

RETINUE STARS INVESTMENTS (PVT) LTD

Versus

OLYMPUS GOLD ZIMBABWE LTD

And

MINISTER OF MINES & MINING DEVELOPMENT N.O.

And

**PROVINCIAL MINING DIRECTOR,
MATABELELAND NORTH N.O.**

And

ENVIRONMENTAL MANAGEMENT AGENCY

And

CITY OF BULAWAYO

And

**DIRECTOR OF ENGINEERING SERVICES
OF THE CITY OF BULAWAYO**

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 13 SEPTEMBER 2022 & 02 MARCH 2023

Opposed Application

Advocate M. Tshuma with J. Tshuma for the applicant

B. Mataruka for 1st respondent

S. Jukwa for 2nd respondent

P. Ncube for 5th & 6th respondent

MOYO J: This is an application in terms of section 4 of the Administrative Justice Act (Chapter 10:28) wherein the applicant seeks an order that:

1. The development permit number 1006/2019 granted to the 1st respondent on the 4th of April 2019 by the 5th respondent and any subsequent renewals of same be and are hereby set aside.

2. The consent letter dated 12 October 2017 signed by the 3rd respondent on behalf of the 2nd respondent be and is hereby set aside.
3. The Environmental Impact Assessment Certificate for Voullaire Residential Estates (9127) granted by the 4th respondent be and is hereby set aside.
4. The letter dated 27 January 2021 by the 5th respondent seeking to stay the mining activity of the applicant be and is hereby set aside.
5. 1st and 5th respondents, jointly and severally, one paying the other to be absolved, be and are hereby ordered to pay costs of suit at an attorney and client scale.

The application involves a land owner and a miner and some administrative authorities. The dispute is that the miner is at qualms with the land owner developing residential properties near the mine. The miner is also aggrieved by the conduct of the 2nd to the 6th respondents who represent administrative authorities in that they should not have granted permits for such a development near the mine.

The respondents raised points *in limine*. The 1st respondent raised 3 preliminary points, that of lack of authority by the deponent to the founding affidavit filed by the applicant, which preliminary point was however abandoned by the respondent at the hearing of this application. The 2nd preliminary point is that of *lis pendens* which the 1st respondent also abandoned at the hearing of this application citing developments in a matter referenced as ACC 40.

The 3rd preliminary point is that on jurisdiction. This preliminary point is to the effect that this court must decline jurisdiction in the matter quoting section 7 of the Administrative Justice Act which provides that:

“without limitation to its discretion, the High Court may decline to entertain an application made under section 4, if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy should be first exhausted.”

The argument is that applicant can approach the Administrative Court as shown by its case there filed under cover of ACC 48/20. That the Administrative Court was set up to deal with the issues that applicant seeks to bring to this court in that the Administrative Court’s powers are to “review, confirm, reverse or set aside” the decision, order, or action concerned or refer the matter back to the body, person or authority concerned for further consideration. The contention is that applicant seeks to set aside administrative decisions by 2nd to 6th

respondents so the Administrative Court is the appropriate forum. It is further contended that in terms of section 172 of the Constitution of Zimbabwe, the Administrative Court was specifically set up to deal with decisions of administrative bodies and that if applicant goes to the Administrative Court, he will get the relief he seeks.

5th and 6th respondents also raised the preliminary point relating to section 32 of the Mines and Minerals Act and that failure to comply with that section is fatal to the application. They submit that it is common cause that the dispute is between a land owner and a miner and that applicant seeks to stop a development by the landowner. That there is a dispute as to whether the mine should continue mining and whether the land owner should continue with the residential housing project development. That section 32 of the Mines and Minerals Act is peremptory and that such a dispute should go to the Administrative Court. Section 32 of the Mines and Minerals Act Chapter 21:05 deals with “Disputes between land owners and prospectors” and it provides as follows:

“If any dispute arises between the holder of a prospecting licence and special grant to prospects or an exclusive prospective order and a land owner or occupier of land as to whether land is open to prospecting or not, the matter shall be referred to the Administrative Court for a decision” (with emphasis)

The 2nd preliminary point by the 5th and 6th respondent is that on the master plan, to the effect that it cannot be brought into question. The respondents quote in this regard section 7 (5) (n) of the Regional Town and Country Planning Act, which provides thus:

“Subject to the provisions of this section the validity of a master plan or local plan, whether before or after it has been approved, shall not be called into question in any legal proceedings and such plan shall become operative at the expiration of six (6) weeks from the date on which the notice notifying the approval of that plan is published in the Gazette.”

The respondents contend that even if applicant does not state that they are challenging the master plan, they are in fact doing so as the document at page 266 of the bound pleadings in paragraph 36 of the answering affidavit where applicant states that;

“further, the basis of this application is to find the decision of the 5th respondent in finding “nothing wrong” with building residences for men and women and children in downwind from an active gold mine, in an area that has been affected by mining activity spanning over more than one hundred years, is wholly and undeniably irrationally and unreasonable.”

Respondents contend that this in essence means that applicant is challenging the master plan because it is in the master plan that this land was so designated as residential land.

In response to the preliminary points applicant’s counsel submitted the following:

1. On the issue of jurisdiction

He submitted that this preliminary point should be dismissed as there are no internal remedies in applicant’s situation. He further submitted that litigants access to the High Court through section 69 of the Constitution and that this court cannot exercise a discretion to refuse jurisdiction and that the court cannot refuse to hear a matter that is properly before it.

It is my considered view that section 7 of the Administrative Justice Act Chapter 10:28, is applicable in this matter in that applicant’s counsel agrees that they are here in terms of section 4 of the same Act and because administrative authorities breached section 3 of the same Act. In other words we have a consensus that this is an administrative matter and that therefore the court can subject same to an assessment in terms of section 7. Section 7 is clear in that the High Court may decline to entertain an application made under section 4 if the applicant is entitled to seek relief through any other law whether by way of appeal or otherwise and the High Court considers that such remedy to seek relief through any other law whether by way of appeal or otherwise should first be exhausted.

The Administrative Court was set up in terms of the Constitution to cater particularly for the issues of litigants disgruntled by the decisions of administrative authorities. I will deal with this preliminary point together with the one dealing with section 32 of the Mines and Minerals Act as it is the one which points to which court this dispute should go. Whilst applicant has not conceded that this is a mine land owner collision of interests relating to land use, I find as a matter of fact that that is what it is. The applicant mine does not want places of residence within 450m of its operations and the land owner says it is my land and I have been permitted to use it as such causing the miner to then seek to overturn the permits

given to the land owner, so it is clearly a dispute governed by section 32 of the Mines and Mineral Act. Having found that the dispute is governed by section 32 of the Mines and Minerals Act, it then follows that there is a peremptory provision that directs the applicant to the Administrative Court as argued by the respondents. I accordingly uphold the point *in limine* on jurisdiction for the reason that this being a mining/ land ownership dispute the applicant should go to the appropriate court being the Administrative Court as directed by the Mines and Minerals Act (*supra*). Again that resolves the issues relating to the point *in limine* on section 32 of the Mines and Minerals Act. Therefore both these points are upheld.

These points dispose of the matter but I will go on to deal with the point relating to the master plan for the benefit of the parties. Applicant's counsel submitted that with regard to the preliminary point relating to the master plan, applicant has not raised any issues with the master plan. At paragraph 36 of the answering affidavit however applicant shows that the basis of the application is the decision of 5th respondent finding nothing wrong with building residences downwind from a gold mine. This in essence relates to the designation of land in the master plan. The master plan designates land purpose and a challenge to the purpose of land as a residential piece of land next to a mine is in fact a challenge to the master plan which designates the land as such. Clearly the master plan can only be challenged in the manner provided for in section 71 (5) of the Regional Town and Country Planning Act (*supra*) which provides that a master plan shall not be called into question in any legal proceedings. I accordingly uphold this point *in limine* as well. The points *in liimine* have the effect of barring these proceedings and thus disposing of the matter.

I accordingly dismiss the application with costs. I will not award punitive costs as requested as I hold the view that applicant's case was not frivolous and vexatious in the circumstances.

The application is accordingly dismissed with costs.

Messrs Webb, Low & Barry, applicant's legal practitioners
Gill Godlonton & Gerrans, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd & 3rd respondents' legal practitioners
Coghlan & Welsh, 5th & 6th respondents' legal practitioners