FRIDAY MARASHA
versus
THE SECRETARY FOR MINES & MINING DEVELOPMENT
and
MRS SHIRIHURU
and
THE CHIEF MINING COMMISSIONER
and
THE MINISTER OF MINES & MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 17 July 2014 and 3 September 2014

Opposed application

Adv. E.Matinenga, for the applicant
B.Diza, for the second respondent
No appearance for 1st, 3rd and 4th respondents

MAFUSIRE J: This was an application for review. The applicant was the registered holder of a mining claim. The second respondent was the registered owner or occupier of the land upon which that claim was registered. The second respondent claimed that the applicant's claim had been duly cancelled by the fourth respondent (hereafter referred to as "***the minister of mines***" or simply, "***the minister***") and that therefore he had to close shop and quit. The applicant claimed that the purported cancellation was null void. Among other things, he said the minister had once allowed his appeal from the decision of the third respondent (hereafter referred to as "***the mining commissioner***") cancelling the claim but that barely a month thereafter the minister had made a U-turn, purporting to reverse his earlier decision and to confirm the cancellation. Applicant's case was that the minister could not legitimately do that because he had become *functus officio*.

Neither the first respondent (hereafter referred to as "***the secretary for mines***" or simply, "***the secretary***"), nor the mining commissioner nor the minister filed any papers. The second respondent opposed the application on a number of grounds. The first was an objection *in limine*. It was said that this court had no jurisdiction in a dispute pitting an owner or occupier of a farm and the holder of a mining claim registered over it. It was said that in

terms of s 32 of the Mines and Minerals Act, *Cap 21:05* ("***the Act***") only the Administrative Court has jurisdiction over such a dispute.

Section 32 of the Act reads:

> "**32. Disputes between landowners and prospectors**
> If any dispute arises between the holder of a prospecting licence or a special grant to prospect or any exclusive prospecting order and a landowner or occupier of land as to whether land is open to prospecting or not, the matter shall be referred to the Administrative Court for a decision."

The second respondent's point *in limine* was spurious for a number of reasons, not least the fact that the dispute before me was not whether land was or was not open to prospecting. The dispute before me was on the propriety of the minister's conduct in allegedly overturning the decision of the mining commissioner cancelling the applicant's claim, and a few weeks thereafter, revoking his own earlier decision and confirming the cancellation.

The point *in limine* was also spurious for the reason that the dispute before me did not pit a land owner or occupier and a prospector. It pitted a prospector and the regulatory authority. The second respondent might have been cited as a party. That was proper. She was an interested party and the one to be most affected by any decision. She might have filed opposing papers. That was her right. The minister and his officials may not have filed any papers. That had been their choice. But all that would not detract from the fact that the second respondent remained a nominal party. The applicant's true grievance lay against the minister and his officials. This court had jurisdiction. The second respondent's first ground of opposition in the form of a point *in limine* is therefore dismissed.

The second respondent's second ground of opposition was that there had been nothing wrong in the minister reversing his earlier decision because the claim should not have been registered in the first place. It was said the claim should not have been registered in the first place because it had allegedly been registered over wet lands that had been earmarked for a dam site and that it was within the prohibited radius of a principal homestead, allegedly in violation of the Act.

The second respondent's second ground of objection was incompetent. The case before me was not about the propriety of the decision to register the claim in favour of the applicant. The claim having been registered, the mining commissioner having given notice of

an intention to revoke it, the applicant having appealed or objected to the minister, and the minister having initially allowed the appeal or objection, the dispute was whether or not the minister could have properly reversed his earlier decision. In other words, had the minister become *functus officio*? Thus, the second respondent, in her second ground of opposition, was answering to something that was neither before me nor had been raised by the applicant.

The second respondent's third ground of objection, only raised or developed in the heads of argument, was that there was nothing to review because the applicant's appeal against the mining commissioner's decision to revoke his claim had been made, not to the minister as the Act provided, but to the secretary. It was argued that the minister could not be said to have become *functus officio* when it was not him who had made the decision in the first place.

To appreciate the second respondent's third ground better calls for a closer examination of the facts, the sequence of events and the documents relied upon by the parties.

According to the certificate of registration issued by the mining commissioner in favour of the applicant on 27 July 2004, the claim had originally been registered on 23 December 1994. Applicant says the original beneficiary had been one Lovemore Mutunhire who had subsequently transferred it to him. By letter dated 1 December 2010 the mining commissioner gave the applicant notice of his intention to cancel the certificate of registration on the ground that the claim was on wetlands and within the prohibited radius of a homestead as aforesaid. Applicant was given 30 days within which to file an appeal to the minister if he had any objections to the intended move. This was in terms of s 50 of the Act. I use the terms "**appeal**" and "**objection**" in the same way or sense as used in that section and the correspondence.

On 6 December 2010 the applicant appealed or objected to the minister in writing. His letter was addressed to "**The Minister of Mines and Mining Development**". It was referenced "APPEAL AGAINST CANCELLATION OF CERTIFICATE OF REGISTRATION AVOCA 9 (22963)"

On 4 March 2011 one I.N. Chihota ("***Chihota***"), signing for the secretary for mines, wrote to the mining commissioner and copied the letter to the applicant and the second respondent. The letter read as follows:

> "RE: APPEAL AGAINST CANCELLATION OF CERTIFICATE OF REGISTRATION; AVOCA 9-22963 VS MRS. D.E. SHIRIHURU"

> The above matter refers.
> Avoca 9 block of claims, registration no. 22963 which was originally registered on 13th (sic) December, 1994, cannot be cancelled in view of the provisions of section 58 on the block of claims namely Avoca 9 has been in existence for a period of more than two years.
>
> Mr. Marasha, owner of Avoca 9 claims and Mrs Shirihuru should co-exist. Mr. Marasha should comply with the appropriate legislation."

The next development was a letter dated 27 April 2011, also signed by Chihota, also signing on behalf of the secretary for mines. It was addressed to both the second respondent and the applicant and copied to the mining commissioner. The applicant claimed he never saw it. The letter read as follows:

> "FARMER/MINER DISPUTE: AVOCA 9 MINE – BARASSIE FARM
>
> The above mentioned matter refers.
> The Honourable Minister of Mines and Mining development has approved the cancellation of Avoca 9 claims registered by Mr. Marasha and turns down his appeal against the cancellation."

The next development was the court application in November 2012. The applicant had been granted condonation for late filing.

Thus, it is not correct that the applicant had appealed to the secretary of mines. His letter was addressed to the minister. Therefore, the second respondent's third ground of objection should fail on that basis.

However, I have to assume that the second respondent made a patent mistake. The substance of her argument on this third ground of objection, as was made clear by counsel during oral argument, was that Chihota's first letter had not come from the minister because it never said that. She said the letter had come from the secretary. In contrast, Chihota's second letter had clearly come from the minister because it said the Honourable Minister of Mines and Mining Development had approved the cancellation of the claim and had turned down the applicant's appeal.

The applicant's response to that argument was that the correspondence had to be read holistically. He had appealed to the minister. The secretary had responded. The secretary is the chief executive officer of the ministry. He had responded on behalf of the minister. So Chihota's first letter rejecting the revocation of the claim had been from the minister.

Chihota's second letter purporting to revoke the earlier decision had also been from the minister. The minister could not do that. He had become *functus officio* with the first decision.

Regrettably, there was nothing else in the documents or the submissions by counsel that would help decide whether Chihota's letters had been authorised by the minister. Furthermore, the failure or neglect by the minister and his officials to file any papers advising what really had taken place, despite being served with the applicant's application, only made the situation more difficult.

In terms of s 50(4) of the Act, when someone appeals or objects to the minister against an intention to cancel his or her right to a claim, the minister can give directions to the mining commissioner. The mining commissioner will then have to act in terms of those directions. So does one assume, as applicant urged, that when Chihota wrote the first of his letters and signed it "***… for Secretary for Mines …***" he was doing so on behalf of the minister? Does one conclude that the clear reference in Chihota's second letter, to the minister having approved the cancellation of the claims and having turned down applicant's appeal, distinguishes that letter from the first, in spite of it also having been signed by Chihota "***… for Secretary of Mines …***"?

It seems from the scheme of the Act, the secretary for mines is reposed with considerable powers to regulate mining affairs. In terms of s 341 he is vested with vast authority to supervise and regulate mining commissioners and other officers of the Public Service duly appointed to such offices. In terms of subsections (1) and (2) what they can do he can also do by assumption. In terms of subsection (3) what the minister can do he can also do by delegation.

Therefore, when Chihota wrote the first of his letters and signed it on behalf of the secretary it is possible the secretary may have been exercising his own original power to reverse what he may have considered a violation of the Act by the mining commissioner in purporting to cancel a claim that had been in existence for a period in excess of two years. Chihota's letter did not refer to the minister. But it is also possible that the secretary may have been exercising delegated authority from the minister even if no reference was made to the minister. Only the minister and his officials could have shed light on this.

But be that as it may, I find for the applicant on the second respondent's third ground of objection. My reasons are these. The minister and his officials had been served with the applicant's papers. From those papers the minister and his officials would have seen that the

applicant was making the point that he had appealed or objected to him against the mining commissioner's intention to cancel his claim. The minister and his officials would have seen that the applicant was construing Chihota's first letter to have been the response from the minister in terms of s 50(4) of the Act. They would have seen that the applicant had believed from Chihota's first letter that his appeal or objection had been allowed. The minister and his official would have also seen that the applicant was not accepting that the minister could subsequently change his mind in the manner he had purportedly done seemingly through Chihota's second's letter. Neither the minister nor any of his officials had bothered to respond or shed any light on the point. The second respondent could not rely on what had not been refuted. She could not rely on some artificial distinction that when Chihota signed the first letter he was doing so on behalf of the secretary for mines, but that when he was signing the second letter he was now doing so on behalf of the minister even if that letter also said he was still signing it on behalf of the secretary for mines. Actually, what the second letter clarifies is that the minister's decisions are communicated through the secretary.

In the premises, I hold that when the applicant appealed or objected to the minister against the decision of the mining commissioner cancelling his claim, the minister allowed the appeal or the objection. I also hold that it was wrong for the minister to subsequently reverse that decision when it had already been communicated to the applicant. By then the minister had become *functus officio*. He no longer had legal competence to do that. He had discharged his office[1]. The rationale for the *functus officio* doctrine is to prevent intolerable uncertainty regarding decisions of public officials affecting private individuals. Applicant's counsel referred me to the case of *Delta Operations Ltd v Maphosa* 2004 (2) ZLR 113 (S). At 116B – E the court stated as follows:

> "An official cannot make a decision which affects or abolishes rights which his previous act has already created. Such a favourable decision may only be revoked with the consent of the beneficiary. Intolerable uncertainty would result …."

The last ground of objection by the second respondent was that the Administrative Court had in 2000 granted her some provisional water right to store on the farm some 840 mega litres of water per year for agricultural purposes and that therefore any decision by this

[1] See BAXTER *Administrative Law* (1984) at p 372 and the case of *Chirambasukwa v Minister of Justice, Legal & Parliamentary Affairs* 1998 (2) ZLR 567 (S)

court granting the application would be tantamount to overruling the Administrative Court decision through the back door, something the High Court cannot do.

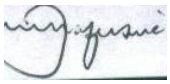
With respect, it was rather desperate of, and somewhat reckless for the second respondent's counsel to have sprung up such a ludicrous argument. The applicant's claim pre-dated the alleged Administrative Court order. It was not shown in what way a decision in favour of the applicant would amount to overruling the order of the Administrative Court. Among other things, it was not shown in what way the applicant's enjoyment of the rights conferred by his claim would interfere with whatever the second respondent did or intended to do with the water right. This ground manifestly lacked merit.

In the circumstances the application is granted. I make the following orders:

1 The decision of the fourth respondent on 27 April 2011 purporting to approve the cancellation of Avoca 9 miming claims registered in favour of the applicant on 27 July 2004 under transfer number 27439, registered number 22963, situate on Lot I of Barassie Farm, is hereby set aside.

2 The costs of this application shall be borne by the second respondent.

3 September 2014



Musunga & Associates, applicant's legal practitioners
Mtetwa & Nyambirayi, second respondent's legal practitioners