

FALCON GOLD ZIMBABWE LIMITED
and
INYAMAZANE GOLD (PRIVATE) LIMITED
versus
MINISTER OF MINES AND MINING DEVELOPMENT N.O.

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE 28 July and 10 August 2022

Opposed Application

T Zhuwarara, for the applicants
C Chitekuteku, for the respondent

WAMAMBO J: The first applicant is a mining company registered according to the laws of Zimbabwe. The applicant is a member of the New Dawn Mining group which owns and operates a number of mines in this country.

The second applicant is a private limited company which holds a tribute agreement to mine several of first applicant's mining claims generally known as Antelope. These are the claims in dispute. They are fully described in the draft order. They will be referred to hereinafter as the mining claims. The respondent is cited in his official capacity tasked with the administration duties in terms of the Mines and Minerals Act [*Chapter 21:05*].

This application is for a review in terms of s 3(2) of the Administration of Justice Act [*Chapter 10:28*]. Applicant seeks a review and setting aside of a decision by the respondent communicated to first applicant through a letter dated 21 April 2022 "Annexure B". The relief sought by applicant is couched as follows:-

"IT BE AND IS HEREBY ORDERED THAT

1. The show cause notice issued by the Respondent to the 1st Applicant date stamped 09th February 2022 in respect of the 1st Applicant's claims being Antelope 9-Reg No. 36034-Antelope 2,3,4,5 and 6- Reg No's 33199, 33127, 33128, 33129 & 33130, Antelope East 2-Reg No-32200, Antelope East Extension & Antelope East Extension 2-Reg No's 34385 & 34386, Antelope East-Reg No-32106, Antelope 11-Reg No-36036 be and is hereby set aside.
2. The decision of the Respondent dated 21st April 2022 which was delivered to the 1st Applicant on the 26th of April 2022 in which Respondent cancelled 1st Applicant's claims with the following claims numbers, Antelope 9-Reg No-36034, Antelope 2,3,4,5 & 6- Reg No's 33199, 33127, 33128, 33130, Antelope East 2- Reg No-32200, Antelope East Extension & Antelope

East Extension 2- Reg No's 34385 & 34386, Antelope East- Reg No- 32106, Antelope 11-Reg No- 36036, be and is hereby set aside.

3. Respondent to meet 1st and 2nd Applicant's cost of suit on a legal practitioner and client scale."

The brief background is that respondent issued what has been referred to as a show cause notice to the applicant. It is dated 17 November 2021 and date stamped 9 February 2022.

It reads on the relevant portions as follows:-

"RE: NOTICE OF INTENTION TO CANCEL MINING TITLE REGISTRATION NUMBER 36036 (ANTELOPE 11) SITUATED AT MATOBO: MATEBELELAND SOUTH PROVINCE

The above matter refers.

The Ministry notes with concern that you have not been declaring output production for the mining location named above. As a result, the Ministry intends to cancel your mining rights to the said mining location in terms of section 400 (1) (a) of the Mines and Minerals Act [Chapter 21:05].

You are therefore called upon to show cause in writing within 30 days as to why your mining rights should not be cancelled. If after the said 30 days you have not written to us your rights will be declared cancelled without any further notice to you.

Be guided accordingly.

Hon. W. Chitando (MP)

Minister of Mines and Mining Development."

Thereafter applicant responded to the show cause notice. The response was penned by first applicant's legal practitioners. It is the same legal practitioners who represent the applicants in this matter. The first applicant's response appears at pages 52-57 of the application.

Thereafter the respondent cancelled mining titles for first applicant in a notice dated 21 April 2022. This notice of cancellation appears at pages 13-14 of the application on the pertinent portions as follows:-

"RE: NOTICE OF CANCELLATION OF MINING TITLES IN TERMS OF SECTION 400(1) (a) OF THE MINES AND MINERALS ACT [CHAPTER 21:05] - ANTELOPE CLAIMS, SITUATE AT MATOBO, MATEBELELAND SOUTH, BELONGING TO FALCON GOLD ZIMBABWE LIMITED

Reference is made to the letter from your lawyers-Gill, Godlonton and Gerrans dated 17th of March 2022 in which they responded on your behalf to the six letters that I wrote to you on the

17th of November 2021. I note that your lawyers have responded to all the six letters in one letter, and in like manner my response to you pertains to all the letters that I wrote to you.

Please note that I remain of the view that section 400(1) (a) as read with section 251 of the Mines and Minerals Act (Chapter 21:05) is the applicable provision in the circumstances. Further note that the titles you hold are for mining, and you were expected to commence mining from the moment you got the titles. You cannot use as an excuse the fact that you have not commenced mining, more than 25 years from the date that you were given the mining titles. The alleged illegal invasions on your mining locations only started in 2019 according to the letter from your lawyers, yet there is no record of any output declared by yourselves for the period before the alleged invasions.

I am further not convinced that after all the years that have passed without any output being declared on your part, the tribute agreements mentioned in the letter by your lawyers amount to good cause for not cancelling.

In conclusion, after having considered the submissions that were made on your behalf by your lawyers, you are hereby advised that the following mining titles belonging to you are cancelled with effect from the 22nd of April 2022:

- i. Antelope East 2 – registration number 32200
- ii. Antelope 9 – registration number 36034;
- iii. Antelope 2,3,4,5 and 6 – Registration numbers 33199, 33127, 33128, 33129, 33130
- iv. Antelope East Extension & Antelope East Extension 2 – registration numbers 34385 & 34386
- v. Antelope East – registration number 32106
- vi. Antelope 11 – registration number 36036

Please be guided accordingly.

Hon. W. Chitando (MP)
Minister of Mines and Mining Development”

Applicants seek a review of the respondent’s decision to cancel the mining claims as more fully appears under the notice of cancellation dated 13 April 2022 (hereinafter called the Notice of cancellation.)

The grounds upon which applicant seeks the relief they pray for appear under five titles in the applicants heads of argument, namely unlawful cancellation, gross(ly) irregularity ulterior motive, second applicant denied the right to be heard and effect of first respondent’s non-compliance with the law.

It will be clear in due course that a thread runs through the five grounds as raised in the heads of argument above. For expediency I will deal with the five grounds of review as raised by applicant but in no particular order under the titles as defined by applicants.

Unlawful Cancellation

Applicant submits that s 400(1)(a) of the Mines and Minerals Act [*Chapter 21:05*] hereinafter called the Act gives respondent power to cancel mining rights for failure to declare output after commencing mining operations thus respondent had no jurisdiction to invoke s 400(1)(a) of the Act.

Applicants canvass this point in paragraphs 5 to 9 of their heads of argument. The gist of the argument as raised by applicants is that applicants had not commenced mining operations and thus section 400 of the Act is not applicable. Effectively that respondent made use of a wrong section to cancel applicant's mining claims.

Respondent was of the view that the cancellation of applicant's mining claims was lawful. The respondent's basis for this position is that first applicant was given mining title 25 years ago and has failed to declare any output after commencement of mining operations.

Respondent argues that applicants commenced mining operations from the moment they obtained an inspection certificate.

Respondent further argues that s 197(1) of the Act provides for a miner to apply for an inspection certificate upon gaining title. That so it is argued is testimony that mining operations would have commenced. Reference was also made to ss 197(2), 199, 200, 205 and 207 of the Act.

The question of first applicant being granted title to the mining claims under the spotlight in this case is not disputed by the applicants. The issue in reality revolves around interpretation of ss 400(1)(a) as read with s 251 of the Act. These are the sections employed by the respondent to cancel first applicant's mining claims.

On this issue I am inclined to agree with the respondent's stance for the following reasons:

It is common cause that first applicant obtained mining title to the mining claims 25 years ago. Part XI of the Act relates to preservation of mining rights. It becomes clear that there has to be some activity before issuance of inspection certificates. Section 197 of the Act provides for the issuance of a first inspection certificate. Section 198 of the Act provides for the issuance of a second inspection certificate. Section 199 provides for issuance of subsequent inspection certificates.

I find in the circumstances of this case that commencement of mining operations had begun because s 197(1) of the Act talks to... “in respect of work executed upon such block or mining lease.” The same wording as expressed above is followed in sections 198 and 199.

The impression gained is that mining operations had commenced. I hold that view because on an interpretation of the phrases as given above, work done in connection with the block can only mean mining operations for what other work would begin on a mining claim besides the commencement of mining operations. Clearly the Act does not contain a definition of “mining operations.”

The closest I could find in the Act is a definition of “mining purposes” which is given as “the purpose of obtaining or extracting any mineral by any mode or method or any purpose directly or indirectly connected therewith or incidental thereafter.”

I find the above definition wide and the closest to mining operations. I find that work being done in connection with the mining block falls into this category.

Section 251 of the Act referred to by the respondent in the notice of cancellation speaks to a miner being obliged to render to the Commissioner General of the Zimbabwe Revenue Authority or an officer of the authority applications for such purpose by the Commissioner General the output and full details of the disposal thereof by him or on his behalf.

It further provides under s 251(1)(b) for a miner to “furnish the Commissioner General or Officer with such affidavits, certificates and documents relating to any matter referred to in paragraph (a) as the mining Commissioner may require”

It is clear applicants have not averted to declaring any output or in any way adhering to ss 400(1)(a) and 251 of the Act. The applicant takes an interpretation that the applicant had not “commenced mining operations.”

I find that applicant had indeed commenced mining operations as adverted to earlier and to that effect I find that there was no unlawful cancellation in the circumstances as adverted to under this ground.

Grossly Irregularity

This ground appears to regurgitate the first ground. The basis of the argument as raised is that s 400(1) (a) of the Act could only be invoked by respondent if mining operations had begun. Although the Notice of cancellation refers to Applicant being expected to commence mining from “the moment you got titles” it does not end there. On this particular point it may be necessary to regurgitate what paragraph 2 of the Notice of Cancellation says which on the pertinent portion reads as follows:-

“You cannot use as an excuse the fact that you have not commenced mining operations more than 25 years from the date that you were given mining titles. The alleged illegal invasions on your mining locations only started in 2019 according to the letter from your lawyers, yet there is no record of any output declared by yourselves for the period before the alleged invasions.”

My reading of the above excerpt speaks to respondent expressing himself that applicant began mining operations 25 years ago and further did not declare any output. I find the Notice of Cancellation thus clear and adhering to s 400(1)(a) of the Act.

For clarity I find that after 25 years after commencing mining operations, applicant failed to declare any output from his mining location. I find further that the respondent indeed gave written notice to the “miner” concerned of his intention to cancel the rights in relation to the mining locations concerned as per s 400(1) of the Act.

The written notices are encapsulated in the aforementioned “show cause” notice appearing at pages 46 to 51 of the application. The written notices are dated 17 November 2021. They reflect that they were all received by first applicant’s representative on 24 February 2022. Indeed on 17 March 2022 the first applicant respondent in writing. I thus find no gross irregularity in the manner the respondent came to and made the decision to cancel the applicant’s mining claims.

Ulterior motives

It is raised and for the first time in the heads of argument that the nature of cancellation was granted by the respondent because of an ulterior motive. It is alleged that the respondent intended to benefit an entity named Yellow Candy Pvt Ltd.

Clearly this assertion amounts to evidence being raised in heads of argument. Heads of argument are meant to be legal opinions raised to assist the court to reach a decision. The respondent besides responding in their own heads of argument have no way of investigating or rebutting an allegation made in the heads of argument.

The argument on ulterior motive is not only not proven but is raised at the wrong form. It also does not impinge on the respondent making a decision as he did in terms of s 400(1) (a) of the Act. A number of cases were cited including **Ramilewa v Secretary of the Public Service Commission 1988(1) ZLR 257 (H) at 262B-F** and **Mugugu v Police Service Commission & Anor 2010(2) ZLR 185 (F)**

However upon a consideration of the cases I find nothing suggesting that respondent abused the authority entrusted in him. The steps taken by respondent in adherence to section 400(1) (a) of the Act appears to be the opposite of abuse of authority.

Second Applicant denied the right to be heard

Applicants aver that the respondent as an administrative authority did not act fairly in accordance with the Administrative Justice Act [*Chapter 10:28*]. The respondent deals with the adherence or non-adherence to the Administration of Justice Act in para(s) 8 to 8.7 of their heads of argument.

It is applicant's argument that second applicant as a tributary should also have been served with a show cause notice by respondent. Effectively that second applicant was denied the right to be heard before the Notice of Cancellation was issued by the respondent.

It is clear that respondent and through his various representation was aware of second applicant having been granted a tribute agreement and approved in terms of section 285 of the Act. The respondent was also aware of the presence of second applicant as first applicant's tributary. At page 55-56 appears an exposition by first applicant of the composition of second applicant, their strategy, finances secured and other minute details. The respondent was clearly aware of this detail and more. The Act however does not under s 400(1)(a) oblige the respondent to notify a holder of a tribute agreement of the cancellation of a claim.

On the pertinent portion s 400(1) reads as follows: -

“The Minister may do either or both of the following:-

1. By written notice served on the miner concerned, notify the miner concerned of this intention to cancel his rights in relation to the mining location concerned, and call on the miner to show cause within such reasonable period as may be specified in the notice, why such rights should not be cancelled.”

“Miner” in the Act “means the person actually carrying on the work of mining on any mining location whether he is the holder or the lessee or assignee of the rights of such holder.” I do not find that the above definition of a miner extends to the holder of the rights as well as the tributary. I find on an interpretation of the above provision of the Act that a show cause notice to first applicant was sufficient. Flowing therefrom is the finding that for purposes of the notice of cancellation second applicant was not denied the right to be heard. If first applicant was of the view that second applicant needed to be heard he could have invited him to submit any representations. In any case the representations from first applicant appearing at pages 52-57 clearly encapsulate the concerns and representations of second applicant.

In view of the above it becomes clear that respondent was aware of second applicant's queries before making the decision that is sought to be impugned.

Effects of First Respondent's non-compliance with the law

I have already found that there was adherence to the law by respondent. The issues of gross irregularity and breach of the law are clearly not proven in this case. A lot has been submitted on the non-adherence to the Administrative Act [*Chapter 10:28*]. I find such submissions without merit as alluded to earlier.

That second applicant made representations to the respondent and he was aware of second applicant's position *vis a vis* the mining claims is neither here nor there.

At the end of the day respondent adhered to the relevant provisions of the Act in resulting in the cancellation of the mining claims.

I order as follows:-

The application be and is hereby dismissed.

Gill, Godlonton & Gerrans, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners