JUVE ZIMBA

versus

THE MINING COMMISSIONER

and

THE MINISTER OF MINES & MINING DEVELOPMENT

and

CHARLES CHAROWEDZA

HIGH COURT OF ZIMBABWE

MAFUSIRE J

HARARE, 13 & 26 October 2015; 13 January 2016

**Opposed application**

*K. Maeresera,* for the applicant

The third respondent in person

No appearance for first and second respondents

MAFUSIRE J: The applicant and the third respondent had competing claims over the same mining block, called New Year 89. Both of them had valid registration certificates over it. These had been duly issued by the first respondent, the mining commissioner. The first respondent had resolved the dispute in favour of the third respondent. The applicant had appealed to the second respondent, the Minister of Mines and Mineral Development. The appeal had been dismissed. The applicant then applied to this court for review. But his application was out of time. So he applied for condonation.

In support of the application for condonation, the applicant said that at the relevant time he had no legal representation and that he had no idea what to do after his appeal had been turned down by the second respondent. He said he had been innocent of the eight weeks limitation within which a review application has to be brought. He also said that he had no money to brief counsel. He had only got *in forma pauperis* representation more than a year after his appeal had been turned down. It was then that he had been told of his right to seek a review. But he had also been advised that it would be necessary to seek condonation first.

Only the third respondent opposed the applicant’s twin applications. The first and second respondents filed no papers at all.

The third respondent’s ground for resisting condonation was equivocal. Through his erstwhile legal practitioners he had made the point that the application was defective for want of compliance with Order 33 r 257 of the Rules of this court. However, despite the applicant asking in what respect his application was in violation of the Rules, the third respondent had not addressed the point any further. At the hearing, the third respondent, who was no longer represented, did not address the issue either. He made no further submissions against the application for condonation and said he was leaving it to the court to make a decision.

I granted the application for condonation. In *Kodzwa v Secretary for Health & Anor*[[1]](#footnote-1) the Supreme Court said that in an application for condonation, the court has a discretion to grant the application when the principles of justice and fair play demand it, and when the reasons for non-compliance with the rules have been explained to its satisfaction.

*In casu*, although the reason proffered by the applicant for the non-compliance, namely ignorance and indigence; and for the inordinate delay, namely a period of one year and one month [but less the eight weeks of r 257], were not that satisfactory by themselves, nonetheless, I granted the application because I considered that the applicant’s appeal to the second respondent had been made well within the time allowed for such an appeal and that he had made regular follow-ups but that it had taken one year and three months for a decision on his appeal to be made or communicated to him. Furthermore, it seemed to me that his application for review had some merit. Thus, on the whole, the applicant had struck me as one who had exhibited a genuine desire to have the dispute between the third respondent and himself adjudicated upon satisfactorily.

The applicant’s grounds for review were allegedly the non-compliance by the first respondent with the Mines and Minerals Act, *Chapter 21: 05* [“***the Act***”], particularly s 50 thereof, and the gross unreasonableness of the first respondent’s decision, which the second respondent had seen fit to uphold. By way of relief, the applicant sought, apart from costs on a higher scale, a declaration that the first and second respondents’ decision to cancel his certificate of registration in respect of the mining block in question be declared null and void, and that he be declared the lawful owner thereof.

It is not altogether clear how exactly the first respondent went about adjudicating and resolving the dispute. But his decision was communicated to the applicant in terms of a letter that read as follows:

“Re: CANCELLATION OF REGISTRATION FOR NEW YEAR 89 MINE REGISTRATION NUMBER 37885

This office wishes to inform you that we propose to cancel the certificate of registration for New Year 89 registration 37885 in the next 30 days because the area you pegged is over pegging current blocks, registration numbers 37441/5 BM owned by Mr Charles Charowedza.

This action is in violation of s 31 subsection [1], [b] of The Mines and Minerals Act [Chapter 21:05], which stipulates that no one should peg upon any mining location.

It has come to our attention that Mr Charles Charowedza pegged the area before you. He submitted his applications on 06/06/07 and yours were submitted on a later date, 02/06/08. This has resulted in the office invoking section 50 subsection [1][a] of the Mines and Minerals Act [Chapter 21: 05 which states that the Mining Commissioner may at any time cancel a certificate of registration issued if he is satisfied that at the time when such block was pegged it was situated on ground not open to prospecting and pegging …

We are therefore giving you 30 days from the date of this letter to appeal to the minister of mines and Mining Development, through the Mining Commissioner’s Office against such cancellation if there is need.”

Thus, the reason for the cancellation of the registration certificate in favour of the applicant was over pegging current blocks, i.e. those in favour of the third respondent.

Section 31of the Act lists the several types of grounds that are not open to prospecting. Even if you are a holder of a prospecting licence or of a special grant, you are not entitled to exercise any rights conferred by those documents if the ground is not open to prospecting. One of those grounds is listed in paragraph [b] of sub-section [1] of s 31. It is any mining location except one in respect of which you have acquired the exclusive right of prospecting. A mining location is, in terms of s 5, a defined area of ground in respect to which mining rights, or rights in connection with mining, have been acquired under the law.

Therefore, by giving over pegging current blocks as the reason for cancelling the certificate of registration in favour of the applicant, the first respondent must have been satisfied that New Year 89 was ground not open to prospecting because it was a mining location, i.e. ground in respect to which mining rights, or rights in connection therewith, had already been acquired, i.e. already acquired by someone else, namely the third respondent.

It was hotly disputed by the applicant that the third respondent had already pegged the area when his certificate of registration had been issued. What was common cause though was that the third respondent’s application for registration had been submitted almost a year before that of the applicant. The third respondent’s application had been submitted on 6 January 2007. On the other hand, that of the applicant had been submitted on 2 June 2008.

However, despite the third respondent’s application for registration of the mining block having been submitted a year earlier than that of the applicant, it was the applicant’s application that was approved and granted first. Applicant’s registration certificate was issued on 30 January 2009. That for the third respondent was issued only on 9 September 2009. But both were in respect of the same block.

In his opposing affidavit, the third respondent said the first respondent had explained to him that the reason for the delay in having his registration certificate issued timeously, or within a reasonable time, was that the relevant file containing his application had been misplaced for several months.

Clearly the first respondent had made a mistake. He had registered the same mining block in favour of two different parties. Obviously the mistake had to be corrected. The first respondent corrected it by cancelling the applicant’s registration, and “awarding” the block to the third respondent. Therefore, the question that I have to determine is whether that cancellation was procedural in terms of the Act. To do this, I first have to determine whether or not at the time that a registration certificate had been issued in favour of the applicant, the ground on which the mining block in question had been registered was indeed a mining location within the meaning of the Act, and therefore ground that was not, or no longer, open to prospecting.

Whether or not at the time of issuing the certificate of registration in favour of the applicant, the ground was not open to prospecting is a matter of fact. In this regard I was presented with two sets of facts, or versions. The applicant’s version – preceded by the argument that the third respondent could not claim any greater rights than him merely because his application for registration had been first in time, as that did not necessarily mean that the application would automatically be approved – was that the land in question was within the prisons services; that he had gone to the area with officials from the Zimbabwe Prisons Services; that there had been no prospecting notices on site and that, at any rate, the officials from the prisons services would have denied him entry if the area had indeed not been open to prospecting.

In one of his follow-up letters on his appeal to the second respondent, a copy of which was attached to his founding affidavit, the applicant had complained bitterly that the first respondent had merely acted on the complaint by the third respondent without affording him a chance to present his own side of the story; that if indeed the third respondent had pegged the ground in question ahead of him, then the evidence of that had to be produced and shown to him; and that unless the decision to cancel his certificate of registration was supported by facts on the ground, other than bias and lies, the second respondent ought to act in terms of s 345[3] of the Act, i.e. hear and determine the dispute

Finally, the applicant unequivocally stated that the first respondent had not complied with s 50 of the Act, in that he had neither posted the cancellation on the board for forfeited registrations, nor caused it to be published in the *Gazette* and a newspaper with local circulation as required by sub-section [2].

On the other hand, the third respondent’s version was that before submitting his application for registration within the thirty day period as prescribed by the Act, he had posted on the ground in question the registration notice, prospecting notice and discovery notice, and had marked the discovery points with pegs in accordance with the provisions of the Act.

The third respondent also claimed that, contrary to his assertions, the applicant had been granted sufficient audience by two officials from the first respondent’s office before his licence had been cancelled. In paragraph 8.1 of his opposing affidavit, which had been settled by his erstwhile legal practitioners, the third respondent said this:

“After the Mining Commissioner’s letter to the applicant [proposing the cancellation of the registration certificate] both applicant and I attended the Mining Commissioner’s office, we were attended to by two officers from the Mining Commissioner’s office namely Mr Chieza and Mr Muza. We both presented our cases. These officers had the two application files **and showed both of us the dates that each of us had submitted our respective applications**. **They explained to both of us that since my application was the first to be received it meant that any purported pegging thereafter was a nullity by reason of the fact that the ground was not open to prospecting and pegging effective from 06 June 2007 when my application was received by the Mining Commissioner**. It is therefore not correct for the applicant to suggest that he was not given the right of audience to present his side of the story. Further, it was clear from the documentary evidence before the Mining Commissioner **in the form of both our applications** that the applicant should not have been issued with the certificate.” [my emphasis]

In his answering affidavit, the applicant flatly denied ever having attended the alleged meeting and said that if the third respondent’s averments had any truth in them, he ought to have attached the minutes of the alleged meeting.

Part IV of the Act has elaborate provisions on the acquisition and registration of mining rights. Very briefly, any permanent resident of Zimbabwe who is eighteen years of age or older can apply for a prospecting licence. A prospecting licence grants the holder thereof the right, *inter alia*, to prospect and search for, among other things, minerals on any land which is open to prospecting. He is entitled, and in some instances, obliged, to post on the ground several types of notices; for example, a prospecting notice, a discovery notice where he has discovered deposits of precious minerals, and so on. He will be entitled, among other things, to the right of pegging of one block of, *inter alia*, precious or base minerals within the times of pegging as prescribed by the Act.

In terms of s 40 of the Act, a prospecting or discovery or registration notice posted on a notice board shall be fixed on a peg. The notices shall be distinctly and legibly written, printed or painted. Paper or other material which is liable to be washed off, or writing liable to be rendered illegible by rain or exposure, shall not be deemed to be a proper marking.

In terms of s 45 of the Act, within thirty-one days of posting a registration notice, the holder of a mining location may, on payment of the prescribed fee, apply to the first respondent for a certificate of registration. The documents to be lodged with such an application include, among others, copies of the prospecting licence, discovery notice, registration notice, a map of the block, drawn to the prescribed scale, and the consent of the owner of the land on which the area falls, where such consent is required.

Thus, it appears that the application for the registration of a miming block is preceded by, among other things, the posting of notices and pegging.

In court, the third respondent suggested that his notices may have been washed away by the rain or destroyed by the weather by the time that the applicant allegedly went to the area accompanied by the prisons officials. However, no such information had been given in the notice of opposition. It was evidence from the Bar. When I queried this, he did not persist with that submission. At any rate, such evidence would not assist the third respondent in view of the provisions of s 40 of the Act which say, in my own words, for the purposes of posting notices, the use of material that may be prone to the vagaries of the weather is not considered to be proper marking.

However, there appeared to exist a conflict of fact whether or not the third respondent had pegged the area when the registration certificates were eventually issued. The third respondent said he had. The applicant disputed it. The absence of any affidavits from the first and second respondents has not helped matters. It has not been altogether possible to determine what exactly was the information that the first respondent had at his disposal, other than the mere fact that third respondent’s application for registration had been first in time, which influenced him to conclude that there had been over-pegging on current blocks.

But on those disputed facts, I am prepared to adopt a robust, common sense approach, and resolve the apparent conflict in favour of the applicant. In *Zimbabwe Bonded Fibreglass[Pvt] Ltd* v *Peech*[[2]](#footnote-2) GUBBAY JA stated as follows[[3]](#footnote-3):

“It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned.”

See also *Room Hire Co [Pty] Ltd* v *Jeppe Street Mansions [Pty] Ltd*[[4]](#footnote-4); *Masukusa* v *National Foods Ltd & Anor*[[5]](#footnote-5) and *Van Niekerk* v *Van Niekerk & Ors*[[6]](#footnote-6)*.*

In motion proceedings, where real disputes of facts emerge, relief can still be granted if the facts stated by the applicant, together with the admitted facts in the respondent’s affidavit, justify such an order. In the South African case of *Plascon-Evans Paints Ltd* v *van Riebeeck Paints [Pty] Ltd*[[7]](#footnote-7) CORBETT JA stated as follows[[8]](#footnote-8):

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. …………... In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. If ….. the Court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks ……….”

In the present case, I have determined that there were no genuine disputes of facts. The application was duly served on the first and second respondents. They would have seen that their decision to cancel the registration certificate in favour of the applicant was being challenged. But they chose to file no papers in response, or in some way to indicate what their position on the matter was. Not only that, but in his aforesaid follow-up letter to the second respondent, the applicant, among other things, insisted on the first respondent, or the third respondent, producing the evidence of the third respondent’s pegging of the ground in question ahead of him. He had also insisted on the first respondent conducting a hearing to determine the dispute in accordance with the Act. Both requests appear to have been ignored. The next thing was a letter from the second respondent dismissing the appeal on the same ground – over-pegging on current claims – as had been given by the first respondent.

Thus, it seems to me more probable than not, that the only evidence of over-pegging on current blocks was no more than the fact that the third respondent’s application for registration had been first in time. Third respondent’s paragraph 8.1 quoted above literally gave the game away. It all but confirms that all the evidence of the alleged over-pegging on current blocks that the first respondent ever had, through Messrs Chieza and Muza, were the two applications for registration, showing that the one for the first respondent had been first in time. The meeting that the third respondent claims he held with those officials, probably did take place, but not with the applicant being present. The third respondent could have simply obtained some official documentation from the first respondent to prove the applicant’s attendance at that meeting. He did not. The evidential onus lay on him.

There are some salient details that fortify my conclusion that at the time of the certificates of registration, no pegging had as yet taken place, and that the only basis for the first respondent’s conclusion seemed to be the fact that the third respondent’s application had been first in time. The one such detail was paragraph 8.3 of the third respondent’s opposing affidavit. Therein, he argued that the only reason why the applicant was able to go onto the ground and start operations before him had been because he [the applicant] had obtained his certificate of registration first. Yet from the structure of the Act, pegging precedes an application for registration.

The second salient detail was the third respondent’s own letter of complaint to the first respondent, a copy of which was attached to his notice of opposition. The letter was dated 7 December 2009, i.e. well after the certificates of registration had been issued to both himself and the applicant. In the letter, he said he had recently received his registration certificate but that when he had gone to the ground “***… to put up beacons …***” he had discovered that that the applicant was already mining on the claim. This suggests that the third respondent had not done what he said he had done ahead of his application for the registration certificate, namely the posting of the several types of notices and the pegging of the block. Apparently, it was only after he had received the certificate of registration that he had then tried to do the pegging.

As the applicant has submitted, it is not a valid ground for cancellation of a registration certificate in terms of s 50 of the Act, as read with s 31, that the application for it has been preceded by someone else’s. The ground that the Act stipulates, relevant to these proceedings, is the carrying out of prospecting operations upon a mining location over which the holder of the prospecting licence holds no exclusive right of prospecting.

Therefore, on this ground alone, I am prepared to grant the application.

But there is yet another ground.

In terms of s 50 of the Act, the first respondent may, at any time, cancel a certificate of registration issued in respect of a block or site if, among other things, he is satisfied that at the time when such block or site was pegged, it was situated on ground reserved against prospecting and pegging under s 31 and s 35 of the Act. *In casu*, the first respondent’s purported ground for cancellation was s 31.

In terms of sub-sections [2] and [3] of s 50, the first respondent is required to give, by registered post to the holder, at least thirty days’ notice of his intention to cancel the block or site. Among other things, the notice must inform the holder of the proposed date of cancellation and his right of appeal to the second respondent at any time before that date. The second respondent, on appeal, shall direct the first respondent whether or not to cancel the certificate of registration. In terms of sub-section [5] the first respondent, upon such cancellation, is required to post on a board where notices of forfeitures are posted, a notice with particulars of such cancellation. In addition, such particulars should be published in the *Gazette* and in a newspaper circulating in the district.

The applicant has argued that there was nothing to show that the first respondent had complied with the posting and publishing requirements of the Act, procedures which are mandatory; that the third respondent was precluded from answering on behalf of the first respondent on this; that there being no compliance, the purported cancellation of the applicant’s certificate of registration was invalid. Support was drawn from the case of *BMG Mining [Pvt] Ltd* v *Mining Commissioner, Bulawayo & Ors*[[9]](#footnote-9).

In that case, MATHONSI J set aside a purported cancellation of a certificate of registration over certain mining claims by the mining commissioner for Bulawayo, whose decision had been grounded on an alleged over-pegging. The court’s decision was based on the failure by the mining commissioner to comply with sub-section [2] of s 50 [i.e. the requirement to give thirty days’ notice], and sub-section [3] [i.e. the need for posting on the board for forfeitures and for publication in the *Gazette* and a local newspaper]. The court found that the mining commissioner had acted merely on the complaint of a rival claimant and that therefore she had violated the *audi alteram partem* rule of natural justice. The court suggested that if the mining commissioner had had reason to believe, *inter alia*, that there had been over-pegging of the mining claims in question, then she ought to have investigated the matter thoroughly and dealt with the complaint of over-pegging in terms of s 353 and s 354 of the Act.

I consider that the circumstances of *BMG Mining [Pvt] Ltd* were essentially on all fours with those of the current case. Among other things, in the present case, there was no evidence of compliance with the posting and publication requirements. This is despite the fact that the applicant had expressly called for it. Furthermore, there was no investigation of the dispute and a proper determination as required by the Act. The first respondent seems to have acted merely on the unsubstantiated complaint by the third respondent and on the mere fact that his application for a registration certificate had been first in time. On his part, the second respondent had merely rubber-stamped the flawed decision of the first respondent. Yet, given the information that the applicant had tendered, and the argument that he had presented, it had become incumbent upon the first respondent to carry out some sort of investigation to ascertain the facts on the ground and to conduct a hearing in accordance with s 345 and s 346 of the Act. It had become incumbent to disabuse the applicant of the strong notion of bias and falsehoods that he had expressly alleged. In the absence of all that, I am not satisfied that there was such evidence of over-pegging on current claims when the certificate of registration had been issued to the applicant as had would have warranted its cancellation.

There was no valid ground for cancellation as envisaged by s 50 of the Act. The applicant, despite a specific request, was denied the chance to be heard. This was a violation of the *audi alteram partem* rule that behoves judicial officers, or persons exercising quasi-judicial functions, to “hear the other side”.

The first respondent’s purported cancellation of the applicant’s certificate of registration was also flawed in another respect. Sub-section [2] of s 50 of the Act, apart from requiring the first respondent to give the mandatory thirty days’ notice of cancellation, also requires that the proposed date of such cancellation be given in the notice. This was not done. Further, whilst the opening paragraph of the first respondent’s letter of notice to cancel was indeed a notice to cancel, the closing paragraph was, in fact, the cancellation itself. Although the letter purported to inform the applicant of his right to appeal to the second respondent, in reality, what it notified was the right to appeal against the cancellation, rather than against the mere intention to cancel as required by sub-section [2] of s 50. Therefore, the first respondent’s actions were *ultra vires* the Act. In the premises, the decision to cancel is hereby set aside.

The applicant has nowhere cited the Administrative Justice Act, *Cap 10: 28*. However, it seems plain that his application is predicated on its provisions. After all, the Act is no more than an elaborate restatement of the common law rule of natural justice, *audi alteram partem*: see *Zindoga & Ors* v *Minister of Public Service, Labour and Social Welfare & Anor*[[10]](#footnote-10) and *Mangenje* v *TBIC Investments [Pvt] Ltd & Ors*[[11]](#footnote-11).

The first and second respondents are administrative authorities in terms of the Administrative Justice Act, *Chapter 10: 28*. Their actions, in purporting to cancel the registration certificate issued in favour of the applicant, were administrative actions within the meaning of that Act. In terms of s 3 of that Act, it is the duty of an administrative authority, *inter alia*, to act lawfully, reasonably and in a fair manner; to give adequate notice of the nature and purpose of the proposed action and to give a reasonable opportunity to make adequate representations where the action contemplated may affect the rights, interest or legitimate expectation of the person to be affected by such action.

In terms of s 4 of that Act, where a person is aggrieved by a failure of an administrative authority to comply with the provisions of s 3, and that person applies to this court for relief, the court may, among other things, confirm or set aside the decision concerned; refer the matter back to the administrative authority for consideration or reconsideration, or give such other directions as the court may consider necessary or desirable to achieve compliance with s 3.

The approach in such matters was set out in *Affretair [Pvt] Ltd & Anor* v *M K Airlines [Pvt] Ltd*[[12]](#footnote-12) where McNALLY JA said[[13]](#footnote-13):

“The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise ‘would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislator’. Thus it is said that: ‘[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. **In exceptional circumstances this principle will be departed from**. The overriding principle is that of fairness.” [my emphasis]

The exceptional circumstances that may lead the court to depart from the general principle to refer an administrative matter back to the administrative authority must satisfy four criteria, namely [1] that the end result is a foregone conclusion and it would be a waste of time to refer the matter back; [2] that further delays could prejudice the applicant; [3] that the extent of bias or incompetence is such that it would be unfair to the applicant to force him to submit to the same jurisdiction and [4] that the court is in as good a position as the administrative body to make the decision: see *Affretair, supra*, at pages 24 – 25.

I am satisfied that there is no need to refer this matter back to the first and second respondents. The application meets all the four criteria. At any rate, I have already made a finding that the third respondent had not pegged the ground in question at the time that the certificate of registration had been issued to the applicant, this being the only, or rather, the major reason for having to refer the matter back.

In the circumstances the application is hereby granted as prayed for, save that there has been no justification given for an order of costs against the respondents on a higher scale.

**DISPOSITION**

1 The first and second respondents’ decision to cancel the applicant’s certificate of registration No 37888 over New Year 89 Mine is hereby set aside and the said certificate is hereby reinstated.

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2 The costs of this application shall be borne by the respondents, jointly and severally, the one paying the others to be absolved.

13 January 2016

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*Maeresera & Partners,* applicant’s legal practitioners

1. 1999 [1] ZLR 313 [S] [↑](#footnote-ref-1)
2. 1987 [2] ZLR 338 [SC] [↑](#footnote-ref-2)
3. At p 339 [↑](#footnote-ref-3)
4. 1949 [3] SA 1155 [T], at p 1165 [↑](#footnote-ref-4)
5. 1983 [1] ZLR 232 [HC] [↑](#footnote-ref-5)
6. 1999 [1] ZLR 421 [SC] [↑](#footnote-ref-6)
7. 1984 [3] SA 623 [A] [↑](#footnote-ref-7)
8. At pp 634H – 635B [↑](#footnote-ref-8)
9. 2011 [1] ZLR74 [H] [↑](#footnote-ref-9)
10. 2006 [2] ZLR 10 [H] [↑](#footnote-ref-10)
11. HH 377/13, at p 20 [↑](#footnote-ref-11)
12. 1996 [2] ZLR 15 [S] [↑](#footnote-ref-12)
13. At p 25D - F [↑](#footnote-ref-13)