K & G MINING SYNDICATE

Versus

RONALD MUGANGAVARI

And

PROVINCIAL MINING DIRECTOR, MIDLANDS

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 27 JUNE & 30 JUNE 2022

Opposed Application

T. Zishiri for the applicant
D. T. Mwonzora, for the 1st respondent
B. Moyo, for the 2nd respondent

KABASA J: The applicant and 1st respondent have had a long standing mining dispute concerning mining claims, Midway 21 and Clifton 15. The dispute was referred to the Provincial Mining Director of Masvingo who gave a determination in favour of the applicant.

The area in which the mining claim is situated falls under Mberengwa. Following the Masvingo Provincial Mining Director's determination, the 1st respondent took the matter to the Gweru Provincial Mining Director who also gave a determination in favour of the applicant. Dissatisfied with the determination, the 1st respondent appealed to the Minister of Mines and Mining Development and was successful. The effect of the Minister's determination was a cancellation of the registration certificate for Midway 21 which is the claim applicant contends belongs to it.

Aggrieved with the Minister's decision, the applicant brought the matter on review to this court. In that application the applicant sought the following relief:

> "The determination by the 3rd respondent dated 17 July 2015 cancelling Midway 21 mining registration certificate held by applicant be and is hereby set aside."

In a judgment handed down on 1st June 2017, TAKUVA J granted the application, effectively reversing the Minister's decision. The 1st respondent noted an appeal which was however aborted.

The wrangle between the parties appeared not to have abated resulting in the 2nd respondent issuing a directive suspending mining and allied operations at the disputed mining claim until the resolution of the matter. The 1st respondent was unhappy with the directive and filed an application for a declaratur seeking to nullify the 2nd respondent's decision. In a judgment handed down on 11 May 2020 MAKONESE J granted the application, declaring the 2nd respondent's order unlawful and invalid and allowing the 1st respondent to resume mining operations at Clifton 15.

The applicant was aggrieved by this decision and appealed to the Supreme Court. An order by consent was subsequently granted, allowing the appeal.

The sum total of this endless litigation meant that TAKUVA J's judgment in HB-131-17 remained extant. In essence applicant was successful in challenging the Minister's decision cancelling its mining registration certificate to Midway 21. It is important to note that in that judgment TAKUVA J made the following remarks:

> "The 1st respondent argued quite strongly that this court should also simultaneously review 2nd respondent's decision which in his view, is anomalous in that Clifton 15 and Midway 21 are two different and distinct mining sites, which do not even share the same boundary. First respondent urged this court to take a judicial notice of the anomaly highlighted above and proceed to make a substantive judgment that would put to rest the entire dispute between the two parties.
>
> I am not persuaded by this invitation. In my view, it would be improper to review proceedings in respect of the 2nd respondent as they are not properly before me. In any event, there is no basis to review these proceedings. If 1st respondent wanted proceedings by the 2nd respondent reviewed, he should have done so before appealing to the Minister."

The 1st respondent therein is the 1st respondent *in casu* and the 2nd respondent is also the 2nd respondent *in casu*. The 2nd respondent's decision that Midway 21 resume full mining operations became the operational order following the setting aside of the Minister's decision by TAKUVA J.

On 20th April 2021 the applicant filed the present application in terms of section 14 of the High Court Act, Chapter 7:06 seeking a declaratur. The applicant sought the following order:

" The applicant be and is hereby declared to be the legitimate holder of title over the mining claim known by applicant as Midway 21 and known by 1st respondent as Clifton 15.

The 1st respondent, his agents, proxies and anyone mining through him be and are hereby evicted from the mining claim known by applicant as Midway 21 and known by 1st respondent as Clifton 15"

In his founding affidavit, Herbert Kwenzani who identified himself as a member of the applicant's mining syndicate seeks the applicant to be declared the legitimate holder over the disputed claim on the basis of TAKUVA J's judgment and alternatively on the basis of the apparent irregularities in the decision of the Minister.

In opposing the application the 1st and 2nd respondents raised preliminary points. These are:-

1. The application seeks to declare TAKUVA J's judgment extant and enforceable and this is untenable as that judgment does not require an accessory judgment for it to be enforceable.
2. The application is an attempt to review the Minister of Mines and Mining Development's decision well out of time.
3. The relief sought as consequential relief seeks the cancellation of 1st respondent's certificate of registration by this court and therefore improperly using the court as a court of first instance when such cancellation is within the purview of the 2nd respondent.

Counsel for the 2nd respondent associated himself with *Mr Mwonzora's* submissions on these preliminary points.

In response counsel for the applicant contended that he intended to withdraw the ground relating to the irregularities in the Minister's decision and leave the ground anchored on the judgment by TAKUVA J.

This judgment is concerned with the points *in limine* as I consider them dispositive of the matter. (*Mbatha* v *Ncube & Another* HH-648-2021, *Telecel Zimbabwe (Pvt) Ltd v PORTRAZ and Others* HH446-15*)*

Mr. Mwonzora's argument that if TAKUVA J's judgment is extant and enforceable as contended by the applicant, it does not need this court to declare it so, is valid. It equally does not require this court to declare it enforceable. The applicant successfully challenged the Minister's decision and the cancellation of the registration certificate of Midway 21 was

consequently reversed. All the applicant has to do is enforce that judgment. How it is going to enforce it is not for this court to say. This court made a decision and that decision is extant. It is to this extant decision that the applicant must look and not seek another judge to declare enforceable a judge of concurrent jurisdiction's decision. Such an approach is novel and not legally sustainable.

This is the long and short of what the applicant seeks in stating that the application is primarily premised on the fact that the judgment by TAKUVA J under case number HC 2031/15 is extant and enforceable. The applicant must enforce the rights stemming from TAKUVA J's judgment, whatever their nature. The point *in limine* was well taken and must succeed.

I must just observe in passing that the applicant cited the 3rd respondent in case number HC 2031/15 as the Ministry of Mines and Mining Development and obtained judgment with the 3rd respondent cited as such. In HC 2764/17, a case referred to by the 1st respondent, the applicant sought to have the judgment in HC 2031/15 corrected in order to reflect the 3rd respondent therein as Minister of Mines and Mining Development. The application was not successful and Dube-Banda J in dismissing the application had this to say:

> "I do not accept that the citation of the Ministry of Mines and Mining Development was a mistake common to all parties. If it was a mistake, it was a mistake made by the applicant and it must live with it. The substitution applicant is seeking is not a matter of form but a matter of substance. Such a substitution of a party cannot be achieved through the vehicle of rule 449"

The application I am now seized with followed this judgment by DUBE-BANDA J, a judgment under HB-159-20. The present application appears to be an attempt to achieve that which was denied by Dube-Banda J. The ill-conceived application for a declaratur, premised as it is on Takuva J's judgment, might have been informed by a desire to then enforce the judgment against the 3rd respondent therein. I have already stated that it is not for this court to pronounce what Takuva J's judgment means to the applicant. The judgment needs no interpretation but enforcement.

The second point *in limine* relates to the decision by the Minister, which decision was already reviewed in the review application heard by TAKUVA J. The irregularity of the

Minister's decision was addressed in HC 2031/15. This fact is very clear, regard being had to what the learned judge said:

> "I take the view that the Minister's decision is null and void for want of jurisdiction. Assuming I am wrong, I entertain no doubt that the decision is grossly irregular and unreasonable in that it ignored the clear provisions of section 177 (3) of the Act."

This court cannot possibly re-review the Minister's decision as that was done in HC 2031/15. The present application is in essence asking the court to re-look at the issue dealt with in HC2031/15.

Mr. Zishiri's decision to withdraw this ground as one of the grounds upon which this application is anchored was therefore wise.

The point *in limine* had been well taken although not in precisely the manner in which I considered it. The issue was not that the applicant was raising a ground for review and ought to have timeously brought an application for review of the Minister's decision. The review application was filed and that is what, *inter alia*, TAKUVA J's judgment speaks to.

It is my considered view that the foregoing is dispositive of the matter. The application was ill-conceived and there is no need to go into the merits of whether a case for a declaratur has been made. I therefore do not intend to exercise my mind on the 3rd point *in limine*.

In the result I make the following order:

1. The 1st and 2nd points *in limine* were properly taken and are accordingly upheld.
2. The application is accordingly struck off the roll, with costs.

Kwande Legal Practitioners c/o Mlweli Ndlovu & Associates, applicant's legal practitioners
Mwonzora & Associates c/o Mashayamombe & Company, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners