SULLIVAN ENTERPRISES (PVT) LTD
versus
PROVINCIAL MINING DIRECTOR
MASHONALAND WEST PROVINCE N.O
and
THOMAS MUSINGARIMI

HIGH COURT OF ZIMBABWE
MAMBARA J
HARARE; 21 and 25 March 2025

Opposed Application

L Uriri, for the applicant
D Machingauta, for the 1st respondent
S D Chivore, for the 2nd respondent

MAMBARA J: The present matter is an application for review filed under s 27 of the High Court Act [*Chapter 7:06*], read together with Rule 62 (1), (2), and (4) of the High Court Rules, 2021. The applicant, Sullivan Enterprises (Pvt) Ltd, seeks a review of the proceedings and determination of the first respondent, the Provincial Mining Director of Mashonaland West, in which the applicant was directed to abandon part of its registered mining claim on the basis that it encroached upon the second respondent's farm.

The application for review is opposed by both respondents. However, the applicant has raised a preliminary point regarding the validity of the opposition on the ground that the opposing affidavit was deposed to by counsel rather than by the second respondent himself. Additionally, the respondents raise a preliminary objection that the review application was filed out of time, arguing that the applicant should have filed its application within the eight-week period prescribed by Rule 62(4) of the High Court Rules, 2021.

The issues for determination in this matter are thus twofold: first, whether the opposition to the application is valid in light of the fact that the opposing affidavit was deposed to by counsel rather than by the second respondent; and second, whether the application for review was filed within the prescribed time frame. If these preliminary issues are resolved in favour of the applicant, the court must then proceed to examine the merits of the review application.

Turning to the first issue, the applicant submits that the opposition is invalid because the affidavit opposing the review application was sworn to by the legal practitioner representing the second respondent, rather than by the second respondent himself, who is the party privy to the material facts in dispute. Rule 58(4)(a) of the High Court Rules, 2021, provides that an affidavit in opposition to an application must be sworn to by a person who has direct and personal knowledge of the facts of the case. The relevant portion of the rule states:

> "An affidavit in opposition to an application shall be made by a person who can swear positively to the facts verifying the opposition, and such affidavit shall set out the grounds of opposition and the facts upon which the opposition is based."

The applicant relies on the case *of Dobbie* v *ZB Bank Ltd & Another HH 126/16*, where ZHOU J emphasized that an affidavit deposed to by a legal practitioner who does not have personal knowledge of the facts at issue is inadmissible. He wrote: "A deponent to an affidavit is only a witness, and the competency of such a witness to depose to an affidavit must be assessed by reference to Order 32 Rule 227(4)(a) of the High Court Rules, which requires that such a person must be a person who can swear to the facts or averments set out in the affidavit.

A similar position was taken in *Mudzengerere* v *Muvhu* HH 231/15, where it was held that an attorney cannot swear to substantive facts on behalf of a client. This principle was also recognized in *Shackleton Credit Management* v *Microzone Trading* 2010 (5) SA 112, where the South African court found that an affidavit deposed to by an attorney is impermissible where the attorney does not have first-hand knowledge of the facts.

The second respondent, through his counsel, has sought to rely *on TFS Management Company (Pvt) Ltd* v *Graspeak Investment (Pvt) Ltd* 2005 (1) ZLR 333, in which it was held that a legal practitioner may depose to an affidavit where the facts are within his knowledge. However, in the present case, para(s) 31 and 32 of the opposing affidavit contain substantive factual averments that only the second respondent himself could properly verify. It is therefore clear that the opposition is invalid, and the affidavit deposed to by counsel cannot be considered.

Having determined that the opposition is invalid, the next issue for determination is whether the application for review was filed within the prescribed time limit. Rule 62(4) of the High Court Rules, 2021, states that an application for review must be filed within eight weeks from the date of the decision sought to be reviewed. The relevant portion of the rule reads:

> "An application for review of any proceedings or decision shall be filed within eight weeks from the date when the proceedings or decision were made, unless the applicant satisfies the court that there are exceptional circumstances justifying the late filing of the application."

The second respondent contends that the decision being challenged is that of the Provincial Mining Director and that the eight-week period must be calculated from the date on which that decision was made. The applicant, on the other hand, argues that the eight-week period should be calculated from the date on which it exhausted domestic remedies. In support of this contention, the applicant cites the case of *Masunda* v *Gweru City Council* HH 115/94, where it was held that where multiple procedural steps exist, the relevant date for purposes of review is the date of the final determination in the chain of decision-making.

Furthermore, in *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S), the Supreme Court held that an applicant must first exhaust domestic remedies before seeking judicial review. The letter on p 54 of the record announcing the Minister's decision, which the applicant submits triggered the review proceedings, indicates that the matter was still being considered at a domestic level until that point. As such, the applicant's review application was filed within time.

Having determined that the opposition is invalid and that the application for review was filed within the prescribed time, it is now necessary to consider the merits of the application. The grounds for review raised by the applicant are as follows:

1. That the first respondent failed to consider new evidence that was material to the determination of the dispute.
2. That the first respondent acted ultra vires the Mines and Minerals Act by cancelling the applicant's mining certificate without following the due process prescribed in s 50(2) of the Act.
3. That the first respondent committed a gross irregularity by failing to consider procedural objections raised by the applicant.
4. That the decision of the first respondent was grossly unreasonable and incapable of practical implementation.

Each of these grounds must be examined in turn.

The applicant's contention that the first respondent failed to consider new evidence is misplaced. In *Zulu* v *ZB Financial Holdings* SC 48/18, the Supreme Court reaffirmed that a review application is not an appeal and cannot be used to introduce new evidence that was not

placed before the decision-maker at the time. The proper remedy for an aggrieved party in such circumstances is to file an appeal, not a review.

The argument that the first respondent acted ultra vires by cancelling the mining certificate also lacks merit. Section 50(2) of the Mines and Minerals Act provides that a mining certificate may only be cancelled after due inquiry and notification to the holder. The applicant has not demonstrated that the required procedures were not followed. The notice cancelling the mining certificate has not been issued. The letter relied upon merely states that the applicant has 14 days to comply, failing which the registration of the claims will be challenged. No formal cancellation has occurred. When such action is taken, the Provincial Mining Director will be required to follow the law, and the applicant will have the opportunity to respond in terms of legal provisions. The Supreme Court in *Girjac Services (Pvt) Ltd* v *Mudzingwa 1999 (1)* ZLR 243 (S) held that:

> "Administrative actions must be taken in accordance with the law and due process. Prematurely challenging a decision that has not yet been formally made is not within the scope of judicial review."

On the issue of procedural irregularity, the applicant has failed to show any prejudice resulting from the failure to consider its objections. In *Sibanda* v *NSSA* HB 90/04, the court ruled that not every procedural misstep warrants judicial intervention. " A party seeking judicial review must demonstrate substantial prejudice resulting from the alleged irregularity", the court wrote.

Finally, the argument that the decision was unreasonable is unpersuasive. The test for gross unreasonableness is set out in *Mwanyisa* v *Minister of Finance* SC 6/02, where the Supreme Court held that a decision must be so irrational that no reasonable authority would have made it:

> "A decision must be so irrational that no reasonable authority would have made it in order for a court to interfere under review proceedings."

DISPOSITION

Having considered the preliminary points and the merits of the application, the court finds that:

1. The opposition filed by the second respondent is invalid.
2. The application for review was filed within time and is properly before the court.
3. The applicant has failed to establish any valid grounds for review.

Accordingly, the application for review is dismissed with costs.

MAMBARA J…….

Kamusasa & Musendo, applicant's legal practitioners
Civil Division of The Attorney General's Office, first respondent's legal practitioners
Koto And Company, second respondent's legal practitioners