AFRICAN CONSOLIDATED RESOURCES Plc
and
DASHLOO INVESTMENTS (PRIVATE) LIMITED
and
POSSESSION INVESTMENTS (PRIVATE) LIMITED
and
HEAVY STUFF INVESTMENTS (PRIVATE) LIMITED
and
OLEBILE INVESTMENTS (PRIVATE) LIMITED
versus
MINISTER OF MINES AND MINING DEVELOPMENT
and
SECRETARY FOR MINES AND MINING DEVELOPMENT
and
THE CHIEF MINING COMMISSIONER

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 9, 12, and 18 March 2010

Urgent Chamber Application

Mrs *J Wood*, for the applicants
F Mutamangira, for the respondents

UCHENA J: The first applicant is a public company listed on the London Stock Exchange. The second to fifth applicants are Zimbabwean companies duly incorporated in terms of the laws of Zimbabwe. They are wholly owned subsidiaries of the first applicant. The second to fifth applicants are holders, of registered mining claims, in the Chiadzwa diamond mining area of Manicaland. Their claims have been subjected to cancellations and litigation over such cancellations. The claims were declared valid by HUNGWE J in HC 6411/07. The respondents appealed against that decision to the Supreme Court, were the appeal is still pending.

The first respondent is the Minister of Mines and Mining Development. The second respondent is the Permanent Secretary in the Ministry of Mines and Mining Development. The third respondent is the Chief Mining Commissioner in the Ministry of Mines and Mining Development.

The second respondent gave notice to the second to fifth applicants of his intention to cancel their claims with effect from 10 March 2010. The notice is dated 28 January 2010. The cancellations are premised on the applicants' claims having been registered over a reserved area in contravention of the Mines and Minerals Act [*Cap 21:05*] the ("Mines Act"). He advised the applicants that the area was reserved against pegging and prospecting by reservation 1558, dated 19 February 2004.

The applicants filed an urgent application on 5 March 2010, seeking a provisional order interdicting the respondent's from canceling their claims on 10 March 2010. The respondents opposed the application and raised the following preliminary issues:

1. That the application was not urgent.
2. That the applicants had not exhausted domestic remedies, and had not complied with Order 33 of the High Court rules
3. That the second to fifth applicants, who are the holders of the claims, did not exist at the time the claims were registered.

Urgency

Mr *Mutamangira* for the respondents submitted that the applicants' application is not urgent because the applicants' who where notified of the cancellations on 28 January 2010, waited until the eleventh hour, before filing their application. He further submitted that the applicants have not exhausted domestic remedies provided in s 50 (2) of the Mines Act. He further submitted, that the applicants appealed to the minister, on 9 March 2010, therefore that process must be completed before this court can intervene.

Mrs *Wood* for the applicants submitted that the delay was caused by the applicants' attempt to persuade the second respondent to withdraw the cancellation. The applicants had previously succeeded in getting the respondents to withdraw the 8 December 2009 cancellations. They believed communication with the second respondent would achieve similar results. She further submitted that the applicants had applied to this court against the 8 December 2009 cancellations, and appealed to the minister. Those proceedings were rendered academic by the second respondents' withdrawal of the 8 December cancellations. The applicants had incurred heavy litigation expenses and wanted to avoid the same in respect of the 28 January cancellations

The second to fifth applicant received the 8 December 2009 notices to cancel from the Acting Mining Commissioner Manicaland. They challenged the cancellations, by pointing out that there was no mining Commissioner for Manicaland. That led to the withdrawal of that cancellation by the second respondent in this case. In his letter of 28 January 2010 the second respondent advised the applicants that he had in terms of s 341 of the Mines Act taken over the functions of the Mining Commissioners, Harare, Masvingo and Manicaland, and was withdrawing the 8 December 2009 cancellations to avoid unnecessary litigation. The second respondent then gave the 28 January 2010 notices of the cancellation of the second to fifth applicants' claims. He again advised them that he had in terms of section 341 of the Mines Act assumed the functions of .the afore-said Commissioners. The second respondent's conduct was clearly aimed at correcting the error pointed out by the applicants, and to personally repeat the same act with resolve. The fact that the withdrawal and the subsequent cancellations took place on the same day must have been of significance to the applicants.

The applicants attached to their application the letters they wrote to and received from the second respondent before they filed this application. They attached the second respondents' letters dated, 28 January 2010, 12, 19 and 23 February 2010, and their letters to the second respondent dated 1, 11, 16, 23 and 24 February 2010.

The correspondence reveals the applicants' attempt to settle the dispute without litigation and the second respondent's insistence that the cancellations were not going to be reversed. It is clear that the applicants genuinely wanted to avoid litigation, and hoped the second respondent could be persuaded to withdraw the cancellation. It is also equally clear from the second respondent's letters that the applicants' attempts were not going to be acceded to. This must have warned the applicants that their delay in applying to the courts or appealing to the Minister may in the circumstances be to their own disadvantage.

I am therefore satisfied that the applicants' explanation for the delay is not satisfactory.

Mr *Mutamangira* made forceful submissions on the effect of the applicants' coming to this court before exhausting domestic remedies. He submitted that s 50 (2) of the Mines Act, provides for an appeal to the minister. The second respondent in his notices of cancellation drew the applicants' attention to their right to appeal. He submitted that the applicants had not appealed to the minister, when they filed this application. He further submitted that this was a deliberate abstention from exhausting domestic remedies. He further submitted that the

applicants have now appealed to the Minister. They did so on 9 March 2010, a day before the date of cancellation, and four days after they filed this application.

Mrs *Wood* submitted that the applicants had no hope of a fair hearing before the minister. She referred to HUNGWE J's comments in HC 6411/07 where the applicants' chance for a fair hearing by the minister was compared to that of "an ice block against hell fire". She pointed out the applicants' allegations of the minister's alleged involvement with companies which have been granted rights to mine diamonds from the disputed claims. If these were the true facts they would have been a fair response to Mr *Mutamangira*'s submissions.

An analysis of the applicants' appeal to the minister is revealing. It seeks the Minister of Mines and Mining Development's recusal from considering the applicant's appeal. This means if that request is acceded to the minister, who is alleged to be biased will not decide the applicant's appeal. If he considers the appeal against them without good grounds for refusing to recuse himself the applicants can take his decision on review. The applicants therefore have a fair chance of their appeal being properly considered on the merits.

The appeal was submitted a day before the date of cancellation, and four days after this application was filed. The filling of the appeal places this court in competition with the minister on the determination of the dispute between the parties. When such a situation arises the court must defer to the determination of the issues through domestic remedies.

That is consistent with the courts' clear position on the need for a party to first exhaust domestic remedies before seeking a remedy before this court. In the case of *Girjac Services* (*Private*) *Limited* v *Mudzingwa* 1999 (1) ZLR 243 (SC) at 249 B-E GUBBAY CJ commenting on the need to exhaust domestic remedies said:

> "In its opposing affidavit, the appellant specifically raised the complaint that the respondent had adopted the wrong procedure in applying to the High Court for relief rather than following the domestic procedure outlined in the code of conduct. In his answering affidavit, the respondent significantly proffered no explanation for taking the route he did. He appears to have been of the view that both options were open; the choice being uninhibited.
> The learned judge a *quo* did not deal with this issue although it was argued and the relevant authorities referred to him. He ought to have done so.
> In *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (H) at 95D, MTAMBANENGWE J observed that where domestic remedies are capable of providing effective redress in respect of the complaint and, secondly, where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for not doing so. The same approach was applied by SMITH J in *Musandu* v *Chairperson Cresta Lodge Disciplinary and Grievance Committee* HH

> 115-94 (not reported); and was referred to with approval by MALABA J in *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H) at 191 D -192B. I respectfully endorse it."

In this case the applicants did not only come to court before exhausting domestic remedies. They are asking this court to determine the legality of the respondents' handling of the cancellations when an appeal is pending before the first respondent or another minister who will decide the case if the first respondent accedes to the applicants' request for his recusal.

The later should in terms of the case law referred to above, and s 7 of the Administrative Justice Act [*Cap 10:28*], hereinafter referred to as the (AJ Act), be sought first. The simultaneous filing of an application before this court, and an appeal before the first respondent, or his substitute, as already said places this court in competition with the determiner of the domestic remedy. When that happens, this court must defer to domestic proceedings, and allow them to be exhausted before it can hear the dispute between the parties. The pendency of the domestic remedy would in my view take away urgency from an application to this court.

Section 7 of the AJ Act provides as follows:

> "Without limitation to its discretion, the High Court may decline to entertain an application made under section *four,* if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy should first be exhausted".

My understanding of s 7 is that this court can decline to hear an application, based on an alleged failure to comply with the provisions of the AJ Act., if it is of the view that the applicant has other legal remedies through which he can obtain the remedy sought before it and it considers that such remedy should first be exhausted. The court can exercise its discretion, but it should not do so in a manner that terminates pending domestic remedies unless there are compelling reasons for it to do so. The intention of the legislature in providing domestic remedies must be respected by the courts, and the officials charged with the authority, to determine, domestic appeals or reviews must be allowed to do their work before this court intervenes. In my view this court should only intervene in cases where it is obvious that domestic remedies will not do justice in the case before it. This approach is consistent with the principle of judicial deference, commented on, in the South African cases of *Bato Star Fishing* (*Pty*) v *Minister of Environmental Affairs* 2004 (4) SA 490 at 513, and *Ekuphuleni*

Metropolitan Municipality v *Dada NO & Ors* 2009 (4) SA 463 (SCA) at p 468, where HURT AJA commented on judicial deference as follows:

> "In *Logbro Properties CC* v *Bedderson NO* & *Ors* 2003 (2) SA 460 (SCA) (2003) 1 All SA 424, para 21, CAMERON JA referred, in the context of a necessity for 'judicial deference', with approval to the following passage from an article by Cora Hoexter entitled *The Future of Judicial Review in South African Administrative Law* (2000) 117 SALJ 484, at 501-2, which is to the following effect:
>
> > '. . . the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of these agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate maladministration.'
> >
> > This passage was also referred to with approval and the theme taken up by SCHUTZ JA in *Minister of Environmental Affairs and Tourism* & *Ors* v *Phambili Fisheries* (*Pty*) *Limited*; *Minister of Environmental Affairs and Tourism* & *Ors* v *Bato Star Fishing* (*Pty*) *Limited* 2003 (6) SA 407 (SCA) ([2003] 2 All SA 616), paras 52 and 53, where, after quoting the passage set out above, the learned judge said:
> > I agree with what is said by Hoexter (op cit at 185):
> >
> > 'The important thing is that judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal'.
> >
> > (53) Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we conclude that his decision cannot be sustained on rational grounds".

In the present case the urgency of the application is diluted by the applicants' conduct. They appealed to the minister a day before the date of cancellation when this application was already pending before this court. They knew from 28 January 2010, that they had a right to appeal to the minister. They avoided that option preferring to communicate with the minister's subordinate, whose letters show that he was not prepared to budge. They then applied to this court, before appealing to the minister well knowing that they would also appeal to the

minister. They appeared before this court on 9 January 2010 when the case was postponed, to 12 March 2010, with the respondents' counsel undertaking to ensure that the applicants' claims would not be cancelled before the determination of this application. They therefore resorted to applying to this court simultaneously with an appeal to the minister. This tends to show that the applicants deliberately delayed, appealing to the minister, so that they could apply to this court on the pretext that they did not expect justice from the minister, when they knew that they would appeal to the minister and ask him to recuse himself so that their appeal would be heard by an impartial acting minister. No explanation was given as to why the applicants did not appeal to the minister in the manner they did before 9 March 2010. The delay in approaching this court or appealing to the minister was therefore a result of a deliberate abstention from acting when the urgency arose on 28 January 2010.

In the case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 at 193 F-G CHATIKOBO J said:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency, which stems from, a deliberate or careless abstention from action until the dead line draws near is not the type of urgency contemplated by the rules."

In the circumstances it can not be said that the application is urgent as I have to defer to the appeal under domestic remedies. I therefore hold that the applicants' application is not urgent

Other points in *limine*

The respondents had also sought the dismissal of this application, on the grounds that the application does not comply with Order 33 of the High Court rules, and that the applicants had not yet been incorporated when they registered the claims in dispute. Mr *Mutamangira* submitted that the fact that they were not in existence when the claims were registered, means the registration is invalid in terms of the Mines Act.

In view of my finding that the application is not urgent, I need not determine the other preliminary issues. Once a case is judged to be not urgent, no further consideration should be given to any other aspect of it. This is because urgency is the key entitling a case to this court's attention on an urgent basis and ahead of other cases awaiting the court's attention.

The appropriate order

Mr *Mutamangira* urged this court to dismiss the application if the court found in favour of any of the respondents' preliminary issues. As I can not deal with other issues in view of my finding that the application is not urgent, the order sought by the respondents is not appropriate. A finding that a case is not urgent, does not mean that the applicant's case has no merits. It means the case does not qualify for hearing on an urgent basis in terms of r 244 of the High Court Rules. It should therefore be set down and heard like any other case. It should simply take its place among cases awaiting to be set-down for hearing in terms of the rules applicable to none urgent applications. See the comments of CAMERON JA in the case of *Commissioner, South African Revenue Services* v *Hawker Air Services* (*Pty*) *Ltd*; *Commissioner, South African Revenue Service* v *Hawker Aviation Partnership* & *Ors* 2006 (4) SA 292 (SCA) at 299F- 300A.

A case judged to be not urgent should simply be struck off the roll for it to be proceeded with like any other case.

In the result the applicant's application is struck off the roll.

Venturas & Samukange, applicants' legal practitioners
Mutamangira & Associates, respondents' legal practitioners.