REPORTABLE (74)

QUARRYING ENTERPRISES (PRIVATE) LIMITED
v
1) SOUTHERN GRANITE (PRIVATE) LIMITED (2) MINISTER OF MINES & MINING DEVELOPMENT (3) THE PROVINCIAL MINING DIRECTOR

SUPREME COURT OF ZIMBABWE
UCHENA JA, CHIWESHE JA & MUSAKWA JA
HARARE: 20 JANUARY 2022 & 26 JULY 2023

T. Zhuwarara, for the appellant.

S. Moyo, for the first respondent.

No appearance for the second respondent.

No appearance for the third respondent.

MUSAKWA JA: This an appeal against refusal to grant an interdict and the granting of a declaratory order in an application for review by the High Court (the court *a quo).*

FACTUAL BACKGROUND.

The facts of this matter are common cause. The appellant and the first respondent are companies duly incorporated in terms of the laws of Zimbabwe. On 22 June 2007, the second respondent published a forfeiture notice in terms of which part of the notice related to mining claim number 26736, known as Mutuwi. The mining claim was registered in the name of an entity known as Dimension Stone Quarries (Private) Limited. The notice stated that the mining location had on

20 June 2007 been forfeited in terms of the Mines and Minerals Act [*Chapter 21:05*] (the Act). It also stated that it was open for re-allocation in terms of s 272 of the Act unless revoked on or before 10 July 2007.

Following the forfeiture notice, the first respondent pegged the mining location and it was issued with a Claim Certificate No. 32675BM on 28 September 2007. The first respondent paid all the inspection fees from 2007 to the date of the application for review. On 4 April 2018, the second respondent wrote to the first respondent advising it of the notice of intention to cancel the certificate of registration. The notice was issued following a complaint by the appellant that there was over- pegging on its claim. The second respondent further advised the first respondent that it had discovered that the blocks were overlapping each other. It was also noted that the appellant was the prior pegger. In view of the discoveries, the second respondent advised of his intention to cancel the certificate of registration issued to the first respondent in terms of s 50 (2) of the Act. The reason given was that when the block was registered the area was not open to prospecting and pegging. The letter further advised the first respondent of its right to appeal to the second respondent if aggrieved by the determination.

The first respondent noted an appeal with the second respondent, who decided that the prospecting and pegging by the first respondent violated s 31 of the Act and ordered cancellation of the first respondent's claim. Following the dismissal of the appeal, the appellant filed an urgent chamber application under case number HC 11538/18 for an interdict on 13 December 2018. The urgent chamber application was struck off the roll as the court found that the matter was not urgent. The appellant proceeded to file a court application in which it sought to interdict the first

respondent from carrying out any mining operations, in particular the extracting and mining of any granite mineral ore from the boundaries of the claim number 26736BM and further from exporting, selling or in any way disposing of the granite whether in its raw or processed form.

At the hearing of the matter, the appellant argued that it is the lawful owner and holder of the claim in question and contended that the notice of forfeiture in respect of Dimension Stone Quarries was revoked on 2 July 2007. It further argued that the mining location was initially held in the name of Dimension Stone Quarries (Private) Limited before transfer to Ruenya Granite in 2005 and eventually to itself on 15 May 2008. The first respondent counter argued that it legally acquired the mining claim during the period of forfeiture.

On 14 December 2018, the first respondent filed an application for review before the court *a quo* under case number HC 11561/18, seeking an order reviewing and setting aside the decision of the second respondent to cancel its certificate of registration. The grounds of review were that the Minister did not apply his mind to all the material facts placed before him. It further contended that the decision was made in circumstances which violated the first respondent's rights. It was also contended that the decision was marred by procedural irregularities including failure to hear the first respondent before making a decision affecting its rights.

The two interrelated applications were consolidated by an order of the court *a quo* and a composite judgment was passed, which is the subject of this appeal. The issues that were presented for determination before the court *a quo* were as follows:

1. Whether the Forfeiture Notice No. 9 of 2007, item No. 1041 was revoked.

2. Whether Southern Quarries lawfully acquired the claim number 32675BM.
3. Whether Quarrying Enterprises has proved a case for an interdict.
4. Whether Southern Granites has proved a case for the review and setting aside of the decision of the minister.

COURT *A QUO'S* FINDINGS

In relation to the first issue for determination, the court *a quo* found that Forfeiture Notice No 9 of 2007 was not revoked. It reasoned that there was no evidence of revocation of the notice effected on 2 July 2007 or on any other date at all. It found that the appellant could not have acquired the claim on 15 May 2008 because it was not available for acquisition at that point in time.

On the second issue for determination, the court *a quo* found that the claim was lawfully acquired by the first respondent. It reasoned that the Ministry of Mines accepted the pegging by the first respondent, registered the claim in its name and collected the requisite fees from it. It therefore followed that the first respondent had lawfully acquired the claim. On the third issue, the court dismissed the application for an interdict on the basis that the appellant had not met the requirements for the final interdict sought. The court reasoned that the cancellation of the first respondent's registration certificate by the second respondent was null and void and therefore the appellant had failed to establish a clear right to the mining location in dispute. It also found that the appellant had failed to prove any injury actually committed or reasonably apprehended, as there cannot be injury where there is no right. The appellant's failure to prove that it had a clear

right also meant that the consideration whether there was no other satisfactory remedy was purely academic.

With reference to the application for review, the appellant raised a point *in limine* to the effect that the application did not state the applicable law under which it had brought the application. It argued that the application did not meet the requirements set out in s 27 of the High Court Act [*Chapter 7:06*] which sets out the grounds for an application for review, consequently there was no application for review before the court. The preliminary point was dismissed as the court found that the grounds of review advanced by the first respondent relied on unreasonableness, irrationality and procedural fairness. These grounds of review are provided for in s 5 of the Administrative Justice Act, in particular s 5 (j), (k), and (n). In addition, the court found that failure to identify with any precision the provisions of the Administrative Justice Act upon which the first respondent relied was not fatal to its cause of action.

On the merits of the application, the court held that the decision of the second respondent was not justifiable. It also found the decision to be irrational as the second respondent's conduct to delegate his statutory powers to a committee denied the first respondent the right to procedural fairness. The court *a quo* found that the decision to cancel the first respondent's registration certificate was irrational. It found that the proper procedures were not adhered to in arriving at the decision. Regarding the appellant's application for an interdict, the court ruled that the appellant had failed to establish the requirements for an interdict.

In the result, the application for an interdict in case number HC 11538/18 was dismissed with costs. The decision by the second respondent cancelling the first respondent's registration certificate was set aside with the appellant, second respondent and third respondent jointly and severally, each paying the other to be absolved the costs of suit in case number HC 11561/18.

Aggrieved by the decision of the court *a quo*, the appellant noted an appeal to this Court on the following grounds:

GROUNDS OF APPEAL

The grounds of appeal are as follows:

1. "The court *a quo* erred in determining that under case HC 11561/18 the first respondent had lodged valid petition for review. It is an immutable requirement of our law that in an application for review, the cause on which such review is predicated must be enunciated in the founding papers and not the answering affidavit or heads of argument as the first respondent did *in casu*.
2. The court *a quo* erred in setting aside the second and third respondents' 'decision to cancel the first respondent's certificate No 326775BM. The said court fell into error by precipitously ignoring the documented findings of the second and third respondent, rehearing the disputation *inter partes* and thereafter substituting its discretion for that of the administrative authorities empowered by the State.
3. Further the court *a quo* erred in declaring the first respondent as the lawful and valid holder of the Mutuwi Mine Claim. A declaratory order of such genus cannot be actuated by a

petition for review, more so in case where the evidence led *a quo* conclusively demonstrates that the first respondent was, after investigation, adjudged to have pegged on a claim that was not open to prospecting and pegging.

4. The court *a quo* grossly misdirected itself in finding that the appellant's registration certificate No. 26736BM over the Mutuwi Mine Claim had been rendered ineffectual on account of forfeiture. Such determination is in clear incongruity with the facts before the court *a quo* more distinctly because such finding did not take into consideration that the second and third respondents as custodians of the mining records, had investigated and determined that such forfeiture had been revoked and the appellant was the lawful holder of the claim.
5. The court *a quo* erred in refusing the appellant an interdict. *In casu* the appellant had predicated its cause for such interdict on the determination(s) of the second and third respondents which determination afforded the appellant a clear right and concomitant entitlement to the injunction sought.
6. The court *a quo* grossly misdirected itself in finding that the appellant had no cognizable right to the mining claim in issue. Such determination is palpably irregular when one turns to the facts more particularly the inspection certificates produced by the appellant as well as the result of the investigation carried out by the second respondent.

RELIEF SOUGHT

TAKE FURTHER NOTICE THAT the appellant seeks the following relief:

1. That **t**he instant appeal succeeds with costs.
2. That the order of the court *a quo* be set aside and substituted with the following

1. The application for review lodged under HC 11561/18 is dismissed with costs.
2. The respondent in HC 11538/18, its employees and all those claiming occupation of the area falling within the applicant's claim No. 26736BM be and are hereby ordered to vacate from the boundaries of the said claim within 5 days of this order.
3. In the event of the respondent in HC 11538/18 failing to vacate in terms of para 2 herein the sheriff or his lawful deputy be and is hereby authorised to evict the respondent and all those claiming occupation through the said respondent.
4. The respondent's mining operations on the applicant's claim, claim No 26736BM be and are hereby declared unlawful.
5. The respondent under HC 11538/18 is to pay costs of the application on a legal practitioner client scale."

APPELLANT'S SUBMISSIONS.

Mr *Zhuwarara* for the appellant submitted that the court *a quo* erred in issuing an order for a declaratur under the guise of a review. He added that the application for review was defective as it did not postulate the grounds as set out under s 27 of the High Court Act [*Chapter 7:06*]. He argued that the court departed from the common law review and reverted to the Constitution and the Administrative Justice Act. He further submitted that the court *a quo* reheard the matter and substituted its judicial role for that of an administrator to come to a determination that the second respondent was wrong. Thus, the court rewrote the standard on how to relate to an administrative authority's decision.

In relation to the application for an interdict that was before the court, Mr *Zhuwarara* submitted that the interdict was not based on the alleged forfeiture. Rather the interdict was predicated on the Minister of Mines' decision which was in favour of the appellant and remained extant. With reference to the application for review, Mr *Zhuwarara* submitted that the application did not specify the law under which it was premised and to that extent it was fatally defective. He argued that the application did not meet the requirements set out in s 27 of the High Court Act which sets out the grounds for an application for review, consequently there was no application for review before the court.

FIRST RESPONDENT'S SUBMISSIONS.

Per contra, Mr *Moyo* for the first respondent submitted that there was nothing in the rules of the court that states that one cannot seek other relief in an application for review. He submitted that in an application for review, the court could either set aside, correct proceedings or correct the decision. The court can substitute its own decision where remitting the matter would cause undue delay or where the proceedings under reviewed are marred with gross incompetence.

With reference to the application for an interdict that was before the court *a quo*, counsel submitted that when the application was declared not urgent, the appellant filed a court application for a final interdict but failed to demonstrate that it had a clear right to the mining claim. This was so as the Minister of Mines had not cancelled the first respondent's mining certificate as the procedure set out in terms of s 50 of the Mines and Minerals Act [*Chapter 21:05*] for the cancellation of a mining certificate had not taken place. On the issue of the grounds for review, counsel argued that the grounds for review pleaded in the court *a quo* were correct as the

appellant had conceded that the Minister's decision should be set aside. Finally, Mr *Moyo* prayed that the appeal be dismissed as it was devoid of merit.

ISSUES FOR DETERMINATION.

Arising from the appeal, the following issues fall for determination.

1. **Whether or not the court *a quo* erred in setting aside the second and third respondent's decision to cancel the first respondent's registration certificate.**
2. **Whether or not an application for review can be combined with a declaratur.**
3. **Whether or not the court *a quo* erred in refusing to grant the interdict sought by the appellant.**

APPLICATION OF THE LAW TO THE FACTS.

Whether or not the court *a quo* erred in setting aside the second and third respondent's decision to cancel the first respondent's registration certificate.

Section 50 of the Mines and Minerals Act [*Chapter 21:05*] (the Act) sets out the procedure for cancellation of a certificate of registration. It provides as follows:

> "(1) Subject to subsection (2) the mining commissioner may, notwithstanding subsection (1) of s 58, at any time cancel a certificate of registration issued in respect of a block or site if he is satisfied that;
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> (a) at the time when such block or site was pegged it was situated on ground reserved against prospecting and pegging under s thirty-one or thirty-five on ground not open to pegging in terms of subsection (3) of s two hundred and fifty-eight; or
> (b) provisions of this Act relating to the method of pegging a block or site were not substantially complied with in respect of such block or site."

In a case which falls under subs (1), the second and third respondents are required to act in terms of subs (2) and (3) which provide that;

> "(2) At least thirty days before cancelling a certificate of registration under sub section (1) the mining commissioner shall give notice to the holder of the block or site of his intention to cancel such certificate and of the grounds for such cancellation and of the proposed date of such cancellation, and shall at the same time inform the holder that he may, at any time before that date, appeal in writing to the Minister against such cancellation.
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> (3) Such notice shall be given by registered letter addressed to the holder of the block or site at the postal address recorded in the office of the mining commissioner or, if no such address is recorded, by publication thereof in the Gazette."

There was no compliance with any of the above provisions relating to the cancelation of the registration certificate. What the second respondent did was merely to announce the cancellation and directing the office of the Provincial Director to attend to the matter.

The import of s 50 (1) (a) above is that a cancellation can only take place where the pegging is done on reserved ground or on ground not open for pegging or where the provisions of the Act relating to the method of pegging a block or a site were not complied with. Only the mining commissioner has the authority to cancel a certificate of registration. In the event that a party appeals, the Minister has the prerogative to give directions to the mining commissioner as to whether or not the certificate of registration has to be cancelled. The party that appeals has to be afforded the opportunity to be heard before the Minister gives directions to the mining commissioner. A thorough reading of the record shows that the first respondent was not given an opportunity to make representations before the Provincial Mining Director of Mashonaland East decided to write a letter of cancellation of the registration certificate. Further, the first respondent

did not receive any notification from the Minister of Mines and Mining Development prior to the notice of intention to cancel the certificate of registration on the basis that the appellant had complained of over-pegging. In the case of *BMG Mining (Pvt) Ltd v Mining Commissioner Bulawayo & Ors HB-05-11* the procedure for cancelling a mining claim was extensively discussed by MATHONSI J (as he then was) who stated the following:

> *"*If a cancellation is done by the 1st respondent in breach of the Act, such cancellation is void *ab initio* because anything done by an official in excess of the powers conferred upon him or without following the procedure for such cancellation is null and void. *Musara versus Zinatha 1992* (1) ZLR 9 (H) at 13A. In that case Robinson J went on to state at 13B –C that an interested person should be at liberty and entitled, at any time, to approach this court for an order declaring the act in question to be null and void and that the court should be slow to turn a party away where it seeks a declaratory order about its status. At 13F the learned judge concluded that:
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> > 'I consider that the same approach should be adopted by the court in a civil case where, on the papers before it – the more so where those papers seek a declaratory order – an act of glaring invalidity is, as in this matter, staring the court straight in the face. For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void *ab initio* on some technical ground would, I agree, be to ignore the courts fundamental duty to see that justice is done which, after all, is the duty which the layman expects the courts to discharge."'

It is pertinent to take cognisance of s 58 of the Act. It provides that when a mining location or a secondary reef in a mining location has been registered for a period of 2 years it is not permissible for any person to dispute title in respect of such location. The first respondent registered its claim in 2007. It had been paying fees from the time of registration until the cancellation of the certificate of registration. It is untenable for the appellant to challenge title and unlawful for the second and third respondents to cancel the registration certificate in the absence of proof that the forfeiture was revoked. Clearly, the second and third respondents failed to take cognisance of s 58 of the Act.

We do not agree with Mr *Zhuwarara*'s contention that the court *a quo* erred in setting aside the second and third respondents' decision to cancel the first respondent's registration certificate. To deny the first respondent audience in the face of glaring irregularities on the part of the second and third respondents amounts to an abdication of duty. This was in the face of clear violation of the Act.

WHETHER OR NOT AN APPLICATION FOR REVIEW CAN BE COMBINED WITH A DECLARATUR.

Concerning the ground that the court erred by allowing the first respondent to seek a declaratory order by way of a review application, it is our view that the court *a quo* adequately addressed the issue. Mr *Zhuwarara* argued that it was not permissible to seek substantive relief in an application for review. However, Mr *Moyo* submitted that a court application for review can be combined with an application for substantive relief. He cited the cases of Affretair *P/L & Anor v MK Airlines (Pvt) Ltd 1996(2) ZLR 15, Mutare City Council v Mudzime 1999 (2) ZLR 140 (S) & Mawere v Minister of Justice 2005 (1) ZLR 317* in support of his contention.

The approach in such matters was set out by McNALLY JA (as he then was) in the *Affretair* case *supra.* Quoting from BAXTER *Administrative Law*, the learned judge of appeal said at p 24 D-E:

> "The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislature. Thus, it is said that: '[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In

> exceptional circumstances this principle will be departed from. The overriding principle is that of fairness." (my emphasis)

It is not an absolute position that a court will not substitute its own decision for that of the administrative functionary. In exceptional circumstances, it will. In other words, the courts have a discretion to grant a declaratory order in an application for review when it is in the interests of justice and fairness to do so. A court will substitute its own decision for that of the administrative functionary in exceptional circumstances. There are four criteria. These were discussed by McNALLY JA in the *Affretair* case and aptly summarized by Gwaunza JA (as she then was) in the *Gwaradzimba N.O v Gurta SC 2015 (1) ZLR 402 (S) at 410 E-F*. They are:

1. where the end result is a foregone conclusion and it would be a waste of time to refer the matter back;
2. where further delay could prejudice the applicant;
3. where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction;
4. where the court is in as good a position as the administrative body to make the decision.

In *casu*, the appellant cited the case of *Geddes Ltd v Tawonezvi 2002 (1) ZLR 479 (S)*. This case actually supports the first respondent's case as the following remarks were made:

> *"*The fact that an applicant seeks a declaratory relief is not in itself proof that the application is not for review. In *City of Mutare v Mudzime & Ors* 1999 (2) ZLR 140 (S) MUCHECHETERE JA quoted with approval from *Kwete v Africa Publishing Trust & Ors* HH-216-98, where at p 3 of the cyclostyled judgment SMITH J said:
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> > "It seems to me, with all due respect, that in deciding whether or not, in an application for damages or reinstatement arising from alleged wrongful dismissal from employment, the provisions of Rule 259 of the High Court Rules, 1971 should be complied with, one should look at the grounds on which the application

> is based, rather than the order sought. … It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation, as long as a declaratory order is sought. A declaratory order is, after all, merely one species of relief available on review."

Therefore, the court *a quo* cannot be faulted for granting a declaratory order in an application for review.

WHETHER OR NOT THE COURT *A QUO* ERRED IN REFUSING TO GRANT THE INTERDICT SOUGHT BY THE APPELLANT.

Finally, it is important to discuss the issue of whether the court *a quo* erred in refusing to grant an interdict sought by the appellant. The appellant sought a final interdict in the court *a quo*. The requirements for a final interdict were clearly set out in the case of ZESA *Staff Pension Fund v Clifford Mushambadzi SC-57-02* wherein ZIYAMBI JA (as he then was) remarked as follows:

> "It is trite that the requirements for a final interdict are:
> a) a clear right which must be established on a balance of probabilities.
> b) irreparable injury actually committed or reasonably apprehended; and
> c) the absence of a similar protection by any other remedy."

See *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Flame Lily Investment Company (Private) Limited v Zimbabwe Salvage (Private) Limited & Anor* 1980 ZLR 378; *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (SC) at 56 *Sanachem (Pty) Ltd v Farmers Agricare (Pty) Ltd* 1995 (2) SA 781A at 789B.

The appellant failed to establish a clear right to the mining block. The appellant ought to have proved that it was the prior pegger. However, evidence proves that the first respondent was the prior pegger who registered its certificate in 2007 whereas the appellant did so sometime in 2008. *In casu*, the appellant is not the owner of the mining block. It failed to establish the injury committed or reasonably apprehended. On the third requirement, there was an alternative remedy present, which is a claim for damages. There was accordingly no basis shown for the grant of the interdict sought by the appellant. Clearly, the court *a quo* was concerned with preserving ownership which is the mother of all real rights. Such an approach cannot be faulted. The appellant had no clear rights over the mining block as the forfeiture of the block was not lawfully revoked.

DISPOSITION

For the above reasons, the appeal cannot succeed in its entirety. Costs will follow the cause. Accordingly, it is ordered as follows:

1. The appeal is allowed in part.
2. The judgment of the court *a quo* is set aside in para 2 and substituted with the following:

   "The matter is remitted to the second respondent for determination of the appeal in accordance with the law."
3. The first respondent shall pay the appellant's costs.

UCHENA: I agree

CHIWESHE JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Scanlen & Holderness, 1st respondent's legal practitioners

Civil Division of the Attorney General's Office, 2nd & 3rd respondents' legal practitioners