BETMON INVESTMENTS (PRIVATE) LIMITED
versus
G & W INDUSTRIAL MINERALS (PRIVATE) LIMITED
and
THE PROVINCIAL MINING DIRECTOR -MASHONALAND CENTRAL PROVINCE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE 26 March 2025 & 1 April 2025

Urgent chamber application

T.A. Mandizvidza for the applicant
Ms. N. Y. Motsi for the 1st respondent

DUBE-BANDA J:

[1] This is an opposed chamber application brought on a certificate of urgency, in terms of which the applicant seeks an interim interdict in the following terms:

Final relief sought

That you show cause to this Honourable Court why a final order should not be made in the following terms:

i. 1st respondent and all persons acting through or on its behalf, be and are hereby permanently interdicted from interfering in any manner with the applicant's mining operations at claims registration numbers 41445BM and 41446BM.
ii. 1st respondent shall bear costs of suit.

Interim relief granted

Pending the determination of this matter on the return date, the applicant is granted the following relief: -

i. 1st respondent and all persons acting through or on its behalf, be and are hereby immediately interdicted from entering, accessing, or conducting any mining operations at claims numbers 41445BM and 41446BM pending determination of the appeal under case number HCH 1301/25.

ii. The 2nd respondent is interdicted from cancelling applicant's claims with registration numbers 41445 & 41446BM pending determination of the appeal under case number HCH 1301/25 is finalised.

iii. 1st respondent shall bear costs of suit.

Service of the provisional order

The applicant /applicant's legal practitioner and/or employees or Sheriff or the Zimbabwe Republic Police be and are hereby permitted to serve copies of this provisional order on the respondents or their legal practitioners/employees.

[2] The applicant contends that it is the registered holder of mining claims with registration numbers 41445BM and 41446BM. The certificates of registration show that these claims were registered on 15 March 2017. On 20 March 2017, the first respondent lodged a complaint with the second respondent ("the Provincial Mining Director") alleging that the applicant was mining on its locations i.e., registration numbers 24827BM and 24828BM. The Provincial Mining Director initiated a dispute resolution process, resulting in a determination handed down on 28 February 2025. The operative part of the determination is that the applicant's blocks of claims registration numbers 41445BM and 41446BM ought to be cancelled for contravening s 31 of the Mining and Minerals Act [*Chapter 21:05*] ("Act"). The applicant was notified of the ministry's intention to cancel its blocks of claims in terms of s 50 of the Act. The proposed date of cancellation was set to be 9 April 2025.

[3] Aggrieved by the decision and certain findings of the Provincial Mining Director, the applicant lodged an appeal with this court in case number HCH 1301/25. The appeal is pending finalisation. On 14 March 2025, the first respondent commenced mining operations on the disputed claims. The applicants argued that the first respondent is not only mining on the disputed claims, but is also loading and removing minerals previously mined and stock piled by the applicant. It is against this background that the applicant launched this application seeking the order stated above.

[4] In its notice of opposition, the first respondent took two preliminary points, i.e., that the notice of appeal, on which this application is predicated is invalid for want of exhaustion of internal remedies provided for in the Act; and that this application is not urgent as contemplated by the rules of this court. During the hearing, Ms. *Mosti* counsel

for the first respondent abandoned the attack on urgency, and no further reference shall be made to this preliminary point.

[5] In summary, the first respondent contends that this application is predicated on an invalid appeal, in that the applicant has not exhausted internal remedies provided for in the Act. It was argued that the applicant, must in the first instance appeal to the Minister of Mines and Mining Development ("Minister") as provided for in s 50(2) of the Act. It was further argued that the applicant can get a definitive and effective relief from the Minister, and it has not provided reasons for bypassing the appeal route provided in the Act. The first respondent sought that the preliminary point be upheld and this application be struck off the roll with costs on legal practitioner and client scale.

[6] In summary, Mr *Mandizvidza* counsel for the applicant argued that this is an urgent application pending appeal before this court, and this court has an inherent power to control its own process. Counsel argued that the appeal is valid in that it was noted in terms of s 361 of the Act. Counsel argued further that s 50 is not applicable to this case, and they are no internal remedies to exhaust. It was argued that the appeal has been noted against the whole decision of the Provincial Mining Director, not only the cancellation of the mining claims. Counsel further argued that s 50 is not peremptory, a litigant is entitled to note an appeal to this court in terms of s 361 of the Act. Counsel submitted that this preliminary point has no merit and must be dismissed.

[7] A closer scrutiny of the preliminary point taken by the first respondent shows that it is an issue that turns on the merits of this application. I say so because my view is that the issue whether the applicant is guilty of failing to exhaust internal remedies in the Act might well be a preliminary point in the appeal, but in this application, it can be an indicator that the appeal has no prospects of success. This is so because the success of this application must stand on the prospects of success of the appeal. If the appeal has no prospects of success, this application cannot succeed. See *Mhlanga* v *Dzira N.O and Anor* HB 111-22; *Ncube v Sangster N.O. & Another* HB 214/24.

[8] The premise on which a court may grant an interim interdict pending appeal is the inherent power reposed in it to control its own process. However, in order to succeed in this application for an interim interdict the applicant must show: (a) that the right which is the subject matter of the appeal and which it seeks to protect by means of an interim relief is clear, if not clear, is *prima facie* established, though open to some doubt; (b) that, if the right is only *prima facie* established, there is a well-grounded

apprehension of irreparable harm to the applicant if the interim relief is not granted and it ultimately succeeds in establishing its right on appeal; (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory remedy. See C.B. Prest *Interlocutory Interdicts* (Juta & Co. Ltd 1993) 55; *Ismail No v St John's College & Ors* 2019 (3) ZLR 753 (CC).

[9] The departure point is whether the applicant has established a *prima facie* right. The applicant contends that the appeal has prospects of success, in that it has a clear and recognised right to conduct mining operations at claims 41445BM and 41446 BM, which operations have been disrupted by the first respondent. It was further argued that minerals are a finite resource, if the first respondent is allowed to continue mining, the resource would be depleted resulting in significant financial loss to the applicant. *Per contra*, Ms *Motsi* counsel for the first respondent argued that the applicant has not established a *prima facie* case, in that the Provincial Mining Director determined that the first respondent was the first pegger. It was argued further that the applicant has approached a wrong forum, in that it has not exhausted internal remedies provided in the Act.

[10] In determining whether the applicant has established a *prima facie* case, it is important to first inquire into whether there are any internal remedies available to it in the Act, and if so, whether such remedies have been exhausted, if not the consequences thereof. Section 50 (2) of the Act provides thus:

> "At least thirty days before cancelling a certificate of registration under subsection (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."

[11] The Provincial Mining Director notified the applicant of the intention to cancel its registration certificates, and the date of the proposed cancellation. The applicant was further notified that if aggrieved by this decision, it may consider appealing to the Minister within 30 days of receiving the determination as provided for in s 50 of the Act. Instead, of appealing to the Minister, the applicant filed an appeal to this court in HCH 1301/25.

[12] It is clear that the Act provides internal remedies, and that the applicant has not exhausted such remedies. The next inquiry is, what are the consequences of not exhausting internal remedies? It is trite that the general rule is that an internal remedy must be

exhausted prior to approaching the courts, unless the litigant can show exceptional circumstances to exempt him or her from this requirement. See *Matukutire* v *Medicines Control Authority of Zimbabwe* HH 59/2008; *Musanhu* v *Chairperson of Cresta Lodge Disciplinary and Grievance Committee* HH 115/94; *Tuso* v *City of Harare* HH 1/2004. What constitutes exceptional circumstances depends on the facts and circumstances of the case and is decided on a case-by-case basis. Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is available, effective and adequate. An internal remedy is effective and adequate if it is capable of redressing the complaint.

[13] Mr *Mandizvidza* counsel for the applicant argued that the appeal is against certain reasons and findings of the Provincial Mining Director. It is an entrenched position in our law that one appeals against the order of court and not the reasons thereof. See *Manjovha v Delta Beverages (Pvt) Limited* SC 64/21. In *casu*, the operative part of the determination reads as follows:

> "As a result, Rock Chemical Fillers t/a Betmon Enterprises Pvt Ltd (applicant) blocks of claims registration numbers 41445BM and 41446BM ought to be cancelled for contravening s 31 of the Act. By copy of this determination, Rock Chemical Fillers t/a Betmon Enterprises Pvt Ltd <u>is hereby notified of the ministry's intention to cancel its blocks of claims registration numbers 41445BM and 41446BM as provided for in s 50 of the Act. The proposed date of cancellation is 9th of April 2025</u>.
>
> Should Rock Chemical Fillers t/a Betmon Enterprises Pvt Ltd be aggrieved by this decision, they may consider appealing to the Minister of Mines and Mining Development within 30 days of receiving this determination as provided for under s 50 of the Act." (My emphasis).

[14] The determination makes it clear that the certificates have not been cancelled. The applicant has merely been notified of the intention to cancel the certificates, and it was informed that if aggrieved by the intention to cancel, it may to note an appeal with the Minister in terms of s 50 of the Act. The determination complied with s 50(2) in that it informed the applicant of the intention to cancel registration certificates and of the grounds for such proposed cancellation and of the proposed date of intended cancellation. In addition, it informed the applicant that he may, at any time before that date, appeal in writing to the Minister against such intended cancellation.

[15] In terms of s 50(2) the applicant must, if aggrieved by the intention to cancel note an appeal to the Minister. The rationale for the requirement to appeal to the Minister in the first instance is not difficult to find, it is to enable the Minister to first deal with the matter

because he is well placed to deal with issues which arise from disputes of over mining locations; over pegging; and encroachment etc. He has technical teams and experts who can go on the mining locations in dispute, carry out surveys and make expert findings.

[16] In fact, it is incomprehensible what the applicant is appealing against, the certificates have not been cancelled, it has merely been notified of the intention to cancel. It is this intention to cancel that the law places within the jurisdiction of the Minister to consider. I take the view that the appeal on which this application is predicated is not ripe for consideration by the High Court, simply because what is sought to be appealed is not a final and definitive determination, in that the certificates have not been cancelled.

[17] Mr *Mandizvidza* argued repeatedly that the appeal is in terms of s 361 of the Act, and therefore s 50 (2) has no application. Section 361 of the Act says:

> "Any party who is aggrieved by any decision of a mining commissioner's court under this Act may appeal against such decision to the High Court, and that court may make such order as it deems fit on such appeal."

[18] It is clear that s 50 (2) is the specific provision, while s 361 is the general provision. The rule of statutory interpretation, that a specific provision overrides a general provision, applies to provisions within the same legislative instrument. See *Trustco Group International (Pty) Ltd v Vodacom (Pty) Ltd* (82/2015) [2016] ZASCA 56 (1 April 2016). Put simply, a court first looks to the specific provision of a statute, if there is none dealing with issue, it then moves to the general provision. In *casu,* there is a provision that is specific to the applicant's case i.e., s 50(2) of the Act. There would be no basis at law to anchor an appeal on a general provision, when there is a specific provision in the same statute dealing with the same issue. Therefore, the argument that the appeal is in terms of s 361 of the Act is of no moment. It is of no consequence. It cannot excuse the applicant from the requirement of exhausting the internal remedies provided in s 50(2) of the Act.

[19] I underscore that the success of this application is predicated on the prospects of success of the appeal. In this application, the applicant has not shown exceptional circumstances in the appeal to exempt it from the requirement to exhaust domestic remedies in terms of s 50(2) of the Act. I say so because it seeks to appeal a decision that is not yet ripe for appeal, i.e., against an intention to cancel, not the cancellation of the certificates. It is for these reasons that the appeal has no prospects of success. Having found that the appeal is doomed to fail, for the reasons of failing to exhaust domestic remedies, the applicant cannot be said to have established a *prima facie* right in this matter.

[20] In general, absent a *prima facie* right, there could be no useful purpose of inquiring on whether the other requirements of an interim interdict have been met. See *Heuer v Two Flags Trading (Private) Limited and Others* SC 45/24. However, in the circumstances of this case, such an inquiry whether the applicant has an alternative remedy remains necessary. I say so because the first respondent has on the 14 March 2025 commenced mining operations at the disputed locations, loading and removing minerals mined and stock piled by the applicant. A closer reading of the Provincial Mining Director's determination does not appear to sanction such conduct. Ms *Motsi* argued that if the applicant is aggrieved by the conduct of the first respondent, s 354 of the Act may provide it with an alternative remedy. It says:

> "(1) Any person claiming to be legally interested in any mining location, or in any servitude appertaining to a mining location, or complaining that he has been obstructed or interfered with in the enjoyment of his rights in respect of the premises aforesaid, may make application to the mining commissioner for an injunction in terms of this section."

[21] It is clear that s 354(1) provides an alternative remedy, which the applicant has for no good measure ignored. The fact that in terms of s 354 (8) the High Court has power to grant injunctions in any matter arising under this Act is not the answer to the applicant's case. The applicant must first look s 354 provides for remedy. This is so because at the intention to cancel stage, the Minister may provide the applicant with adequate relief.

[22] The requirements of irreparable harm and the balance of convenience are overshadowed and recede to the remote background to warrant any consideration because of the absence of a *prima facie* right and the presence of an alternative remedy. I underscore that the appeal in HCH 1301/25 has no prospects of success. It is for these reasons that this application has no merit and must fail.

[23] For completeness, I mention that the applicant made an oral application to amend the terms of the interim relief sought in this application. However, because of the decision I have reached, there would be no useful purpose to deal with the application to amend the terms of the interim relief.

[24] There remains to be considered the question of costs. No good grounds exist for a departure from the general rule that costs follow the event. The first respondent is clearly entitled to its costs. The first respondent sought costs on a legal practitioner and client scale, and no case has been made for such costs. See *Kangai v Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H).

In the result, I order as follows:

The application be and is hereby dismissed with costs on a party and party scale.

DUBE BANDA J: ………………………………………

Masiya-Sheshe & Associates, applicant's legal practitioners
B. Chipadza Law Chambers, 1st respondent's legal practitioners