

REPORTABLE (6)

ANJIN INVESTMENTS (PRIVATE) LIMITED

v

- (1) THE MINISTER OF MINES AND MINING DEVELOPMENT
(2) THE COMMISSIONER-GENERAL OF POLICE (3) ZIMBABWE
MINING DEVELOPMENT CORPORATION (4) ZIMBABWE
CONSOLIDATED DIAMOND COMPANY**

**CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC,
MAVANGIRA JCC, UCHENA JCC & ZIYAMBI AJCC
HARARE, 19 JULY, 2017 AND 27 JUNE, 2018.**

T Mpofu with *P Ranchhod*, for the applicant
L Uriri, for the first and second respondents
J.R Tsivama, for the third and fourth respondents

HLATSHWAYO JCC: This is an application for relief made in terms of s 85 (1) (a) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (“the Constitution”).

The applicant seeks a declaration that its right to fair administrative justice provided for in s 68 (1) of the Constitution and its right to freedom of association in s 58 (1) of the Constitution have been infringed by the conduct of the first, second and fourth respondents arising from the issue of a summary notice on 22 February 2016 declaring Special Grant No. 4765 to be void. The applicant is also seeking an order directing the second respondent and any police officer acting under the instructions of the first and second respondents to cease any action that has the effect of preventing the applicant from lawfully accessing and

conducting its business in the area encompassed by Special Grant No. 4765. Further, the applicant seeks a declaration to the effect that the fourth respondent cease forthwith to claim any right or benefit from the area encompassed by special Grant No. 4765 issued to applicant. An order of costs on a legal practitioner and client scale against the first, second and fourth respondents, jointly and severally, the one paying the others to be absolved, is also being sought by the applicant.

The factual background leading to this application is set out hereunder.

Background

The applicant is a mining company incorporated in terms of the laws of Zimbabwe. Until the 22 February 2016, the applicant was one of the many companies that were carrying out mining operations in Chiadzwa, Marange District.

Through a letter dated 22 February 2016, the Secretary for Mines and Mining Development communicated to the applicant's chief executive officer that Special Grants 4765 and 5247 for diamonds that had been issued to the applicant had since expired and, consequently, the applicant was to cease all mining activities with immediate effect. The applicant was also ordered to vacate the mining areas covered by the two special Grants.

On the same date, the Minister of Mines and Mining Development issued a press statement on the consolidation of all diamond mining activities in the grant areas. The statement declared that the government of Zimbabwe had resolved to consolidate the diamond mining entities that were either already conducting mining activities or those that intended to do so in future, in the area.

This decision by the government of Zimbabwe to, firstly, declare Special Grants 4765 and 5247 void and, secondly, consolidate all mining entities in Chiadzwa, did not find favour with the applicant. The applicant avers that the above decisions had a material and ongoing prejudicial effect on it. The applicant's right to property was also violated by this decision according to the applicant.

The applicant filed an urgent chamber application with the High Court in Case No. HC 2183/16. It must be noted that the parties before the High Court in the urgent application, although not identical, are substantially similar to the ones before this court. Before the High Court were three respondents, namely, the Minister of Mines & Mining Development, the Minister of Home Affairs and the Commissioner- General of the Zimbabwe Republic Police. The Zimbabwe Mining Development Corporation (which falls under the Ministry of Mines and Mining Development) and the Zimbabwe Consolidated Diamond Company (an outcome and vehicle of the consolidation policy) were not parties before the High Court but are parties in *casu*. In the urgent application, the applicant sought interim relief setting aside the first respondent's directive and having the parties return to the *status quo ante* 22 February, 2016.

Seized with the urgent application, the High Court dismissed it on grounds, *inter alia*, that the Special Grants 4765 and 5247 had ceased to exist five years ago *ex lege*. This High Court decision has not been appealed against. It remains extant. What is before this Court is a direct application to the Constitutional Court in terms of s 85 (1) (a) and not an appeal directly to the Constitutional Court from the High Court.

The respondents have fervently opposed the application. The first respondent in particular took a number of preliminary points, among them that the application is improperly before the court as it appears to be a response to the judgment of the High Court. The proper recourse the applicant should have taken was to appeal the High Court judgment and not to mount a direct application to this Court.

The second preliminary point taken is that the cause of action is *res judicata*. The third preliminary point taken is that the applicant has a substituting non-constitutional remedy which it could have utilised before approaching this Court. In other words, the first respondent argues that the principle of avoidance finds application in this matter. The final preliminary point raised is that the relief sought seeks to perpetuate an illegality.

At the hearing, parties extensively made argument on the preliminary points raised and judgment thereon was reserved. I will address the preliminary points raised hereunder.

Whether or not the application is properly before the court

The first and second preliminary points raised by the first respondent will be addressed under the same heading above. The first respondent in his opposing affidavit takes the point that the application is improperly before this Court. The basis of this argument is that the application was brought in response to the judgment of the High Court per Mr Justice MANGOTA in *Anjin Investments (Private) Limited v The Minister of Mines & Mining Development & Ors* HH-228-16. Could it be said that the application this Court is seized with is a disguised appeal which should have been brought in terms of s 167 (5) (b) of the Constitution? It would appear so, and for a very good reason that a proper appeal could not have been validly pursued from the High Court proceedings.

Before the court a *quo* was an application for interim relief. No constitutional question was decided by the court a *quo* which the applicant could have appealed against in terms of s 167 (5) (b) of the Constitution. Hence this disguised attempt to reverse the High Court decision.

The second preliminary point taken is that the cause of action is *res judicata*. The principle of *res judicata* precludes the court from re-opening a case that has been litigated to finality. The principle was aptly defined in the case of *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472 A-B. The South African Appellate Division had this to say:

“If a cause of action has been finally litigated between the parties, then a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*.”

The immediate question then is whether the same cause for the same relief between the same parties or their privies has been pursued by the applicant in *casu*, after the matter has been finally determined?

To be successful, where *res judicata* is raised, all the requisites for the plea must exist. These requisites were didactically stated in the case of *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45 E-G as follows:

“There is nevertheless no room for this exception (of *res judicata*) unless a suit which had been brought to an end is set in motion afresh between the same persons about the same matter and on the same cause for claiming, so that the exception falls away if one of these three things is lacking.”

What was before the court a *quo* was an urgent application for interim relief with the effect of reinstating the applicant to the *status quo ante*. In the present case, the applicant

is seeking a declaration that certain of its fundamental rights have been violated. In the event that this Court is to agree with the applicant, it seeks an order that has the effect of restoring the *status quo ante*, that is, the applicant retains powers to mine in Chiadzwa. Although the *basis* of the application has changed with the introduction of the constitutional question, the *effect* of the relief sought remains the same. Whether this disjuncture between the bases upon which relief is sought while the *effect* remains the same negates the plea of *res judicata* at all or only in specific circumstances I will leave open for now as there are other less disputable grounds upon which this matter may be resolved.

Similarly, although the parties in the High Court are not identical to current ones, they are similar as indicated earlier and, in my view, may be taken as privies of those now before this Court.

Whether the applicant has a substituting non-constitutional remedy

All respondents argue that this is a proper case for the application of the avoidance principle. At the centre of the avoidance principle is the concept of ripeness which dictates that a court should not adjudicate a matter that is not ready for resolution. The Constitutional Court is thus prevented from deciding on an issue too early, when it could be decided by means of legislation subordinate to the constitution, general criminal or civil law and should not be made into a constitutional issue. In the case of *National Coalition for Gay & Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) for example, it was held that:

“Ripeness and constitutional avoidance are sometimes inter-related. If it is possible to decide a matter without determining the constitutional validity of legislation or other action, the principle of avoidance may lead to the conclusion that the constitutional question is not ripe to be determined. While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

In our jurisdiction, this Court has had occasion to pronounce on the principle of avoidance. In the case of *Zinyemba v Minister of Lands & Rural Settlement and Anor* CCZ 6/16, this Court reiterated the need to observe the avoidance principle. MALABA DCJ (as he then was) concluded that remedies should be found in legislation before resorting to constitutional ones:

“Two principles discourage reliance on the Constitutional rights to administrative justice. The first is the principle of avoidance which dictates that remedies should be found in legislation before resorting to Constitutional remedies. The second principle is one of subsidiarity which holds that the norms of greater specificity should be relied on before norms of greater abstraction.

The applicant is not challenging the constitutional validity of any provision of AJA (Administrative Justice Act) nor is she seeking to use the constitutional rights to administrative justice to interpret the provisions of AJA. The exceptional circumstances in which an applicant can rely on the constitutional rights to administrative justice do not apply to the applicant. She ought to have used the remedies provided for under AJA to enforce her rights to just administrative conduct.”

The pith of the present application is that certain rights of the applicant enshrined in the Constitution have been violated. The applicant avers that its right to fair administrative conduct and due process as guaranteed in s 68 (1) of the Constitution have been violated. The applicant further avers that its right to property in terms of s 71 (2) of the constitution has been violated. The final allegation is that applicant’s right to freedom of association in terms of s 58 (1) has also been infringed. It is alleged that the action and conduct of the first, second and fourth respondents since 22 February 2016, which conduct persists, has been violating the above-mentioned fundamental rights of the applicant.

The right to just administrative action which forms the bulk of the applicant’s argument is protected under the Administrative Justice Act [*Chapter 10:28*]. The allegation of violation of the right to property as well as the right to freedom of association finds its root in the decision taken or communicated on 22 February 2016. The issuing of a Special Grant by the Secretary for Mines and Mining Development in terms of s 291 of the Mines and Minerals

Act [*Chapter 21:05*] is an administrative decision in term of the Administrative Justice Act. The terms on which the Special Grant is issued, including when it will expire, is governed by the Mine and Minerals Act.

The import of the letter dated 22 February 2016 is that there was no valid Special Grant issued in the first place for want of specifying the lifespan of the special grant as required in s 291 of the Mines and Minerals Act. The letter also communicated that the Special Grants were deemed to have been granted for the period which applicant had requested in its application. The decision taken by the Ministry of Mines undoubtedly is an administrative action whose legality is prescribed in relevant specific legislation in particular and the Administrative Justice Act, in general.

The press statement declaring the issued Special Grants void without affording the applicant an opportunity to be heard can be addressed in terms of the Administrative Justice Act. The applicant's founding affidavit registers grief over the lack of prior warning on the impugned decision of. Section 4 (1) of the Administrative Justice Act provides for relief against administrative authorities.

The applicant is also at pains to point out that it was not given an opportunity to make representations before the Special Grants conferred to it were cancelled. Clause 10 (ii) of the Special Grant mandates the Secretary for Mines and Mining Development to afford the holder of a special grant a reasonable opportunity to make representations in the matter. The applicant in its founding affidavit laments the failure to afford it a reasonable opportunity to make representations before its grant was declared void. This alleged failure is adequately

addressed in the Administrative Justice Act. The common law tenets of natural justice also encompassed in the Act can adequately address the grievance of the applicant.

In the event that the applicant is of the view that the High Court erred in not properly applying the rules of natural justice, the appeal avenue is open to the applicant to pursue. One is puzzled why the applicant has not appealed the decision of the High Court if it feels the court a *quo* erred or misdirected itself in any way.

The substantive issues raised by the applicant are capable of determination outside the constitutional framework. That being the case, this Court ought not to assume jurisdiction over the issues. The finding in *S v Mhlungu* 1995(3) SA 867 (CC) is apposite wherein it was held:

“I would lay it down as a general principle that where it is possible to decide any case, civil, or criminal, without reaching a constitutional issue that is the course which should be followed.”

This matter can adequately be determined without raising any constitutional issues. Assuming that the applicant’s allegations are correct, they can be addressed in terms of specialised legislation, the Administrative Act and the common law. In the same vein, in *S v Dlamini* 1999 (4) SA 623 (CC) it was held that:

“As a matter of judicial policy, constitutional issues are generally to be considered only if and when it is necessary to do so.”

It is therefore not necessary to determine or consider the issues raised by the applicant in this Court as such issues can be considered by the Administrative Court or the High Court. The matter is therefore not ripe to be heard by the Constitutional Court.

Perhaps it bears reiteration for the benefit of legal practitioners in particular and litigants in general that this Court is mandated to deal with constitutional matters only, that is, matters in which there are issues or aspects of the interpretation, protection or enforcement of the constitution. Litigants must disabuse themselves of the tendency to invariably seek direct access to the Constitutional Court whenever their causes of action have a mildly constitutional flavour. There are a myriad and often more efficacious and speedier other avenues that the litigants can use, and certainly, such avenues existed which the current applicant could have adequately used to address its cause without raising a constitutional question.

In the light of this finding, it is unnecessary to address the last preliminary point pertain to alleged illegality.

Costs

The applicant prayed for costs of suit on a legal practitioner and client scale. The first respondent also prayed for the dismissal of the application with costs on a punitive scale.

While the issue of costs is within the province of the court's discretion, sight should not be lost of the cardinal rule that constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations, i.e the broader public. In fact, it has the effect of enriching the general body of constitutional jurisprudence and adding texture to what it means to be living in a constitutional democracy. See *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

Nonetheless, constitutional litigation must be conducted without abuse of the court processes, which may attract punitive costs. However, the first respondent has not produced evidence of such abuse as would have necessitated the levying of punitive costs. Therefore, the ordinary rule that costs follow the outcome should apply in this matter.

In the result, the application is dismissed with costs on the ordinary scale.

MALABA CJ: I agree

GWAUNZA JCC: I agree

GOWORA JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA JCC: I agree

UCHENA JCC: I agree

ZIYAMBI AJCC: I agree

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Civil Division of the Attorney General's Office, first and second respondents' legal practitioners

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