HB 119-17
HC 993-16

DAWN MINING SYNDICATE
versus
TAKESURE MBANO
and
ACTING PROVINCIAL MINING DIRECTOR MIDLANDS N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 16 MAY 2017 AND 1 JUNE 2017

Opposed Application

N Mehlo for the applicant
B C Madanhe for the 1st respondent
2nd respondent in default

MATHONSI J: The applicant pegged and registered mining claims in Gokwe Communal Lands South West of the confluence of Musorowaparuka and Munyati Rivers, known as Musorowaparuka 5 Mine, registration number 30263. The applicant must have commenced mining activities there but soon came on a collision course with the first respondent who lodged a complaint with the second respondent that the applicant was mining on his agricultural land.

On 7 December 2015, the second respondent gave applicant notice of a proposal to cancel the mining claims and at the same time advising the applicant to lodge an appeal to the Minister of Mines and Mining Development (the Minister) if aggrieved by the proposed cancellation. Acting on that advice, the applicant wrote an appeal letter to the Minister dated 16 December 2015 in which they submitted that their mining claim was located in a forest area under Chief Chisina and was nowhere near any farming concern.

Notwithstanding those submissions, by letter dated 30 March 2016 the second respondent purported to cancel the registration of the applicant's mining claim. The letter in question which is addressed to both the applicant and the first respondent reads:

> "REF: APPEAL AGAINST PROPOSED CANCELLATION OF MUSOROWAPARUKA 5 MINE REGISTRATION NUMBER 30263, GOKWE
>
> Reference is made to the above subject matter. We refer to the appeal to the Minister for Mines and Mining Development dated 16 December 2015 against the proposed cancellation of Musorowaparuka 5 Mine, Registration Number 30263 mine *(sic*). We are

in receipt of correspondence, dated 11 March 2016, from the Secretary of Mines and Mining Development directing the office to implement the Minister's decision on the matter. The Minister made a determination to:

1. Uphold the High Court judgment of 17th October 2012 by Hon. Justice Mutema on the basis that the Ministry has no jurisdiction over matters presided over by the High Court.
2. No mining operations should be allowed to take place in Mr Mbano's farm without his consent.

As such, Musorowaparuka 5 Mine, registration number 30263, has been cancelled on 30 March 2016".

Before leaving the contents of that letter let me briefly comment that clearly the second respondent had earlier made a decision to cancel the registration and invited the applicant to appeal to the Minister. When the appeal was lodged, the Minister declined jurisdiction on the basis that there was, in existence, a High Court order purportedly barring mining operations on the first respondent's farm. Armed with that, the second respondent proceeded immediately to cancel the applicants mining claim. That is my reading of the letter.

The applicant has now brought the decision to cancel its mining licence on review before this court seeking an order setting aside the entire proceedings before the second respondent and punitive costs. The applicant cites as its ground for review that it was not afforded an opportunity to be heard before the decision to cancel was taken in breach of the *audi alteram partem* rule as no hearing whatsoever was conducted prior to the decision being made.

In its founding affidavit deposed to by one of its directors Gostaff Gomo the applicant made reference to a court application filed by the first respondent out of this court in Harare in HC 735/12 in which he cited seven respondents, villagers based in Chapinduka village in Gokwe. In that application the first respondent had complained that those villagers were disrupting his farming activities at a piece of land in that village where he claimed to be growing cotton, maize and other crops. He had stated in his affidavit sworn to on 20 January 2012 that the seven had besieged his land and started assaulting his workers unprovoked declaring that he "had no right to engage in farming on the farmland and undertook to do all they could to disrupt (his) project."

That way the first respondent obtained an order, unopposed on 17 October 2012, per MUTEMA J, in the following:

"IT IS ORDERED THAT

1. The 1st-7th respondents be and are hereby interdicted from entering the applicants field in Chapinduka village.
2. The 1st-7th respondents or anyone acting by or under them be and are hereby barred/ interdicted from verbally or physically assaulting or in any way harassing or breaching the peace of the applicant or any person working for or under the applicant.
3. Should the 1st -7th respondents or anyone acting under them violate any of the terms of this order, the Deputy Sheriff or any member of the Zimbabwe Republic Police be and are hereby authorized and directed to arrest the person and bring him before this Honourable Court to answer charges of contempt of court.
4. The respondents pay the costs of suit."

The applicant stated that the first respondent wielded that court order before the second respondent to try and force it from its mining claim, a mining claim which is not on the first respondent's farmland but at a forest area. That way he misled the second respondent into unilaterally cancelling its licence without bothering firstly to accord the applicant audience and secondly to investigate the matter further to ascertain the truthfulness of the first respondent's claim.

The applicant attached a letter from Gokwe South Rural District Council dispelling any fears that there may be a miner-farmer conflict in respect of the location of the mine. It reads in relevant part:

> "Our investigations through the local VIDCO which is responsible for allocating land in the area revealed that the area in dispute, where the proposed claim is situated was not allocated to anyone for use as a field. The area has been mined by various individuals with some doing so illegally and some legally for over thirty years. The current claims to the land have absolutely nothing to do with land for farming but have an inclination on attempts to acquire mining rights on the land. We therefore recommend that the Commissioner of Mines deals with the issue of mining rights according to their procedures."

The District Lands Officer also weighed in affirming the position taken by the Rural District Council by letter dated 11 April 2016 addressed to Gokwe Rural District Council;

> "We would want to make it clear that there is no farm whatsoever administered by the Ministry of Lands in the said area. Our understanding is that the area is purely communal area and falls under your jurisdiction as the Local Authority."

Gomo added that far from being a farmer in the area in dispute, the first respondent is actually an illegal miner who is trying to take away the applicant's mining claim through

misrepresentation. It is for that reason that he has tried to hoodwink the mining authorities using a court order which has nothing to do with the area where the mining claim is located.

The first respondent opposed the application but in doing so steered very clear from the merits of the matter. In fact in his extremely brief opposing affidavit he made sure he said nothing whatsoever about anything that could shed some light as to his own proprietary claim over the mined area. Instead he was content to argue merely on the technically that the applicant cited the wrong party, the second respondent instead of the Minister who made the decision to cancel the certificate. The first respondent asserted that the second respondent never made a decision to cancel the mining certificate. Instead that decision was made by the Minister who has not been cited. For that reason alone, the application should be dismissed.

I have already said that the second respondent made the decision to cancel and also cancelled the applicant's mining licence. For his part the Minister declined jurisdiction preferring to uphold the High Court order. Unfortunately there was nothing to uphold in that order, to the extent that Musorowaparuka 5 is concerned. Not much industry was required of both the second respondent and the Minister, if ever he was seized with the matter, to see through the façade.

The applicant was not a party to the court application filed by the first respondent in HC 735/12. Only Jotam Shereni, Luis Manduna, Charles Singwere, Champion Charume, Chivhapu Charume, Tsuro Mungwebe and Lizwe Sibindi and his family members were the respondents in that matter. The applicant is a mining syndicate made up of Mbizo Sibindi and Gostaff Gomo according to the certificate of registration issued by the second respondent. Therefore even the members of the applicant were not parties to the court order issued on 17 October 2012. Clearly therefore that order was not made against the applicant and is therefore not binding upon the applicant.

Even more significant is the fact that it should have been apparent from a reading of the court order that it did not relate to and certainly did not purport to resolve any mining dispute. It took the form of a peace order issued against the named villagers who were accused of disrupting farming activities of the first respondent. Even in his application the first respondent did not claim that those individuals were engaged in mining activities. The subject matter of that

application was completely irrelevant to the present matter involving the cancellation of a mining licence.

As if that was not enough, the court order sought to resolve disturbances at the first respondent's "field in Chapinduka Village." Surely it should have been a matter of concern to the second respondent, before acting precipitously to cancel a mining licence, whether the mine was situated at that field. The second respondent was unconcerned preferring to take an arm chair approach and resolve the matter from the comfort of his office in town. A survey or even a visit to the site would have helped. At the very least, the second respondent should have heard the applicant's side of the story.

The applicant says that it was denied audience. The second respondent was served with the application but chose not to oppose it. The first respondent opposed it but chose not to contest the allegation of a breach of the *audi alteram partem* rule. Therefore I have no reason to disbelieve the applicant on that account. In fact considering all the evidence that the applicant has placed before me pointing to the fallacy of the first respondent's claim that the mine is located on his agricultural field, I have no doubt that the applicant was denied audience. If it was afforded that, it would set the record straight for the benefit of the second respondent.

The *audi alteram partem* rule is the corner stone of all civilized systems of justice without which courts of law may not dispense justice. It is a requirement that before a decision is taken which affects a person that person must be afforded an opportunity to make representations. That is the whole essence of due process. That concept was eloquently stated by PATEL JA in *Attorney General* v *Mudisi and others* 2015 (2) ZLR 214 (S) 219 E-F as:

> "One of the fundamental precepts of natural justice, encapsulated in the maxim *audi alteram partem*, is the right of every person to be heard or afforded an opportunity to make representations before any decision is taken that might impinge upon his rights, interests or legitimate expectations. This precept of the common law forms part of the larger duty imposed upon every administrative authority to act legally, rationally and procedurally. See the *Telecel* case *(supra) (Telecel Zimbabwe (Pvt) Ltd* v *Attorney General NO* 2014 (1) ZLR 47 (S)) ---. That common law duty is now codified in s3 (1) (a) of the Administrative Justice Act as the duty to 'act lawfully, reasonably and in a fair manner.' The obligation to act in a fair manner is further expanded in s 3 (2) of the Administrative Justice Act to require the giving of 'adequate notice of the nature and purpose of the proposed action' and 'a reasonable opportunity to make adequate representations' as well as 'adequate notice of any right of review or appeal where applicable.'"

I must add that the embodiment of the common law maxim, *audi alteram partem* has received constitutional expression in s68 of the Constitution which provides for a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. See *Telecel Zimbabwe (Pvt) Ltd* v *Potraz & Others* 2015 (1)ZLR 651 (H) 663 A-D; *U-Tow Trailers (Pvt) Ltd* v *City of Harare & Another* 2009 (2) ZLR 259 (H) 267 F-G; *Tachiona* v *Bulawayo Seventh Day Adventist City Centre Church & Others* HB 63/17.

By cancelling the applicants mining licence without according him an opportunity to make representations (which would have assisted him to see the light) the second respondent acted contrary to the common law, the Administrative Justice Act and the Constitution of Zimbabwe. The decision is therefore reviewable and should be set aside. I do not agree that the first respondent can succeed in hiding behind saying the second respondent was merely implementing the decision of the Minister. The decision to cancel the licence was that of the second respondent who then invited the applicant to appeal to the Minister. When the appeal was noted the Minister did not deal with the merits of the appeal.

In the result it is ordered that;

1. The proceedings conducted by the second respondent for the cancellation of the applicants mining licence number 30263 be and are hereby declared null and void and are accordingly set aside.
2. The applicant's mining licence number 30263 for Musorowaparuka 5 Mine is hereby reinstated.
3. The first respondent shall bear the costs of this application.

Hore and Partners, applicant's legal practitioners
Guwuriro and Associates C/o James Moyo-Majwabu & Nyoni, 1st respondent's legal practitioners