SHINGIRAI MUCHINAPO
versus
G. DADIRAI (N.O)
and
EDWICK DZAPASI
and
THE SECRETARY OF MINES AND MINING DEVELOPMENT
and
THE MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 25 February 2025 & 4 April 2025

Opposed Matter

S Madzima, for the applicant.
P Chibanda, for the 1st, 3rd and 4th respondent.
Adv T Zhuwarara, for the 2nd respondent.

MUNANGATI-MANONGWA J: This is an application for review in terms of s26 of the High Court Act [*Chapter 7:06*] as read with r 62 of the High Court Rules, 2021. The applicant approached this court seeking the following relief:

1. That the application for review succeeds.
2. That the proceedings by the first respondent of 8 January 2024 resulting in the notice of intention to cancel the applicant's certificate of registration in respect of Chifumbi 2 mine (Registration No. ME 1688G) and suspension of mining operations by the applicant and conferring the right to mine on the second Respondent violated the right to be heard and therefore was irregular and is hereby set aside.
3. That the decision/ determination by the first Respondent of 8 January 2024 resulting in the notice of intention to cancel the applicant's certificate of registration in respect of Chifumbi 2 mine (Registration No. ME 1688G) and suspension of mining operations by the applicant and conferring rights to mine to the second Respondent is irregular on the basis that the first Respondent was *functus officio* and is thereby set aside.

4. That the decision/ determination by the first Respondent of 8 January 2024 is unlawful, irrational, arbitrary and grossly unreasonable and is therefore set aside.
5. That the first and second Respondents shall pay costs of this application jointly and severally the one paying the other to be absolved.

In seeking such relief, the applicant relies on the following grounds;

1. There was gross irregularity in the proceedings when the first Respondent reached a decision and delivered a determination/notice of intention to cancel the applicant's certificate of registration without affording the parties a hearing, thus violating the right to be heard.
2. In any event, there was gross irregularity in the proceedings when the first Respondent made a determination over a dispute it was *functus officio,* in that the same office once gave a determination regarding the same dispute/issue and same parties, which determination is still extant.
3. At any rate, the decision/determination by the first Respondent is unlawful, irrational, arbitrary and grossly unreasonable in the sense that it directly contradicts the previous determination of the same office on the same facts and legal principles.

Facts

A mining dispute arose between the applicant and the second respondent from allegations that, the second respondent invaded the applicant's mining location and refused to vacate resulting in the applicant filing a complaint to the first respondent (the acting Provincial Mining Director) on 26 July 2022. Applicant alleged that the second respondent had abandoned her mine a distance away and encroached into his claim and carried mining activities. After the first respondent handled the matter, a physical survey and ground visit was carried out by the fourth respondent's officials who in their recommendations of 1 December 2022 made a finding that the second respondent's blocks of claims named Averum 22 were not corresponding with the coordinates submitted at registration. It was found that the second respondent's ground coordinates were approximately 4km away from the coordinates submitted at registration whereas those of the applicant for Chifumbi mine were found to be at their original position as per the docket map. Thus, first respondent's office through the then PMD Mr Kashiri issued a determination based on

recommendations made by the fourth respondent's officials. The second respondent was ordered to revert to her registration position and the applicant was to maintain his ground position, being the one he was occupying at that time carrying his mining activities.

Aggrieved by the determination made, the second respondent in January 2023, purportedly noted an appeal against the determination of 1 December 2022 to the third respondent. In February and March 2023, the second respondent filed an application to the third respondent's office for an injunction which was unsuccessful after having being opposed by the applicant. On 26 May 2023, the second respondent filed a chamber application for condonation for late noting of an appeal under Case No. HC3475/23 which is pending in this court. It is common cause that another determination was handed down by the Provincial Mining Director acting on the instruction of the Secretary for Ministry of Mines (hereinafter referred to as "the secretary") purporting to be acting in terms of s341 of the Mines and Minerals Act [*Chapter 21:05*](hereinafter referred to as "the Act") which decision overturned the prior determination.

The applicant avers that he was never called to a hearing of that determination which was issued by the first respondent on 8 January 2024, suspending applicant's mining operations pending cancellation of his certificate as well as giving the second respondent permission to carry out mining operations on the applicant's purported mining location. The effect of the order was to cancel the applicant's mining certificate even before the determination of the proceedings on the notice of intention to cancel. The applicant avers that the second determination is irregular as there was no error which called for the third respondent to invoke his powers to correct errors. The applicant alleges that despite the first respondent's office being in possession of the record of proceedings, the first respondent's assumption of review or appellate powers are unfounded at law. He states that the first respondent should have carried out an investigation to come with a decision rather than suspend his operations and give such right to the second respondent to carry mining activities at his location before finalization of the dispute.

Further, the applicant avers that the circumstances do not warrant invoking s 58 of the Act as the second respondent does not have registered title to the mine in dispute which makes the decision grossly unreasonable and irrational. He averred that this fact was proven by the ground survey that the applicant's mine is 4km away from that of the second respondent. The applicant avers that in such circumstances, priority and protection should be given to him as the registered

holder. He further averred that no appeal lies with the third respondent as alleged in these circumstances, therefore this court has powers to review the purported correction which the applicant alleges is a nullity. It is due to these substantive and procedural issues that the applicant files this application.

In opposing the application, the first respondent states that his decision was prompted by communication that he received from the Permanent Secretary authorizing him to correct an error that had been made in a determination of 1 December 2022 in that, the applicant having failed to challenge the second respondent occupation of the ground for more than 2 years, his claim falls foul of s58 of the Mines and Minerals Act which was an oversight which affects the validity of the said determination. He states that the Permanent Secretary in terms of s3 41(2) of the Act authorized him to rectify the error which prompted him to write a notice of intention to cancel applicant's certificate of registration. He avers that ignoring such would have defeated the purpose hence the reason why he had to make communication of immediate suspension of the applicants' operations through a letter dated 8 January 2024. He states that he acted lawfully when he issued a notice of intention to cancel the certificate to the applicant on 8 January 2022 and that the applicant was given adequate time thereafter to make representations to the Minister. He further states that there were no proceedings that took place because his decision is founded on s341 of the Act and that the applicant can still approach the Minister to state his case. He highlighted that although it is admitted that the second respondent's block is 4km away from that of the applicant, the Permanent Secretary's position is that the applicant has failed to challenge that within the required time limit. He therefore states that the application is premature given that the applicant has appealed to the Minister.

The applicant raised a **preliminary point** to the effect that the first respondent's opposing affidavit is defective in three ways. He alleges that the opposing affidavit does not show that the facts are deposed under oath, that an oath was taken before a commissioner of oaths and does not show the place where such oath was taken. An affidavit is a sworn statement made under oath. It implies that the wording of the affidavit should capture words taken on oath after which the commissioner of oaths then endorses his signature in confirmation. Given the presence of the Commissioner of oath's signature, the court takes it that the commissioner commissioned the applicant's affidavit after having satisfied himself that an oath was indeed taken. Argument by the

applicant that the first respondent's opposing affidavit is defective in the sense that it does not show that the facts are deposed under oath is without merit. Failure by the first respondent to state that he was swearing to the contents in his opposing affidavit does not vitiate the deposition. Equally, the argument that the opposing affidavit does not show the place where that oath was taken is neither here nor there. In the result, this preliminary point is dismissed.

The second respondent raised **preliminary points** to the effect that the applicant has not exhausted internal remedies available to him in terms of Act and that the application is premature on the basis that the applicant has not exercised his right to be heard within the stipulated time of 30 days. The point that the applicant has not exhausted internal remedies before filing this application is misplaced. This court having been reposed with the power to review, set aside or correct decisions made by administrative authorities in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*], it has the power to sit as a review court in these present circumstances in terms of s26 of the High Court Act [*Chapter 7:06*] (see also *Gwaradzimba N.O* v *Gurta A.G* SC10/15). Given that the present application was filed after variation of the decision made by the Mining Commissioner, and there are allegations of bias, lack of jurisdiction and existence of gross irregularity and irrationality in the decision in terms of s 27 of the High Court Act, this court has jurisdiction to entertain this application.

Notably, the purported instruction by the Secretary to the first respondent did not clarify that the 1st respondent will be acting in the capacity of the Mining Commissioner or that the Secretary himself was giving the instruction acting in that capacity. It is taken that the first respondent was acting on behalf of the Secretary who communicated such determination through the office of the first respondent whose office is the one responsible for handling disputes within his province. Considering the determination seeks to cancel the applicant's mining certificate, the procedure which forms the core of such intention to cancel is reviewable. It is common cause that cancellation itself affects the rights of the applicant and such a drastic measure cannot be taken without the applicant being heard which is a procedural irregularity. In the result, the applicant aggrieved by that determination can exercise his right to seek review of the procedure which brought about the impugned decision. That being the case, the preliminary point is dismissed.

Equally, the second preliminary point raised by the second respondent to the effect that the application is premature on the ground that the applicant has not exercised his right to be heard

within the stipulated time of 30 days lacks merit. It is clear that when a notice of intention to cancel the certificate was send to the applicant on 8 January 2024, he was given time thereafter to make representations to the Minister, which he did in the form of an appeal. Whether it is the correct procedure is a story for another day. The right to appeal to the Minister can be exercised concurrently with the right to seek review in this court.

The 2nd respondent contended that the applicant is a forum shopper hence the application is not properly before the court. Mr *Zhuwarara* for the second respondent argued that in approaching this court seeking review of the determination, the applicant did not state in his papers that he appealed to the 3rd respondent on 18 January 2024. He submitted that since the Minister is seized with this issue, this court should decline jurisdiction and if it proceeds, it usurps the Minister's powers. He argued that the relief being sought by the applicant is intended to resume illegal mining. He contended that the appeal activated domestic issues which this court cannot interfere with. He submitted that on that basis this application should be struck off.

Mr *Madzima* for the applicant argued that this application is proper given that remedies for appeal and review are mutually exclusive. He argued that the applicant cannot be expected to appeal against a decision which is non-existent. He attacked the notice of intention to cancel the applicant's certificate issued by the first respondent and submitted that it is not a notice in actual sense, but a decision which stopped the applicant from mining and gave mining rights to the second respondent. He argued that such decision is reviewable before this honourable court. The court makes a finding that non-revelation of the fact that there is an appeal before the Minister does not affect the propriety of the application as requirements for a review are different from those of an appeal. Accordingly, this objection has no merit and is dismissed. The matter thus has to be determined on merit.

On merits

Issues for determination

1. Whether there is gross procedural irregularity given that the parties were not accorded the right to be heard prior to the second determination.
2. Whether there is procedural irregularity in the second determination given that first defendant is *functus officio* and thus had no right to determine the matter.

3. Whether the decision by the first respondent is grossly irregular, irrational, unlawful and unreasonable.

Whether there is gross procedural irregularity given that the parties were not given the right to be heard prior to the second determination.

The right to be heard is constitutionally entrenched in terms of s 69 (2) and (3) of the Constitution. It is rooted in the *audi alterum partem* rule where a party should be afforded an opportunity to make representation before a decision that affect him is made. When the second determination was made in terms of s 341(1) of the Act, the applicant should have been notified and be given the opportunity to make representations. The authority could not have unliterary decided that there was an error and proceeded to purport to correct it without giving the applicant an opportunity to be heard. This is more particularly when the same office had reached a decision based on factual findings arising out of an investigation carried out by that office. The second decision having been made without according the applicant the right to be heard, such a decision is therefore irregular.

Whilst the Mining Commissioner has the right to issue a notice of intention to cancel a registration certificate in terms of s 50 (2) of the Act, the situation *in casu* is that the actions of the 1st respondent went beyond a mere notice. The court aligns itself with the applicant's argument that the notice of intention to cancel herein is in actual sense a determination given that the purported notice suspended the applicant's operations and allowed the second respondent to resume mining activities on the applicant's mine. This in essence amounted to *de facto* cancellation of the certificate as the applicant was immediately stripped the right to mine with the second respondent being allowed to resume mining activities. All this was done without the applicant being given the opportunity to be heard as immediate action was taken. That being so, this ground succeeds.

Whether there is gross irregularity in the second determination given that the first respondent is *functus officio*?

The Mining Commissioner having made a decision in a dispute between the parties on 1 December 2022 pertaining to the same subject matter, he is *functus officio*. It stands to be stated that *functus officio* entails that the authority who made the decision cannot sit again in that matter

having completed their assigned task by pronouncing a decision that finalise the matter. Such a decision can be varied by a competent judicial authority. Section 361 of the Act grants another legal recourse by giving a party who is aggrieved by the decision of a Mining Commissioner the right to approach the High Court which the second respondent seems to be pursuing given her pending application for condonation for late noting of an appeal under Case No HC3475/23.

The need to assess the import of s 341(1) of the Act therefore becomes crucial in these circumstances in determining whether the Secretary has a right to interfere with the first decision given that it was a decision of a Mining Commissioner. For clarity the section reads as follows:

> "**341 Administration of Ministry**
>
> (1) **The Secretary shall be and is hereby vested with the authority generally to supervise and regulate the proper and effectual carrying out of this Act by mining commissioners or other officers of the Public Service duly appointed thereto, and to give all such orders, directions or instructions as may be necessary**.
> (2) The Secretary may at his discretion assume all or any of the powers, duties and functions by this Act vested in any mining commissioner, and **may lawfully perform all such acts** and do all such things as a mining commissioner may perform or do, and is further **empowered in his discretion to authorizes the correction of any error** in the administration or in the carrying out of the provisions of this Act, or to perform any other lawful act which may be necessary to give due effect to its provisions.
> (3) ……"

The above section is clear that the Secretary can give orders or directions when supervising Mining Commissioners. Even if it is taken that the Secretary can vary such decision in terms of s 341 (1) of the Act which empowers him to supervise Mining Commissioners and give orders, directions and instructions as may be necessary to ensure proper and effectual carrying out of the provisions of the Act, the section is clear that the exercise of such power should be done, when necessary, which is not the case. The court finds that the first determination having been based on factual findings on the ground, there is no justifiable reasons that warranted the Secretary to interfere with such finding and order otherwise. Suffice to state that the above cited section does not give the Secretary appellate powers over the court of the Mining Commissioner. Given the aforegoing, the first decision is still extant, hence this ground of review succeeds.

Whether the decision by the 1st respondent is grossly irregular, irrational, unlawful and unreasonable?

As highlighted earlier, the first respondent although he delivered the second decision on the instructions of the Secretary, the need to assess the rationality of such decision is vital.

Interpretation of the powers reposed in the Secretary in terms of s 341 of the Act was clearly highlighted in *Stonezim Granite Private Limited Mashonaland East and Another* v *The Provincial Mining Director Mashonaland East and Another* SC01/24 where MATHONSI JA held that, although vested with the above cited powers, the powers are not so wide to give the Secretary a blank cheque to act as he may please. Relying on the above cited authority, the Secretary's conduct of varying the first determination alleging that he was correcting an error is not legally acceptable. There is no error to talk about given that the first determination was based on factual findings which were supported by a ground survey. One wonders what the Secretary relied on to reach such a conclusion and instructed first respondent to reverse the first decision given that this is a case whereby the second respondent who is not the registered owner of the mine in question abandoned her mine and occupied the applicant's mine. In these circumstances, the Secretary cannot be said to have exercised his powers lawfully on the ground that his decision is totally opposite of what is actually on the ground (see *Stonezim Granite Private Limited Mashonaland East and Another* v *The Provincial Mining Director Mashonaland East and Another* SC01/24).In fact there is no factual evidence of the existence of the grounds that warrant cancellation of the applicant's certificate in terms of s 50 of the Act. This certainly points towards bias.

This case warranted that the Secretary provides reasons for the decision particularly why the first determination could have been said to be wrong. One wonders the basis of his corrections given the absence of a further investigation conducted or reasons to justify such deviation. The rationale is that administrative bodies or authorities should act in a lawful and fair manner. Such deviation from the findings of the team on the ground without basis is not sustainable at law. His decision and incidentally that of first respondent is therefore grossly unreasonable and irrational given the facts at hand and cannot be sustained.

In light of the above, the application succeeds. In the result, the decision by the first respondent of 8 January 2024 is irregular and is therefore set aside. As regards costs, the general principle that costs follow the cause applies.

Given the facts of the matter the court cautions that when the Secretary utilizes the powers conferred on him in terms of the Act particularly s341 of the Act, it must be clear which role he assumes. Suffice to state that the powers reposed in the Secretary in terms of s341(1) and s341(2) of the Act are different. It being that in s341(1) he acts as the Secretary and in s341(2) he can assume the role of a Mining Commissioner and the implications thereof are different.

Accordingly, the following order is granted;

1. The application for review succeeds.
2. The proceedings by the first respondent of 8 January 2024 resulting in the notice of intention to cancel the applicant's certificate of registration in respect of Chifumbi 2 mine (Registration No. ME 1688G) and suspension of mining operations by the applicant and conferring the right to mine on the second Respondent violated the right to be heard and are therefore irregular and are hereby set aside.
3. The decision/ determination by the first Respondent of 8 January 2024 resulting in the notice of intention to cancel the applicant's certificate of registration in respect of Chifumbi 2 mine (Registration No. ME 1688G) and suspension of mining operations by the applicant and conferring rights to mine to the second Respondent is irregular on the basis that the 1st Respondent was *functus officio* and is thereby set aside.
4. The decision/ determination by the first Respondent of 8 January 2024 is unlawful, irrational, arbitrary and grossly unreasonable and is therefore set aside.
5. That the first and second and third Respondents shall pay costs of this application jointly and severally the one paying the other to be absolved.

MUNANGATI-MANONGWA J…….

Farai & Associates Law Chambers, applicant's legal practitioners.
Civil Division of the Attorney General's Office, first, third, fourth respondent's legal practitioners.
Bhatasara Attorneys, second respondent's legal practitioners.