

PERCIVAL NDOGA  
versus  
THE PROVINCIAL MINING DIRECTOR MASHONALAND WEST PROVINCE NO  
and  
THE MINISTER OF MINES AND MINERALS DEVELOPMENT N.O

HIGH COURT OF ZIMBABWE  
WAMAMBO J  
HARARE, 23 August & 2 September 2022

### **Urgent Chamber Application**

*Mr I Mataka*, for the applicant  
*Mrs K Munatsi-Manyowa*, for the respondents

**WAMAMBO J:** The applicant seeks a review of a decision made by the first respondent in respect of his application for registration of a special prospecting license for claims at Silverside Mhangura in Mashonaland West. The first respondent rejected the applicant's application in a letter appearing at p 44 of the record which letter will be analyzed in fuller detail in the course of the judgment, and herein after referred to as the rejection letter.

The background to the matter is summarized below;

Applicant holds eight special prospecting license numbers 021753BA to 021760BA issued by the first respondent's office on 18 and 19 July 2022. The licenses provide that the applicant is entitled at law to prospect for any minerals, mineral oils and natural gas. After obtaining the special prospecting licenses applicant pegged mining claims at Silverside Mhangura. The exercise involved personnel from the first respondent's office. On 2 August 2022 applicant paid all registration and prospecting fees at first respondents' offices. On 11 August 2022 he was contacted to collect a response to his application. This is the very rejection letter that the applicant seeks to impugn in this urgent chamber application. I will reproduce it below;

“Ndogo Percival  
6249 Mornington  
Kadoma  
077348557

**RE: APPLICATION FOR REGISTRATION REJECTED UNDER SPECIAL PROSPECTING LICENCE NUMBERS 021753BA – 021760BA: APPLICATION NUMBERS 624-31**

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Reference is made to the above subject matter.

This office regrets to advise that your application for registration under special prospecting license numbers 021753BA – 021760BA have been rejected in terms of Section 372 (9) of the Mines and Minerals Act [*Chapter 21:05*] for violating Section 372 (1) of the same Act which states that:

“No person shall intentionally peg any ground that is not open to prospecting.”

The prospecting discovery and registration notices dated 26 July 2022 which means such pegging was done within the area covered by then Exclusive Prospecting Order Application Number 23 of 2020. Pegging was done prior to lifting of the reservation which was later done on 29 July 2022.

Attached please find your special Prospecting License Numbers 021753BA – 021760BA and a copy of the map for the area applied for registration.

S.Mpindiwa

PROVINCIAL MINING DIRECTOR MASHONALAND WEST

**For: SECRETARY FOR MINES AND MINING DEVELOPMENT”**

Applicant impugns the reasons given by the first respondent in rejecting his application. He attacks the form of the letter as well. He submits that the letter is deliberately undated though it is date stamped 4 August 2022. He questions first respondent’s rejection of his application against the backdrop that first respondent allowed the process to unfold i.e. the payment of fees and pegging. He argues that if the area was not open for prospecting first respondent should not have allowed the process to unfold especially with his cooperation and consent.

The Exclusive Prospecting Order (hereinafter referred to as the EPO) Number 23 of 2020 was uplifted on 29 July 2022. Applicant submits that at the time of the upliftment of the EPO processes had already begun and even went beyond 29 July 2022.

Applicant submitted that respondents in their notice of opposition have added another reason for rejecting his application. This reason is the existence of a special grant. Applicant is of

the view that the issue of the special grant did not form part of the reasons given in the rejection letter.

The respondents are opposed to the application. Mrs *Munatsi-Manyowa* for the respondents made the following submissions which were supplemented by Mrs Sangoya, first respondent's representative.

The applicant's application was rejected because there was an EPO in existence. Simply, put the area in question was not open for prospecting.

When the prospecting notices were posted by applicant on 26 July 2022 the land in question was still covered by the EPO. The rejection letter is not informed by the date of the letter but when prospecting and pegging were done. The applicant posted prospecting notices before the lifting of the EPO. The letter is date stamped 4 August 2022 but that is no necessarily the date on which the decision was made.

On the Special grant issue Mrs *Munatsi Manyowa* argued that it buttresses the position that the area in question is reserved. If an area is reserved, it is not open for prospecting. The issue of the special grant was discovered late on the day. Special grant applications are submitted to the Secretary of Mines and the information is stored at the Head office and not at the Provincial offices. If there is an existing application already filed by another miner that ground is no-longer open for prospecting or pegging. The argument was to the effect that although not specifically mentioned in the rejection letter the existence of a special grant buttresses the contention that the area in question was not open for prospecting.

In oral submissions before me Mr *Mataka* for the applicant emphasized that the decision to reject the applicant's application should not be allowed to stand. Further that the court should intervene as it is clothed by s 26 of the High Court Act with powers to so intervene. Section 26 of the High Court Act provides as follows:

**“26 Power to review proceedings and decisions**

Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.”

While s 26 clothes the court with power, jurisdiction and authority it is s 27 of the High Court Act which provides grounds of review. Section 27 of the High Court Act provides as follows:

## **27 Grounds for review**

(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—

- (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
- (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
- (c) gross irregularity in the proceedings or the decision.

(2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities.

Notably in applicant's founding affidavit he does not enumerate on which, one or more of the three grounds as provided for in s 27 above he bases his application.

The closest the applicant comes, to identifying the ground for review is at page 1 of the application where he refers to the application being "for an urgent review of the grossly unprocedural manner in which the first respondent handled the applicant's application for a special prospecting license.

I take it from the application holistically that gross irregularity is the ground upon which this application is based on.

It is necessary to have a close scrutiny of the reasons applicant advances in the quest to review the decision made as per the rejection letter. The reasons advanced by applicant were summarized earlier in this judgement. I will however focus on para 8 of the founding affidavit which reads as follows:

"8 Put simply the rejection of my application by the first respondent is illogical and procedural. At the time of making the decision to reject my application on 4 August 2022, the Exclusive Prospecting Order Application Number 23 of 2020 had already been uplifted. The 1<sup>st</sup> respondent was supposed to make a decision on the basis of the state of affairs at the time of her decision."

The first point to note is that the rejection letter is impugned by applicant for being illogical and unprocedural.

The next point is that the decision to reject applicant's application was made on 4 August 2022 after the upliftment of the EPO Application number 23 of 2022. The question to be asked is whether the decision to reject applicant's application was made on 4 August 2022? The rejection letter bears no date but is date stamped 4 August 2022. That it is date stamped 4 August 2022 does not necessarily mean that the decision was made on that date. I am attracted to Mrs Munatsi-Manyowa's submission on this issue. There is too much emphasis on the rejection letter being undated. The logical implications I draw from this rejection letter are that the decision to reject applicant's application was made before the uplifting of the EPO. Indeed, the documents the applicant relies on predate the uplifting of the EPO. Note should be taken here of the special prospecting licences appearing as A1-A8. The letters are all dated 18 July 2022 with the exception of A8 which is dated 19 July 2022. They all precede the uplifting of the EPO.

The discovery notices which appear as B1 to B8 all dated 26 July 2022 B1, B2, B4, B5 and B6 are 26 July 2022 while B3, B7, and B8 are all dated 27 July 2022. All the discovery notices predate the upliftment of the EPO. The registration notices appear on record as C1, C2, C3, C4, C5, C6, C7 and C8, C1 to C6 are all dated 26 July 2022 while C7 and C8 are both dated 27 July 2022. All the registration notices predate the upliftment of the EPO. The prospecting notices appear on the record as D1 to D7. D1, D2, D3, D5, and D6 are all dated 26 July 2022. D4 and D7 are both dated 27 July 2022. All the prospecting notices predate the upliftment of EPO.

Notably the receipts which appear on record as E1 and E2 are dated 2 August 2022. It is important to note that the documents A1-A8, B1-B8, C1-C8, D1-D7 and E1 and E2 all bear the date stamp of 2 August 2022. I note however that A1 to A8 bear an additional date stamp of 18 July 2022. The applicant asserts in para 4 of the founding affidavit that special prospecting licenses were issued on 18 and 19 July 2022. The record reflects the same as also having a date stamp bearing the date of 2 August 2022 although they were issued on 18 and 19 July 2022. I find that the date stamps do not necessarily follow the date of issuance. One will note that A8 reflects in handwritten form that it was issued on 19 July 2022 but it reflects two date stamps one dated 18 July 2022 and another dated 2 August 2022. The date stamp of 2 August 2022 appears on most of the documents relied on by applicant. For the above reasons I find that the rejection letter was issued before the upliftment of the EPO.

Having found as above the next issue to be examined are the provisions of the Mines and Minerals Act [*Chapter 21:05*] relied on by first respondent when rejecting the applicant's application.

### 372 Illegal pegging

(1) No person shall intentionally peg any ground which is not open to prospecting.

(9) The mining commissioner may refuse to register a mining location in respect of which there has been a contravention of this section.

That applicant pegged on the land central to this application is common cause between the parties. The applicant asserts that the pegging took place with the involvement of the first respondent's personnel see para 5 of the applicant's founding papers. That the first respondent's personnel were involved in the pegging does not legalize the process however. Whether first respondent's personnel were mistaken or unaware of the position of the land in question may be an issue for another day. I find that just because first respondent's personnel were involved and cooperative does not change the complexion of the matter. I have already found that when these processes were carried out the EPO had not been uplifted. That to my mind renders the processes illegal as the pegging was done on land not open to prospecting by virtue of the existence of the EPO.

In *Affretair (Pvt) Ltd and Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) MCNALLY JA at p 24B-F said; "I rely I particular upon that passage in the Tikly Judgment supra where TROLLIP J (as he then was) said that a review was -:

"a limited hearing with or without additional evidence or information to determine whether the decision under appeal was correct or not, but whether the authority had exercised their powers and discretion honestly and properly.

I rely also on the comments of Baxter's Administrative Law at p681 as follows:

"the function of judicial review is to scrutinize the legality of the administrative action not to secure a decision by a judge in place of an administrator. As a general rule the court 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 legislator. Thus it is said that the 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.”

In applying the above principles to this case, I find that first respondent did not act ultra vires the enabling Act. On the contrary I find that first respondent acted within his given powers. I also do not find his decision illogical or unprocedural. I say this alive to the fact that applicant went through the legal steps assisted by personnel from the first respondent’s office. I have however found that just because there was cooperation it does not solidify applicant’s position to the extent that he can enforce relief as prayed for, for the respondent’s hands were tied by the EPO.

In the notice of opposition and oral submissions counsel for the respondents sought to advance argument that there was also a special grant application in existence on the same land central to the application. Further that a special grant application is only done on a reserved area. Special grants are regulated by ss 29 to 296 and ss 297 to 307 of the Mines and Minerals Act [*Chapter 21:05*]. The fact that there was a special grant application was not given as a reason for rejecting applicants’ application.

In any case a reading of ss 291 to 296 of the Mines and Minerals Act [*Chapter 21:05*]. Clearly speaks to a “special grant issued”. The special grant is issuable as provided for in the aforementioned provisions of the Mines and Minerals Act.

I therefore find that the special grant application relied on by respondents is not relevant to the instant case.

For the aforementioned reasons I find that the application lacks merit and stands to be dismissed. In the circumstances I order as follows-

The application is dismissed with costs.

*Chambati Mataka and Makonese*, applicant’s legal practitioners  
*Civil Division of the Attorney General’s office*, respondent’s legal practitioners