

MMS MINING SYNDICATE  
**versus**  
K MLANGENI (in his capacity as PROVINCIAL  
MINING DIRECTOR, NO  
and  
TSN MINING SYNDICATE  
and  
ZIALANDIA MINING COMPANY (PVT) LTD  
and  
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 4 OCTOBER 2017 AND 2 NOVEMBER 2017

### **Opposed Matter**

*L Mudisi* for the applicant  
*Ms R Hove* for the 1<sup>st</sup> respondent

**MOYO J:** This is an application for review of the first respondent's decision to cancel applicant's certificate of registration. The grounds for review are stated thus:

1. The first respondent arbitrarily wants to cancel the certificate of registration issued to the applicant without lawful cause.
2. The first respondent erred by awarding a ruling to the second respondent in a dispute wherein she was not a party.
3. The decision arrived at by the first respondent on the 19 October 2015, is irregular and corrupt in nature, that no reasonable authority furnished with the same facts would have arrived at the same conclusion.

The relief sought is

- 1) an order setting aside the proposed cancellation of the applicant's certificate of registration by the first respondent as irregular and invalid.

- 2) An order restoring the applicant's right to full use of the mine claim as per certificate of registration.

At the hearing of the application, the applicant's counsel submitted that first respondent's opposing affidavit was fatally defective for want of compliance with rule 227 (4) (a). The rule provides that:

"An affidavit filed with a written application (a) shall be made by the applicant or respondent or by a person who can swear positively to the facts or averments therein."

Applicant's counsel raised a preliminary point that the opposing affidavit was shown to be by a person who could not swear positively to the facts as they were not the decision maker. There are also allegations of corruption against the decision maker who is the first respondent. The opposing affidavit was sworn to by one Malcom Mazemo who avers that he is the Provincial mining director for Midlands Province and that the facts and allegations deposed to there in are to the best of his knowledge true and correct.

In the case of *Bubye Minerals Pvt Ltd and Another v Rani International Ltd* SC 60/06 where a founding affidavit was challenged on almost similar grounds. The Supreme Court held that the argument that the person who had sworn to the founding affidavit had access to the records of the respondent and had full consultations with employees, while that could be correct it was not enough. The Supreme Court referred to the case of *Mouschenson and Mouchenson v Mercantile Acceptance Corp of S. A Ltd* 1958 (3) SA 362 where it was held that if material allegations in the affidavit are hearsay, the affidavit is defective and the application is bad.

The case of *Newman Chiadzwa v Herbert Paulerer* SC 116/91 was also referred to and in the Newman case the court held that a relative of the applicant, who was not present at the negotiations of the sale of property but gained knowledge of facts from an agreement of sale and letters written by the parties and what he was told by the plaintiff; was not shown to be a person who had personal knowledge of the facts. It was pointed out that the test would be to ask whether the deponent to the affidavit would be a competent *viva voce* witness to the facts were he to be called to testify.

The Supreme Court in this case held that there was no proper affidavit founding the application and therefore no valid application before the court.

I am inclined to find that the situation before me, where a decision of one person is challenged but another person avers that the decision was correctly reached and that even where allegations of corruption were made, the current provincial mining director can swear positively that there was no corruption, is not in my view within his knowledge. Whilst he could reason out the ruling from the papers at the office he cannot swear positively to the aspect of corruption. The affidavit is resultantly bad and cannot stand on that basis.

Counsel for the first respondent argued that certain contents of the affidavit should be struck out e.g. the ones relating to corruption but the rest should be accepted. I believe where an affidavit is based on hearsay the court cannot find otherwise as clearly the deponent was not the decision maker and could not vouch for another decision maker's findings.

The deponent in this matter does not attest to the fact that he was part of the panel that sat in the decision making process. Neither was he privy to the decision itself. It would appear he is relating information in the files and explains the dispute as he perceives it. It therefore cannot be held that he is a person who is competent to swear to the facts on the decision making as only the decision maker knows what led to such a decision being made. The decision maker is also the only person who can deny as a matter of fact the corruption allegations.

I find accordingly that the opposing affidavit is bad at law and can therefore not stand.

The application is granted only to the extent that the decision of the mining commissioner that is being challenged is set aside. I do not see any reason why I should substitute my decision for the tribunal. I have not dealt with the merits of this case and it will therefore be hazardous for me to start substituting the decision with orders that affect the merits of the case. I also cannot cancel a court order herein

- 1) It is accordingly ordered that the decision of the first respondent dated 19 October 2015 be and is hereby set aside.
- 2) Respondents pay the costs of suit.

*Mutendi, Mudisi & Shumba*, applicant's legal practitioners  
*Civil Division Attorney General's Office*, 1<sup>st</sup> respondent's legal practitioners