered by a curt answer like "I have considered

relevant facts”. Simply put the respondent did not address his mind to the appeal and if he did then he did so and kept the deliberations stored in his memory. To do that, accounts for a gross irregularity. The applicants ground of review that the decision of the respondent was irregular for failure to give reasons has merit.

In relation to the second ground of review, the applicant averred that the respondents’ decision was irregular because he did not observe the *audi alteram partem* rule by not giving the applicant the opportunity to be heard on the survey process which was conducted on 28 May 2021. The applicant averred that the survey report was used to justify the decision to cancel its certificate of registration. Firstly, there is nothing in the decision of the first respondent to suggest that the first respondent based his determination upon a consideration of a survey report. If the first respondent did so then he unfortunately was coy and did not say anything about it. In any event, the first respondent would not have been justified to rely on a report prepared after the decision on appeal before him was made without seeking to involve the parties to the initial dispute as determined by the Provincial Mining Director. The first respondent in the opposing affidavit admitted implicitly that the Provincial Mining Director did not supply the survey report on which he based his decision to the applicant. He was content to say that the applicant did not follow up on the survey report/diagram. The applicant averred that the same was not forthcoming. The fact remains that the diagram was not supplied.

Grounds three and four raise the same issue of the unreasonableness of the first respondent’s decision. The issue raised is in my view unnecessary to address for the reason that without reasons for the decision, the reasonableness or unreasonableness or irrationality thereof cannot be determined. A decision or order flows from reasons for the decision or order. The respondent’s decision having been found to be irregular for the reason that it is not justified by any reasons or facts, means that there was no valid decision rendered and that is the end of the matter.

The last issue concerns costs which the applicant claims from the respondent. Costs are in the discretion of the court. The discretion is exercised judicially taking into account the peculiar circumstances of each case. The applicant did not in the founding affidavit or heads of argument motivate the claim for costs. In exercising its discretion, the court takes *inter alia* the general principle that facts follow the event. Recently MUCHAWA J dealt with principles relating to a costs award in the case *Ashley Radira N.O v Claudius Nhemwa N.O and 4 others* HH 97/23. The learned judge aptly quoted from the renowned authors on civil

procedure, Hebstain and Van Winsen in their book, *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 5th Edition; Volume Z P 954*, as follows:

“The award of costs in a matter is wholly within the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties.”

In casu, the decision reached is informed by a finding that the respondent did not give reasons for his decision and did not address the grounds of appeal. There was no allegation of bias, *malice*, corruption or abuse of power. There was sheer ineptitude by the respondent in dealing with the appeal. The respondent otherwise acted in terms of the law albeit he went about it wrongly. As a general principle, an administrative authority which has carried out its function should not be penalized for costs for procedural shortcomings only. To do so may end up with a result that such authorities will become scared or compromised in discharging their functions freely because of fear that they may end up being ordered to shoulder costs when their decisions are set aside on appeal or review by the High Court. The conduct of the respondent does not show anything untoward than his simply executing his functions. A procedural flaw occurred which unfortunately proved to be fatal to the decision reached. An appropriate order is one whereby each party bears its own costs.

I lastly need to comment on the unsatisfactory manner in which the applicant presented its case. The application is unnecessarily pregnant with facts and documentation which did not constitute part of the matters placed before the Provincial Mining Director and the respondent. A review is based upon a consideration of the proceedings before the decision maker whose decision is brought on review. Review is a quality control measure employed on an already baked and consumed cake so to speak. The review court does not consider new facts nor should a review be constituted by a founding affidavit drawn in a manner of making a claim and narrating the background and disputes in any greater detail than to simply place the review in context. The applicant is advised for the future not to waste the courts' time pleading irrelevant matter to the relief sought. Such conduct such conduct must be depreciated. A court would be within its right to deprive the errant party of its costs even if it succeeds as a mark of disapproval for wasting the court's time reading through irrelevant matter. Rule 59(1) provides that a court application “.....be supported by one or more affidavit setting out the facts upon which the applicant relies for relief”. The

rules provides that to the founding and supporting affidavit may be attached supporting documents.

In casu, the applicant filed an application for review. A review is founded upon the record of proceedings. A review court is concerned with the regularity or lawfulness of the process by which the decision made by the tribunal, inferior court or administrative authority has been arrived at. The review court engages in a qualitative analysis of the proceedings to ensure that the decision reached is fair, reasonable and lawful. It is for the reason that the merits of the grounds of review must be supported on the record that rr 62(4) and (5) were enacted. Subrule (4) provides that proceedings for review be instituted within eight weeks of:

“.....the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred.....”.

Subrule (5) provides that the record of proceedings in issue be lodged with the Registrar by the clerk or keeper of the record of proceedings brought on review. Simply put the review process like the appeal process is based on the consideration of the record of proceedings. The applicant and the respondent have no cause therefore to regurgitate what is on record nor to prepare a founding affidavit in which the claim or defence as the case may be in the form of restating the case or defence placed before the body whose decision is to be reviewed. This is what the applicant did in this case. It prepared a founding affidavit with attachments and presented its case as if the review court was a court of first instance. This was wrong and the applicant should be guided in the future.

Having expressed my disquiet on the manner in which the applicant presented this review case, I nonetheless and as I have already indicated found merit in the review. I make the following order:

IT IS ORDERED THAT:

1. The application for review succeeds with no order of costs.
2. The decision of the respondent to cancel the applicant's certificates of registration numbers 46035-46038, otherwise called Botha Mine 1 - 4 as communicated in the respondent's letter dated 7 June 2021 franked with the respondent's official stamp dated 16 June 2021 is hereby set aside.

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