

CHRISTOPHER MAZEMBE

Versus

MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 5-16 October, 2023

Civil Review

F. Murisi for the applicant

C. Chitekuteku for the respondent

BACHI MZAWAZI J:

1. This court has been asked by the applicant to review the decision of the respondent of the 14th of October 2022, stamped on the 30th of November, 2022, on the basis of gross irregularity and unreasonableness as well as illegality. The application has been brought in terms of s27 of the High court Act [*Chapter, 7:06*] as read with s4 of the Administrative of Justice Act [*Chapter 10:28*]. It is contested.
2. The brief undisputed factual narrative is that, the applicant up to the time of this lawsuit, was a holder of mining rights in respect to Epson E2-E4 situated on Francey Farm, approximately 500 meters, South West of Epson Mine, Mashonaland West, mining claims. These had been registered on the 19th of May 2021 as borne by the mining certificates of registration.
3. However, the respondent, on the 31st of August 2022, served the applicant with a notice to cancel his mining title registration numbers 17734-36 (Epson E2-E4) for non-compliance with section 400 of the Mines and Minerals Act, [*Chapter 21:05*], which speaks to the periodical disbursements of outputs. The same notice of cancellation invited the applicant to make representations within a specified period therein to show cause why his mining rights should not be subsequently cancelled.

4. The applicant then filed his defense on the 28th of September, 2022 and served the respondent on the 29th of September 2022. In his show cause letter to the respondent, as well as, his oral submissions in court the applicant, proffered several reasons in support of his case, in an endeavor to persuade the respondent not to cancel his mining claims. Amongst these, are the facts that, he paid an admission of guilty fine to purge his default and evidence of his compliance with all the other provisions of the governing Act including the capital injected in infrastructure development, human capital and community social responsibility projects amongst other factors.
5. It is common cause that in terms of s400 (1)(a) of the Mines and Mineral Act, [Chapter 21:05], a registered miner has to declare and pay stipulated periodical payments to the respondent who is the National Mining Authority, through his designated points and agents. The section clearly and unambiguously places that obligation on the miner as soon as mining operations commences.
6. Both parties have different interpretations as to when mining operations commences in terms of s (400) (1)(a) of the Mines and Mineral Act, [Chapter 21:05]. Mr Murisi, for the applicant, argued that mining operations commences when the miner starts the actual reaping of minerals from the ground at the exclusion of prospecting, explorations and preliminary ground preparations and other ancillaries thereto.
7. On the other hand, Mr Chitekuteku, for the respondent, argues that the clock starts ticking the moment there is registration of mining rights which can be distinguished from exploration or prospecting stage which does not allow for the extraction of mineral.
8. That being the case, it seems the respondent was not swayed by the applicant's reasons and on the 5th of December plaintiff was served with a letter from the respondent dated the 14th of October, 2022, stamped the 30th of November, 2022 cancelling the above-mentioned mining rights. It is that decision which is subject to this review.

9. It is the applicant's case that the failure of the respondent to accept his representations was unreasonable, irregular, unfair and unjust warranting its overturning in terms of the provisions of the two Acts cited herein.
10. In light of the above, the issues are whether or not the decision of the respondent under impugn was grossly unreasonable or irregular? Whether or not the discretion of the respondent was irrational in the circumstances of the applicant's case?
11. It is established law that, as a general rule, Courts do not interfere with the discretion of subordinate courts, tribunals or quasi- judicial functionaries, as observed Makoni JA, in the case of *Gumbura and Anor v Mapfumo and Ors* SC10/22 and cases cited therein though addressing untermiated proceedings in a court of first instance.
12. The same sentiments were enunciated in, *Charuma Blasting and Earthmoving Service (Pvt) Ltd v Njainjai & Ors* 2000(1)ZLR 85 (S) that:
“... An appeal court will generally not interfere with the exercise of a judicial discretion by the lower court. However, the appeal court is entitled to substitute its discretion for that of the lower court where the lower court's exercise of its discretion was based on an error, such as where it has acted on a wrong principle, or it took into account extraneous or irrelevant matters or did not take into account relevant considerations or it was mistaken about the facts.”
13. The case of *Barros & Anor v Chimphonda* 1999(1) ZLR58 (S) at p62F-63A, further authoritatively states that:
“The attack upon the determination of the learned judge that were no special circumstances for preferring the second purchaser above the first one which clearly involved the exercise of judicial discretion, see *Farmers' Co-operative Society (Reg). v Berry* 1912 AD 343 at 350 may only be interfered with on limited grounds. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be renewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing.” (My underlining underscores instances where a court can interfere with discretion of a subordinate court).
14. In evaluation, the applicant admits to paying an admission of guilty fine but uses the fine as both a shield and a sword. From one angle, he says the payment of a fine

absolved him from his misfeasance and was adequate punishment for contravening s(400) (1)(a) of the Mines and Mineral Act, [Chapter 21:05].

15. From the other, he says the payment of a fine was only for the purpose of rapport as in actual fact, they had not committed any offence as they had not commenced mining operations which is a prerequisite for the violation of s400(1)(a) above. Mr, Murisi, counsel for the plaintiff's argument is commencement of mining operations means the actual excavation of minerals, which they had not yet embarked on at the time of the notice to cancel and the subsequent payment of a fine.
16. Whilst it is true literally that excavation of the minerals signifies actual mining operations, it does not seem so from the construction of the Mines and Minerals Act [Chapter 21:05] which differentiates mining certificates from prospecting ones. The latter being the prerequisite of the former, which cannot be issued without compliance with the prospecting requirements.
17. Reverting to the issue of the payment of a fine, the court is alive to the fact that the payment of an admission of guilty fine means the applicant was admitting to his non-compliance with the provisions of s(400)(1). It illustrates that he was acceding to the fact that mining operations had commenced and he had not declared his outputs as required by the Act. Therefore, his argument that in reality, mining had not commenced is both superfluous and self-contradictory.
18. In that regard, I find Mr, Murisi's submissions that they only admitted to the guilty for the sake of peace unpalatable. More so, when they still rely on the fine as their strongest ground in purging their default.
19. On further analysis, still on the issue of the payment of a fine, the essence of a fine is an admission of guilty to whatever charges, statutorily or criminally. It is meant to appease, purge or correct the wrong or the default. It is a penalty in its own right.

20. In comparison to a criminal offence, if one pays a fine he cannot be charged, prosecuted and convicted on the same offence. It will be double jeopardy. The legislature in its wisdom made provisions for the payment of a fine as an option amongst other penalties meaning it is an alternative punishment and an open avenue to be explored and exploited first before other sterner measures are taken. It can be likened to the first verbal, the written warning and so on in the labour or industrial relations.
21. Thus, in my view, from the import of this first cause or defence by the applicant alone, there was no justification in cancelling the applicant's mining rights after he had paid a fine and purged his default.
22. However, in rendition, I agree with Mr Chitekuteku's contention that, prospecting which is equivalent to exploration is the precursor of real mining rights. Hence, a prospecting license and a mining certificate are two different licenses with distinct life spans and mandates. The prospecting licence has a short two-year life span allowing for the identification of mineral rich ground and pegging of claims, whilst the mining certificates allow for the extraction of minerals from the ground of already pegged claims See sections 2 and 3 of the Mines and Minerals Act [*Chapter 21:05*]. See *Mount Grace Farm (PVT) LTD v Jumua Metals and Minerals (PVT) LTD and Anor HH844/19*.
23. Nevertheless, I am of the view that the respondent did not fully consider the applicant's representations. If he had done so he would have taken into account that the applicant's actions immediately after the issuance of the notice of intention to cancel illustrated his contrition, readiness to make amends and he did indeed comply with most if not all the requirements of the Mines and Minerals Act and its attendant regulations up to the time the decision to cancel was made.
24. The major infra-structure development, financial and human capital injection and social responsibility projects made applicant a valuable asset in the mining sector, who recognizes the plight of and ploughs into the neighboring community making him a rare gem. This omission to address the peculiar individual circumstances of the

applicant's case undermined the respondent's discretion as irrational falling foul of s5(h) of the Administration of Justice Act, [Chapter 10:28].

25. What can be termed irrational was described in the South African case, *Mystic River Investments 45 (Pty) Ltd & Another v Zayed Paruk Incorporated & Others (Case no 432/2022) [2023] ZASCA 54 (19 April 2023)* where it was held that the test for irrationality was stated by Lord Diplock in *CCSU v Minister for the Civil Service (1984)*³ All ER 935 at 951a as follows:

“By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’... it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.”

26. Sight cannot be lost, however, that indeed, the respondent followed due process in the issuance of the notice of intention to cancel embracing an invitation to make representations within the stipulated time frames, but to that end were his administrative actions within the purview of sections 3 and 4 of the Administration of Justice Act, [Chapter 10:28]. In that regard, it is the rationality of his decision that is put to test not the procedural aspect of his decision. It is also important to note that administrative authorities are entitled to use their discretion but it has to meet the reasonableness criterion when challenged. See *Grandwell Holdings (private) limited v Zimbabwe Mining Development and others SC5/20*.

27. In the circumstances of this case, as each case is treated on its own merits, s5 of the Administration of Justice Act, [Chapter 10:28] outlines the criteria under which a court can use to determine the rationality of an administrative decision. See *Ministry of Public Construction and National Housing v Zescon (PVT) LTD 1989 C21 ZLR311 al 318* where it was stated “The law is clear. This is a remedy to which a party is entitled as of right. It cannot be withheld or arbitrarily or capriciously”

28. Section 5 reads: For the purpose of determining whether or not an administrative authority has failed to comply with section 3 the High Court may have regard to whether or not;-

(h) a discretionary power has been exercised in accordance with a direction as to policy without regard to the merits of the case in question.

29. On further interrogation of the rationality of the respondent's discretion the court also took judicial notice of the fact the applicant placed, evidence of compliance in all the succeeding months after the notice of cancellation building up to the date of cancellation by making receipted payments through the respondent's designated offices and agents. The act of continuous receipt of his cash disbursements was an act of silent acquiescence, acceptance and condonation. As such the decision to cancel was irregular, unreasonable and had no rational basis.

Disposition

Applicant has succeeded to demonstrate that the discretion of the respondent was irrational in the face of the applicant's case and circumstances. It thus follows, the respondent's decision to cancel the applicant's claim after the payment of the fine and rectification of all his wrongs, was grossly irregular and unreasonable.

Accordingly,

It is ordered that:

1. The decision of the Respondent of the 14th of October 2022, stamped on the 30th of November 2022 cancelling the applicant's Mining Title in respect of Registration numbers 17734-36 (Epson E2-E4) situated in Mashonaland West Province be and is hereby set aside.
2. That the applicant's Mining Title in respect of Registration numbers 17734-36 (Epson E2-E4) situated in Mashonaland West Province be and is hereby restored and reinstated.

Murisi and Associates Applicant's Legal Practitioners
Civil Division of the Attorney General's Office.