TECHMATE ENGINEERING (PVT) LTD

Versus

PROVINCIAL MINING DIRECTOR, GWANDA N.O.

And

WHITE NILE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 10 MAY 2022 & 2 JUNE 2022

Application for review

B.C. Dube, for the applicant
D. Dube, for the 2nd respondent

DUBE-BANDA J

Introduction

1. This is a review application, brought in terms of section 27 of the High Court Act [Chapter 7:06], as read with rule 62 of the High Court Rules, 2021. Applicant seeks to challenge the decision of the 1st respondent made on the 19 October 2021.

2. Applicant seeks an order couched in the following terms:

   i. The application for review be and hereby succeeds.
   ii. The decision of the 1st respondent dated 19 October 2021, in respect of the dispute between applicant and 2nd respondent under Ref: MATSOUTH/2/619/91/21 be and is hereby set aside.
   iii. The mining shafts and workings under contest between the applicant and 2nd respondent be declared to fall within applicant's mining claim, that is, Goodenough 7 Reg. No. 34308.
   iv. 2nd respondent's alleged special grant be and is hereby set aside to the extent that it encroaches on the Goodenough 7 mining claim Reg. No. 34303 as pegged in 1988.
   v. Costs of suit at an attorney-client scale.

3. The application is opposed by the 2nd respondent. 1st respondent neither filed opposing papers nor participated in the hearing of this matter. I take the view that 1st respondent having been cited in his official capacity has taken the position that it will abide by the decision of this court.

Factual background

4. This application will be better understood against the background that follows. According to the applicant it holds title to the mining claims Goodenough 7-8 claims Reg. No. 34 308-9 registered on the 5 May 2021. The applicant lodged a complaint with 1st respondent alleging that 2nd respondent had encroached onto its mining claims Goodenough 7-8. According to 2nd respondent the shafts under contest fall within White Nile Special Grant Reg. No. SG 8565 (SG 8565) and outside Goodenough boundaries. 1st respondent was asked to establish each party's boundaries.

5. On the 8 September 2021, applicant complained to the 1st respondent that one Brian Samuriwo was conducting illegal mining at Goodenough mine 7 registration number 34 308. In the letter of complaint, applicant said Brian Samuriwo was insisting that he was mining within the confines of his Special Grant named White Nile. Applicant asked 1st respondent to stop operations and processing of gold from Goodenough 7 mine pending a determination of the matter. Applicant informed 1st respondent that the parties held an onsite meeting and failed to agree and both resolved that the dispute be resolved by his office. Following the complaint, the parties were invited for a hearing before 1st respondent.

6. Surveyors from the 1st respondent's office in the presence of the both parties and /or their representatives visited the disputed claims. On the basis of information from ground observations and office records the surveyors produced a report. According to the report, as it appears in the decision of the 1st respondent, Goodenough 7-8 mine claims, Reg. No. 34 308-9, were registered on the 5th May 1988. The White Nile Special Grant mine claim, Reg. No. SG 8565 was granted on the 19 May 2021. Goodenough 7-8 claims were pegged earlier than SG 8565. On the ground the boundaries of Goodenough 7 and SG 8565 overlap as per indications. At registration the SG 8565 has partial overlaps over Goodenough 8 and minor overlap over Goodenough 7. There is a deviation from ground indicated positions with those as at registration for Goodenough 7. There is a minor deviation from ground indicated positions with those as at registration for SG 8565 mine claim. The shafts working under contest fall within SG 8565 boundary.

7. On the basis of the submissions by the parties and the report compiled by the surveyors, 1st respondent ruled that:

> According to section 177, it is hereby deemed Special Grant title for SG 8565, was issued subject to that any portion of it overlapping Goodenough 7-8 registration numbers 3408-9 is subordinated to Goodenough 7-8. Brian Samuriwo, of SG 8565 is hereby ordered to adjust SG 8565 boundaries outside Goodenough 7-8 boundaries with immediate effect and submit adjusted the map for survey verification. Techmate Engineering P/L of Goodenough 7 is hereby ordered to revert to their boundary position as at registration with immediate effect and request surveyors to verify. <u>The workings and workings under contest are hereby confirmed as falling within SG 8586 and outside Goodenough boundaries.</u> Any suspension of operations is hereby uplifted. Any party not concurring with the above may appeal to the High Court.

8. It is against this background that applicant has launched this application seeking the relief mentioned above.

9. In its papers 2nd respondent raised two preliminary points, being that applicant has no *locus standi* to institute this application, and that the form used is not provided in the rules of this court. At the commencement of the hearing Mr *D. Dube* counsel for the 2nd respondent abandoned the preliminary points. No further reference shall be made to these preliminary objections.

Grounds of review

10. In essence, the grounds on which the applicant seeks to review the decision of the 1st respondent are these:

    i. The proceedings conducted by the 1st respondent were biased in that he gave the 2nd respondent the right of audience when 2nd respondent had failed to produce any documentation, during the hearing and upon request, for mining at the disputed mining claim, that is Goodenough 1 and Goodenough 8 held under Reg. No. 34 308-9. 1st respondent's decision to proceed with the hearing in such circumstances also amounted to a glaring gross irregularity in the proceedings.

    ii. The determination of the 1st respondent was grossly irregular in that it was at complete variance with the survey that was conducted and thus ignored the fact that the applicant was the prior peggers of the mining claim under dispute and ought to have been given priority in terms of section 177 of the Mines & Minerals Act [Chapter 21:05].

    A *fortiori*, the interpretation and application of section 177 of the Mines and Minerals Act by the 1st respondent was so outrageous in its defiance of logic that no reasonable or right minded person seized with the similar facts and circumstances would have arrived at a similar decision.

    iii. The 1st respondent finding that the workings under contest fell outside Goodenough boundaries as pegged in 1988 is so outrageous and irrational and grossly irregular as it is contradictory to the survey diagram attached to the

determination of the 1st respondent and also the 1st respondent's admission that the applicant's claims were pegged prior the 2nd respondent's special grant.

Submissions by the parties

11. Applicant contends that the disputed claims fall within the mining claims that it acquired particularly those under Goodenough 7 and 8. It is submitted that 2nd respondent does not hold title to these mining claims. It does not even possess a special grant that it alleges it was given by 1st respondent. It is submitted that during the hearing of the matter, applicant produced its mining papers and 2nd respondent failed to produce a copy of the special grant to the mining claims in question. It is further submitted that 2nd respondent is an illegal miner who encroached into applicant's claims without any supporting paper work. It is argued that 2nd respondent is not entitled to carry out any mining activities at the disputed mining claims.

12. According to the applicant 1st respondent was biased in favour of the 2nd respondent. This contention is anchored on the allegation that 1st respondent said 2nd respondent has a special grant when none exists. 1st respondent is criticized for having continued with the hearing and found in favour of the 2nd respondent, when the latter failed to produce any documents in support of its claim.

13. Applicants contends further that the determination of the 1st respondent is grossly irregular and ought to be set aside. In support of this contention it is argued that applicant's mining claims were pegged and registered in 1988. The alleged special grant was allegedly issued to the 2nd respondent in May 2021. It is submitted that when the applicant's claims were pegged there was no GPS system so its boundary was established by the pegs that exists on the ground.

14. It is contended for the applicant that the survey diagram clearly established the pegs that were in existence as far back as 1988 on the mining claims and the mining shafts in question fall within the pegged area of the applicant. It is argued further that the 1st respondent was obliged to give effect to the first peggers and deal with the pegs on the ground as they were pegged without the GPS system then. It is submitted that the 1st

respondent was in error in seeking to determine the dispute using GPS system when applicant's claims were pegged before the GPS system.

15. According to 2nd respondent applicant's 1st ground of review is ill-conceived in that nothing arises from the none production of papers as 1st respondent can proceed on the verbal submissions made by the papers before checking records at his office. It is contended that 1st respondent holds both parties' titles and thus does not rely entirely on documents submitted at a hearing. It is argued that the 1st respondent is the holder of a special grant SG 8565 which was granted on the 19 May 2021.

16. It is submitted further that the second and third grounds of review is also devoid of merit in that applicant seeks to incorporate workings falling outside its boundaries by virtue of being an earlier pegger. It is argued that section 177 (3) of the Mines and Minerals Act is not applicable in this instance in view of the fact that the shafts in contention fell outside applicant's boundaries at registration.

The law

17. The facts and submissions made by counsel in this matter require this court to revisit the distinction between a review and an appeal. This application turns on the distinction between an appeal and review.

18. Appeal and review are both ways of reconsidering a decision. While the reason for seeking one or the other will usually be the sale – that is, dissatisfaction with the result-appeal and review perform different functions. Appeal is appropriate where it is thought that the decision-maker came to a wrong decision on the facts or the law. It is concerned with the merits of the case, meaning that on appeal the second decision-maker is entitled to declare the first decision right or wrong. See: *Tikly v Johannes NO* 1963 (SA) 588 (T) @ 590 G-H.

19. Review by contrast, is not concerned with the merits of the decision but whether it was arrived at in an acceptable fashion. The focus is on the process, and on the way the decision-maker came to the challenged decision. Instead of asking whether the decision was right or wrong, a court on review concerns itself with issues as absence of

jurisdiction on the part of the court, tribunal or authority concerned; 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; gross irregularity in the proceedings or the decision. See: High Court Act [Chapter 7:06].

20. Underscoring the distinction between review and appeal, Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) @ 154d, said:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

21. It is on the basis of these legal principles that this application must be viewed and considered.

Allegation of bias

22. In section 27 of the High Court Act as read with the provisions of the Administrative Justice Act [Chapter 10:28], bias is listed as a ground on which any proceedings or decision may be brought on review before the High Court on review. The *onus* of establishing bias rest on the applicant. The test for bias is the following: there must be a suspicion that the decision-maker might be biased; the suspicion must be that of a reasonable person in the position of the litigant; the suspicion must be based on reasonable grounds; and the suspicion must be something that the reasonable person in the position of the litigant would have. See: *S v Roberts* 1999 (4) SA 915 (SCA).

23. According to applicant 1st respondent was biased in that he gave the 2nd respondent the right of audience when it had failed to produce any documentation for mining at the disputed mining claims, i.e. Goodenough 7 and Goodenough 8.

24. On the facts of this case the fact that 1st respondent gave 2nd respondent right of audience is not indicative of bias. 1st respondent was adjudicating a dispute involving allegations of encroachment between applicant and 2nd respondent, he had to give audience to both

parties. Furthermore, whether he was right or wrong in giving 2nd respondent audience is not the issue, the issue is whether by giving such audience 1st respondent was showing bias? I do not agree. A reasonable person in the position of applicant cannot say that the 1st respondent was biased because he gave 2nd respondent the right of audience during the hearing. On the facts of this case, a reasonable person in the position of the litigant in the position of the applicant would not have such a suspicion.

25. The first ground of review has no merit.

Is the decision of the 1st respondent irrational?

26. The second and third grounds of review speak to the alleged irrationality of the decision of the 1st respondent.

27. In *Nyamupaguma v The Chairperson (The Disciplinary Committee of Nurses Council of Zimbabwe) & Another* HH 453/19 the court said a decision is irrational if it is so outrageous in its defiance of logic or accepted moral standards. See *Silver Trucks (Pvt) Ltd* & *Anor* v *Director of Customs & Excise* (2) 1999 (2) ZLR 88 (H) at 92A; *Chiroodza* v *Chitungwiza Town Council & Anor* 1992 (1) ZLR 77 (H). For it to be characterised as irrational the impugned decision must be so wrong that the decision-maker "must have taken leave of his or her senses" or something else must be inferred from it.

28. A decision is irrational if it is unsupported by the evidence; there is no connection between the evidence and the reasons provided for the decision; and the reasons are unintelligible. See: Albutt v *Centre for the Study of Violence and Reconciliation and Other* 2010 (3) SA 293 (CC). In *Van Zyl v New national Party* 2003 (10) BCLR 1167 (C) the court said:

> In a review of that kind [rationality review] the merits are not considered in order to determine whether the conclusion arrived at by the administrative decision-maker is right or wrong, but whether there is a rational basis between the outcome and the material available justifying such a decision.

29. Applicant contends that its mining claims were pegged and registered in 1988. The alleged special grant is alleged to have been issued to the 2nd respondent in May 2021. It is further argued that at the time that the applicant's claims were pegged there was no GPS system so it boundaries must be established by the pegs that exist on the ground. It is said the 1st respondent was obliged to give effect to the first peggers and deal with the pegs on the ground as they were pegged without the GPS system. It is contended that the matter should have been resolved by the application of section 177(3) of the Mines and Minerals Act [Chapter 21:05].

30. Cut to the bone, applicant is aggrieved by the fact that 1st respondent determined that the shafts under contest fall within SG 8565 boundary, and outside Goodenough 7 and 8. The 1st respondent found, on the basis of the facts and evidence before him, i.e. report compiled by the surveyors and the survey diagram that: the workings under contest are fall within SG 8565 and outside Goodenough boundaries. What is clear is that 1st respondent found that the shafts working under contest fall within SG 8565 boundary.

31. It is clear that that the decision of the 1st respondent is unsupported by the evidence; and there is a connection between the evidence and the reasons provided for the decision; and the reasons are intelligible. Whether the decision is right or wrong is not the inquiry, what is important in a review application is that it passes the rational diagnostic test.

32. The fact that 2nd respondent did not produce a copy of the special grant is irrelevant. The fact that 1st respondent used a GPS system to determine the boundaries, which system was not in use in 1988 when applicant mining claims were pegged is not the issue. Courts are obliged to examine the means selected by the decision-maker to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. In *casu*, the objective sought to be achieved was to ascertain the boundaries between SG 8565 and Goodenough 7 and 8. The 1st respondent used a GPS system for this purpose, and the fact that such a system was used does not render the decision irrational. The court cannot direct the 1st respondent to use any other system, the choice is his.

33. Applicant makes his own conclusion that the survey diagram shows that the mining shafts fall within its pegged area. According to 1st respondent the diagram shows that the shafts fall within SG 8565. The fact that 1st respondent came to a conclusion different from that of the applicant does not make his decision irrational and reviewable.

Incompetent relief

34. I asked Mr *B.C. Dube* whether *paragraphs* 3 and 4 of the draft order are competent. Section 28 of the High Court Act provides that:

> On a review of any proceedings or decision other than criminal proceedings, the High Court may, subject to any other law set aside or correct the proceedings or decision.

35. It is apparent from *paragraphs* 3 and 4 of the draft order that applicant is seeking the setting aside of the decision of the 1st respondent and consequential relief. In *paragraph* 3 of the draft order applicant seeks this court to order that the mining shafts and workings under contest between the applicant and 2nd respondent fall within applicant's mining claim, that is, Goodenough 7 Reg. No. 34308. In *paragraph* 4 applicant seeks an order that 2nd respondent's alleged special grant be and is hereby set aside to the extent that it encroaches on the Goodenough 7 mining claim Reg. No. 34303 as pegged in 1988.

36. Consequential relief cannot be granted in an application for review. This position was stated in *Police Service Commission and Another v Manyoni* SC 7 /22 the court said:

> It is trite and this appears clearly from the above cited provisions that in an application for review the court must confine itself to establishing whether or not the proceedings were afflicted with irregularities.
>
> As set out above, s 28 provides that the High Court can only set aside or correct the proceedings or decision complained of. The High Court has no power to order the re instatement of a person if a matter is brought on review.
>
> In view of these irregularities and the fact that these documents do not appear to have been placed before the court *a quo* the proper relief should have been the setting aside of the decision of the first appellant, and a remittal of the matter so that it can be determined following the proper procedures.

37. The relief sought in *paragraphs* 3 and 4 of the draft order are incompetent. A court on review cannot start to declare that mining shafts and workings under contest fall within applicant's mining claims. Again, a court on review cannot set aside 2nd respondent's special grant. All the court on review can do if it agrees with the applicant is to set aside or correct the proceedings or decision complained of, and no more.

Conclusion

38. There is no evidence of bias in the proceedings or irrationality in the decision of the 1st respondent. He had before him the parties' submissions, the surveyors' report and the diagram. On the basis of what was before him, he determined that the shafts working under contest fall within SG 8565 boundary, and outside the Goodenough 7 and 8.

39. Cut to the bone, applicant is aggrieved by what it considers a wrong decision on the facts and the law. This application is concerned about the merits of the case, the decision is considered wrong, and that is not the function of a review.

40. Furthermore, applicant seek consequential relief in a review application, which is incompetent.

41. It is for the above reasons that this application cannot succeed. It must fail.

42. The general rule is that the costs follow the result. There is no reason why this court should depart from such rule in this case. The applicant is to pay the 2nd respondent's costs on the scale as between party and party.

In the result:

The application be and is hereby dismissed with costs.

Moyo & Nyoni, applicant's legal practitioners
Mathonsi Ncube Law Chambers, 2nd respondent's legal practitioners