BLACKGATE INVESTMENTS (PVT) LTD
versus
MINISTER OF MINES & MINING DEVELOPMENT
and
RAN MINE (PVT) LTD
and
G & P INDUSTRIES (PVT) LTD

HIGH COURT OF ZIMBABWE
KATIYO J
HAR ARE, 28 March & 10 August 2022

Court Application-Opposed

S M Bwanya, for the applicant
P Chibanda, for the 1st respondent.
Advocate D Tivadai, for the 2nd & 3rd respondents

KATIYO J: The applicant approached this court seeking an order for review of the first respondent as which was drafted as follows:

IT IS ORDERED THAT:

1. The application be and is hereby granted
2. The decision of the first respondent of 31 August 2021 be and is hereby set aside and the following shall stand in its place;
3. Applicant's registration certificates number 36375 and 37353 relating to claims known as Kimberley 18 and 19 be and are hereby confirmed.
4. First respondent is ordered to advise Applicant in writing and within seven (7) days of this order of any outstanding fees or levies due from it in respect of its claims Kimberley 18 (36375), Kimberley 19 (37353), Kimberley 20 (37354) and Kimberley 21 (37355) which payments applicant shall make within 60 days of receipt of such advice.

5. In the event that the first respondent does not comply with the paragraph above, the applicant's claims Kimberley 18 (36375), Kimberley 19 (37353) Kimberley 20 (37354) and Kimberley 21 (37355) shall be deemed to be duly licensed.
6. Second and/or third respondents be and are hereby ordered to cease forthwith any event not more than 24 hours after service of this order, any mining activities, construction and erection of mining equipment within applicant's claims.
7. Failure of which this order shall serve as a warrant of arrest against the Directors of the second and third respondents directing Commissioner General of the Zimbabwe Republic Police to arrest them and bring them before this court to answer charges of contempt of court.
8. The respondents jointly and severally, one paying the other to be absolved, pay costs of this application on a higher scale.

The court handed down an *ex-tempore* judgment dismissing the application and now gives its full reasons as follows. The full grounds for review are as follows:

1. The first respondent having properly construed the import of the Supreme Court order as being able to establish whether or not the following areas of dispute namely; Kimberly 18(36375), Kimberley 19(37353), Kimberley 20(37354) and Kimberley 21(37355), were forfeited or not at the material time he grossly misdirected himself in not determining that which he was ordered to determine, thereby ignoring the dictates and order of the Supreme Court.
2. The first respondent fell into gross error in making a single finding unrelated to the dictates of the Supreme Court order, relating only to Kimberley 18 (paragraph I of his letter) and proceeds to make a baseless decision in respect of Kimberley 19 (paragraph 2 of his letter)

3. The first respondent grossly misdirected himself on a point of law in applying Section 31 of the Mines and Minerals Act to a dispute which related to existing and lawfully issued mining claims over which, having regard to the evidence before the Dispute Committee, the said s 31 was not part of the determination he was ordered to make and, in any case, did not apply in the circumstances.
4. Respondent failed or neglected to determine the question of whether the forfeiture of the claims before applicant's pegging of same was ever revoked, to make such determination, the documents referred to in paragraph 7 hereunder were logically required.
5. As a result of the failure in paragraph 3 above, first respondent failed or neglected to determine the question of whether second and or third respondents had any rights over or were entitled to mine in claims known as Kimberly 18 19, 20 and 21 under registration certificates 36375, 37353, 37354 and 37355 respectively.
6. First respondent ignored the advice and reports prepared by his own staff that conducted the hearings and heard evidence on the dispute, in particular the report of the Mining Commissioner P Shumba dated 15 January 2010 and the conclusions of the investigative mission of ministry officials led by Commissioner Chieza.
7. In complying with the order of the Supreme Court in SC 296/11, first respondent failed in his constitutional obligations under s 196 of the constitution in not requiring the second and or third respondent to furnish the dispute committee with Reconstitution in not requiring the second and/or third respondents to furnish the dispute committee with:

   "(a), the/any map of their claims lawfully issued by the ministry of mines and mining development, (b) registration certificates issued in their favor over the Kimberley 18 and 19 and (c) forfeiture notices issued in respect of the claims in disputed. Their

revocation certificates issued against the existing forfeiture notices."

8. The first respondent failed to comply with the Supreme Court order in SC 296/11 as read with s 196 of the constitution in not investigating the claims by the first respondent Jack Murewa that the claims are owned and controlled by the "First Family" and were therefore unavailable to the applicant but to second and/or third respondent.
9. The first respondent's conduct exhibited gross bias in favor of the second and fourth respondents in that:

a) Sometime in 2019, the first respondent issued certificate of registration of the disputed claims in favor of second and/or third respondent without any written consent from the President of Zimbabwe as required in terms of s 31 of the Mines and Minerals Act.

b) During the subsistence of the dispute and after the granting of the Supreme Court order in SC 296/11, first respondent permitted second and/or third respondents to mine in the contested claims and to erect and construct mining equipment.

c) The announcement of second and third respondent's Mr. Jack Murewa captured in the media suggests that he became aware of the first respondent's decision under challenge before it was officially communicated.

BACKGROUND OF THE PRESENT LITIGATION

The first respondent's ministerial decision arises from an order of the Supreme Court in SC 296/11 a copy of which is attach to the application as "ANNEXURE C" directing the 1st Respondent to hear and determine specifically the question whether or not the claims in dispute has been forfeited at the time the applicant was registered as the holder of the claims.

Having failed to move the 1st respondent into compliance with the order cited above, applicant filed another court application before this court in HC 4431/20 in which first respondent was again ordered to give effect to the Supreme Court order

which is attached as annexure C.

FACTUAL BASIS OF THE APPLICATION

The applicant has been involved in a long-standing dispute with first and second respondents over mining claims in Bindura district. The applicant claims ownership of the said immovable claims which are namely; (a) Kimberley 18, registration certificate number 36375, dated 2nd September 2008 (b) Kimberley 19 registration certificate number 37353, dated 31 October 2008 (c) Kimberley 20, registration certificate number 37354, dated 31 October 2008 (d) Kimberley 21 registration certificate number 37355, dated 31 October 2008.

Applicant claims that its representatives discovered the claims after which it registered them through the relevant Ministry, the second respondent. According to the applicant the mine was abandoned way back in 1999. It alleges that a year after the registration, it filed a complaint against the first respondent on their bias towards the second and third respondents specifically that:

Sometime in 2019, the first respondent issued certificate of registration of the disputed claims in favor of second and/or third respondents without any written consent from the President of Zimbabwe as required in terms of s 31 of the Mines and Minerals Act [*Chapter 21:05*]. During the subsistence of the dispute and after the granting of the Supreme Court order in SC 269/11, the first respondent permitted second and/or third respondents to erect and construct mining equipment and mine in the contested claims.

The dispute escalated to the Supreme Court resulting an order referring the matter back to the Minister to reconsider the issue complained of. After the complainant was dissatisfied by the Minister's conduct, he approached this court where an order under HC 4431/20 for the 1st respondent to give effect to the Supreme Court order was granted in its favor. It is on this background that the applicant still feels that the conduct of the first respondent was not giving effect to the Supreme

Court order thereby bringing the current review.

Arguments

The Court has already put down the grounds of review by the applicant. The first and second respondents are opposed to this application as they hold the view that the applicant is off side. They argue that when the Supreme Court refereed back the matter it was not in any way ordering the issue be decided in the applicant's favor. Whether the 1st respondent did not decide in the applicant's favor does not amount to not fulfilling the Supreme Court or High Court orders. All what was required of the Minister was to constitute his committee and make a determination, which he did. Therefore, to approach this court on review is a misdirection not supported by any legal concept. If at all the applicant must have proceeded by way of an appeal. The respondents moved the court to dismiss the application on that basis.

The respondents also argued that the applicant has dirty hands for failing to purge his failure to comply with this court's order under case HC 7022/20 wherein his application was struck off with costs. They argue that despite being taxed he has not yet paid anything. This followed an urgent application on 4 December 2020. It was also argued that the Supreme Court in *Nhapata* v *Maswi & Anor* (2016) ZWSC 38 observed the following:

> "The applicant contends that the doctrine of dirty hands was inapplicable in this matter because there was no law which required him to comply with an order of the court before approaching the court for redress. This contention in my view is fallacious, besides being devoid of any legal basis. ... Accordingly, the failure of the applicant to comply with ... a lawful order of the court has the effect of tainting his hands with legal dirt. Such dirty hands can only be cleansed upon his compliance with the court order in question. It hardly needs emphasizing that, even if one may not agree with a court order and as long as it is extant, and execution thereof has not been stayed, one is obliged to comply with it before seeking to pursue other legal remedies."

This is a point emphasized in the case of *Econet Wireless (Private) Limited* v *The Minister of Public Service Labour & Social Welfare & Ors* HHC 350/15.

Accordingly, the applicant cannot seek this Honorable Court's assistance in

circumstances where it continues to ignore a lawful and extant order of the very same Court.

Incompetent order

The applicant asserts that its application is for a 'review' of the first respondent's decision. Yet its case and arguments are concerned with the substantive correctness of the reviewed decision as opposed to being limited to procedural correctness. It is trite that a review is not - and cannot be concerned with substantive correctness. As Professor Feltoe set out in "*A Guide 2013. 5th Edition* p 34 to the Administrative and Local Government Law in Zimbabwe":

> "The remedy of review must not be confused with that of appeal. The main difference between these two remedies is that in an appeal what is in question is the substantive correctness of the original decision whereas on review the High Court is not delving into the substantive correctness of the decision, but is only determining whether there were any reviewable procedural irregularities or any action which was reviewable because it was ultra vires the powers allocated to the tribunal, see *Tselentis Salisbury City Council* 1965 (4) SA 61 (SRA)."

The same point arises from the Ndamase decision quoted by applicant in para. 16 of its Heads of argument. This case held - as quoted by applicant - that the purpose of a review was "to correct the erroneous decision making". Which is to say, it is the decision making (process) and not the decision itself that has to be corrected.

An established principle is that the normal remedy in review applications is for the matter to be placed back to the decision-maker for a re-hearing - see e.g. *Director of Civil Aviation* v *Hall* (1990) (2) ZLR 354. This principle is not followed in exceptional situations, such as: where the outcome is inconclusive, where delay causes unjustifiable prejudice or where bias was exhibited. The applicant's founding papers do not address the legally tenable exceptional circumstances. This seems to have been an afterthought after having seen the opposing papers.

Secondly the common cause facts, in fact, contra-indicate the existence of exceptional circumstances. This is because, (as set out in detail below) the applicant pegged areas that belonged to the second and third respondents. In the

circumstances, the first respondent's decision was the only logical decision he could reach.

The respondents further argued that the issues brought about cannot be resolved on papers alone as the applicant cannot pin point which Minister he accuses of bias. The office has been occupied by a number of Ministers during the relevant period. Even on the merits of the matter the respondents are adamant that the decisions made are correct and factually speaking Kimberly 9 -18 claims belong to the second and third respondents. The respondents hold as unfortunate the serious allegations of serious inappropriateness. They also sought costs on a higher scale.

The applicant admits they used the wrong form, that is form 25 instead of 23 but argues that it is not fatally defective. It supported its argument with the case of *Trial Officer & Anor* v *Mucheto* HH 602/18 wherein the respondent raised the issue that the application was fatally defective as it was on form 29B when it ought to be on Form 29. The learned judge found no merit in that point. That approach is commended in the present case which for all intents and purposes exact to HC I1602/18. The second and third respondents are mistaken as to both the purpose and the interpretation of the rules and the objective of litigation.

The applicant went on to argue about administrative justice as a constitutional right under section 68 of the constitution whose enforcement is given effect by s 85(3) of the same Constitution. As cited, the constitutional provisions find expression in the *dicta* of MAKONI J (as she then was) in *Khan* v *Muchenje & Anor* HH 126/13 as follows:

> "It must be appreciated that rules are practical ones for the proper administration of the courts and a court must never be a slave of its own rules: See *Scottish Rhodesian Ltd* v *Honiball* 1973 (2) SA 747 (R) where BECK J (as he then was) said at p 748 "The Rules of court are not laws of the Medes and Persian and in suitable cases the court will not suffer sensible arrangements between the parties to be sacrificed on the alter of slavish obedience to the letter of Rules. See also *Nxasana* v *Minister of Justice & Anor* 1976(3) SA 74 S (D) at 781 where DIDCOTT J stated:
>
> "The rules, after all, are the court's tools, fashioned for its own use. They are more

> flexible, and more easily adapted to meet particular needs, than a statute can ever be."

Sentiments to the same effect were expressed by WINSEN AJA (as he then was) in *Federated Trust Ltd* v *Botha* 1978 (3) SA 645 A at 654 when he said:

> "The court does not encourage formalism in the application of the rules. These rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts."

This approach is consistent with the finding of MAFUSIRE J in *SADIQI* v *MUTESWA* HH 281/20 wherein he states that:

> "Lawyers are not hired guns, they are officers of this court. Litigation is not a game of wits. It is a serious in scientific process to solve disputes amongst individuals and to settle problems in the society."

The Incompetent relief objection

Ndamase & Ors v *Minister of Local Government & Land Tenure, Transkei & Anor* 1995 (3) SA defined the purpose of a review as

> "To correct the erroneous decision making". There is no law limiting the nature of such correction, the court's hands are not tied. The obligation on the first respondent arises from his obligation to obey two court orders (SC 296/11 and HC 4431/20) which he has failed to comply with and is therefore in violation of s 164(3) of the constitution? The relief sought can only be properly understood in the context that first respondent has for 11 years refused to comply with the order of what was the highest court in the country when that order was issued, His most recent attempt at compliance was secured after this court issued another order for his compliance. Without court orders, the first respondent is a law unto himself. It is correct that the general rule is for the court to remit the matter back to the public authority vested with the power to make such decision. The courts have referred the matter to first respondent twice for decision, he continues to fail in his duty. There are however permissible exceptions which all derived from the court's inherent power to develop the common law taking into account the interests of justice and the provisions of this constitution."

The permissible exceptions are set out by Herbstein & Van Winsen: *The Civil Practice of the Supreme Court of South Africa 5t Edition* as follows:

> "The court will not however, exercise administrative functions by substituting its

> own discretion for that body unless there are exceptional circumstances. For example, it is the duty of the licensing authorities (in the case of a review of the proceedings of a *quasi*-judicial, body) to decide on applications for certificates of approval. The court has a judicial discretion in that regard. The court will nevertheless order the issue of a certificate (or give the decision that should have been given by the body whose proceedings are reviewed) it the court has fully investigated the facts and is satisfied that the board or other body failed to exercise its discretion or, it did exercise it, was actuated by improper motives."
>
> "Although the court will, in case of a successful review, generally refer the matter back to the particular body entrusted by the legislature with certain or special powers rather than make the decision itself, it will not do so when the end result is a forgone conclusion and a reference back will merely waste time, when a reference back would be an exercise in futility, or when there are cogent reasons why the court should exercise its discretion in favor of the applicant and substitute its decision for that of the respondent.""

***Res Judicata* & Issue Estoppel**

Applicant admits having filed HC 07022/20 which was dismissed for lack of urgency by MANGOTA J. Argued that this court is at liberty to have regard to the contents of that record under the rule in *Mhungu* **v** *Mtindi* 1986 (1) ZLR 171. The applicant denies that the question of mining rights was ever determined as between the applicant and the second and third respondents. No judgement on the question was ever issued by a court of competent jurisdiction. The requirements of the *res judicata* clearly spell out that the matter before the court ought to have been determined by another court of competent jurisdiction. This point *in limine f*alls within the class of points *in limine* raised as a smokescreen as envisaged by MANZUNZU J's *dicta* "Points *in limine* must not be raised for the sake of raising dust in a matter. Legal practitioners must be discouraged from throwing missiles in all directions with the hope that one might catch up with the target. HH 602/18." See *Trial Officer & Anor* v *Mucheto* (*supra*).

On the Merits

Argued that the is set out in ss 68 and 196 of the Constitution as read with s 3 of the Administrative Justice Act. Efficient, reasonable, s 68 entitles the applicant to

prompt, proportionate, impartial and both substantively and procedurally fair. Applicant also has the right to receive written reasons for the decision made by administrative authorities such as the first respondent in the conduct of discharging their public power, the 1st Respondent is bound by the provisions of s 196 of the Constitution which provide.

Responsibilities of public officers and principles of leadership

> *"(1) Authority assigned to a public officer is a public trust which must be exercised in a manner which ---*
> *(a) is consistent with the purposes and objectives of this Constitution;*
> *(b) demonstrates respect for the people and a readiness to serve them rather than rule them*
> *(c) promotes public confidence in the office held by the public officer.*
> *(2) Public officers must conduct themselves, in public and private life, so as to avoid any conflict between their personal interests and their public or official duties, and to abstain from any conduct that demeans their office.*
> *(3) Public officers in leadership positions must abide by the following principles of leadership -*
> *(a) objectivity and impartiality in decision making;*
> *b) honesty in the execution of public duties;*
> *(c) accountability to the public for decisions and actions; and*
> *(d) the person concerned; and*
> *(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned."*

The codification of the rules of natural justice in both the constitution and in the AJA does not detract from this court's obligation to develop the common law in terms of which this application is made. See Section 176 of the constitution. It is Applicant's case that the Minister failed to consider the matter properly, thus his decision ought to be set aside. The challenged ministerial decision is on all fours with the challenged ministerial decision in *Littlewood* v *Minister of Home Affairs* 2006 (3) SA 474 SCA. In both cases, the Ministers involved had made decisions but in doing so had "failed to apply his mind to the question for decision".

Failure to Determine the Question Per Supreme Court Order.

The applicant contents that above is the yardstick against which the conduct of the first respondent in "hearing and determining of the question whether or not the claims in the dispute had been forfeited at the time the applicant registered as holder of the claims" must be measured. The answer to that question ought to be found in the first respondent's decision letter. It is submitted that to the extent that the answer to the question posed is not apparent ex face his decision letter of 31 August 2021, the first respondent failed to do that which he was required by law to do and therefore his decision ought to be set aside. Failure to do that which he was required to do is a ground of review.

Booysen & *Anor* 1992 (4) SA 69 (A) at 93 is authority for the proposition.

Unreasonable time & Failure to Comply with Time Frame

The Supreme Court order was issued in February 2013, the first respondent only made a determination in September 2021 after a period of 8 years. No explanation for the inordinate and prejudicial delay is contained anywhere in the decision letter. In September 2020, under case number HC4431/20, the HON. MUSITHU J in *Blackgate Investments Pvt Ltd* v *Ran Mine (Pvt) Ltd* ordered the first respondent to comply with the Supreme Court order SC 296/11 "within 30 days of being served with this order".

The Applicant is adamant that the first respondent did not comply with the Supreme Court and High Court orders.

Analysis

The arguments presented in this case are many but the issue for determination is just one. Whether or not the 1st Respondent complied with the court order or not. Compliance from Oxford Dictionary means "t**he action or fact abiding by a wish or command".**

The application is one which can be given as a classic example of emotionally charged one. The application seems to be a hybrid application. One

cannot pin point with certainty as to whether it is an application for an appeal, review, contempt of court or a constitutional matter. The applicant comes under the guise of a review application and yet within it are many other applications. There is a difference of one failing to comply and one complying but does so incompetently or otherwise. Compliance is a procedural issue as pointed out by the 1st respondents in this case. The mere fact he does-not agree with the first respondent's decision does not necessarily make it non-compliant. Failure to comply with a court order does not need review since it constitutes contempt on the party who fails to do so. As pointed out the application is more accusatorial than factual. The applicant of the various authorities who occupied the first respondent's office does not point who failed to comply. He seems to paint all the officials in that office with the same brush. He who alleges must prove his allegations. Let me point out that the applicant, well before the commencement of these proceedings, made unsubstantiated allegations of bias. The judge had to call him to order of which his legal team apologized. This is not to say where there is real apprehension of bias it should not be pointed out.

The alleged forged letter upon which the first respondent relies on is not clear as to how it was forged and by who. As reiterated above this is a case where a wrong application was made. As pointed out the court will not dwell on non-issues as doing so will be reinventing the wheel. The Supreme Court and the High Court simply ordered the respondent to comply and failure to do so is contempt, simple. This court is not there to interfere with an authoritative substantive decision but a procedural irregularity which will most likely result in bias or partiality. The court has no jurisdiction to interfere with an administrative decision unless is unreasonable and irrational to the extent that no one in the exercise of their administrative function would ever come to that conclusion. Compliance does not mean appeasing a particular party. Equally incompetence does not necessarily amount to non-compliance. As pointed out on the authorities cited, the applicant has totally failed to

demonstrate a prosecutable case as he clouded this application with non-issues. His grounds of review are nowhere near the contents of his application. One cannot have more than three grounds when the Supreme Court order was directing the first respondent to carry out his duties as required. Indeed, upon receiving the orders he constituted a committee where a decision was made but sticking to his original position regarding the claims complained of. The applicant might have been aggrieved by that decision but that does not necessarily constitute a procedural irregularity.

As pointed out by the respondents this is a misdirected application which does not point out the procedural irregularities but rather accuses the authorities of bias. This court cannot allow itself to be dragged into the dispute because all it has to do is to ensure that compliance with the rules of justice is achieved.

Conclusion

Having addressed my mind to the arguments as presented above, I am persuaded by the respondents that this is an incompetent review, seeking an incompetent relief. It cannot even be decided on merits. The applicant should reconsider a proper course of action and address his arguments in context. I am not persuaded that there was a procedural irregularity. If it was on the substantive decision as complained of then this is a wrong application. After the perusal of papers filed and hearing counsels.

IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. The applicant to pay costs.

Mutuso, Taruvinga & Mhiribidi, applicant's legal practitioners
Attorney-General's Office., respondent's legal practitioners