**REPORTABLE (27)**

1. **RETINUE STARS INVESTMENTS (PRIVATE) LIMITED**

**v**

**(1) OLYMPUS GOLD ZIMBABWE LIMITED (2) MINISTER OF MINES AND MINING DEVELOPMENT N.O (3) PROVINCIAL MINING DIRECTOR MATEBELELAND NORTH N.O (4) ENVIRONMENTAL MANAGEMENT AGENCY**

**(5) CITY OF BULAWAYO (6) DIRECTOR OF ENGINEERING SERVICES OF THE CITY OF BULAWAYO**

**SUPREME COURT OF ZIMBABWE**

**GUVAVA JA, MAVANGIRA JA & MWAYERA JA**

**BULAWAYO: 20 NOVEMBER 2023 & 14 MARCH 2024**

*W. Ncube* with *M. Tshuma*, for the appellant

*D. Tivadar*, for the first respondent

No appearance for the second, third and fourth respondents

*P.T Ncube,* for the fifth and sixth respondent

**MWAYERA JA:**

1. This is an appeal against the whole judgement of the High Court (“the court *a quo*”) delivered on 2 March 2023. The court *a quo* dismissed an appellant made by the applicant in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*] (“AJA”)
2. The appellant sought an order for the setting aside of a development permit number, 1006/2019 granted to the first respondent, a consent letter dated 12 October 2017 signed by the third respondent on behalf of the second respondent, an Environmental Impact Assessment Certificate for Voullaire Residential Estates (9127) granted by the fourth respondent and a letter dated 27 January 2021 by the fifth respondent staying mining activities of the appellant.

**FACTUAL BACK GROUND**

1. The appellant is the registered holder of 16 mining claims that make up the “Old Nic Mine” and is engaged in underground gold mining. The first respondent is the owner of an adjacent immovable property in the same area as Old Nic Mine, being Voullaire Estate and Voullaire Extension which the appellant bought from the first respondent. The appellant alleged that it heard rumours that the first respondent planned on changing the use of its land to residential stands 500 meters away from the mine. The appellant protested the development arguing that the building of new houses next to a mine was not commendable since the area was not habitable due to the hazardous pollutive chemicals emitted during mining operations.
2. On 27 May 2017, the appellant made representations to the fifth respondent, objecting to the approval of the proposed residential sites around the mine. It highlighted the negative effects of mining and slimes on the environment and residence. It further recommended the need to include a mechanism for coexistence in the planning system.
3. On 12 October 2017, regardless of the objection and recommendations raised, the second respondent wrote to the town clerk of Bulawayo City Council advising that it had inspected the development land map in relation to the mining works and expressed the opinion that the proposed development would not be affected by the mining operation.
4. On 17 January 2018, the fourth respondent issued a permit allowing the first respondent to operate in accordance with part XI of the Environment Management Act [*Chapter 20:27*].
5. On 4 April 2019, Bulawayo City Council granted the first respondent a development permit in respect of the application dated 8 August 2018 for the proposed residential stands 2-397 Voullaire Township of stand 1 Voullaire Township, Bulawayo.
6. Discontented by the conduct of the respondents, the appellant approached the Administrative Court in case number ACC 47/20 challenging the granting of the permits. The appellant sought condonation and extension of time within which to note an appeal in terms of the rules of the Administrative Court (Miscellaneous Appeals) Rules, 1982.
7. The court found that the appellant was not properly before it on the basis that firstly, the first respondent had not been served and secondly, that it could not bring an appeal but a review application challenging the procedural defects. The appellant then approached the High Court with an application in terms of s 4 of the Administrative Justice Act.

**SUBMISSIONS BEFORE THE COURT *A QUO***

1. The appellant averred in its founding affidavit that the application was in terms of s 4 of the Administrative Justice Act. It sought to set aside the decision of the third respondent. The appellant contended that the third respondent acted in dereliction of its statutory duty by signing a consent letter for residential development by the first respondent when such development was next to a mine. It further contended that the second respondent, without applying its mind, approved the development of residential premises in an area less than 450 metres away from an active mine.
2. The appellant further alleged that the fourth respondent issued out an environmental impact assessment certificate without giving due consideration to the environmental hazard and long term impact of allowing residential property to be built next to an active goldmine. The appellant further contended that the fourth respondent did not conduct proper consultations in terms of the Regional Town and Country Planning Act [*Chapter 29:12*].
3. It was further submitted by the appellant that the fifth respondent granted a development permit to the first respondent in violation of the procedure laid out in the Regional Town and Country Planning Act [*Chapter 29:12*] (“the Regional Town and Country Planning Act”). It argued that the fifth respondent acted without consideration of the circumstances as such residential development was unsuitable for location close to a mine. It contended that by granting the development permit the third respondent failed or neglected to consider the provisions of the Mines and Minerals Act [*Chapter 21:05*].
4. As regards the proximity of the housing development to the mining operations it averred that the close proximity of residential areas to the mine would cause the residents to be susceptible to *inter alia* air pollution and water contamination.

**SUBMISSIONS *A QUO* BY THE FIRST RESPONDENT**

14. The first respondentarguedthat the court *a quo* lacked jurisdiction to determine the matter. It averred that s 7 of the Administrative Justice Act provides that the High Court may decline to entertain an application brought under s 4 of the said Act in the event that the applicant is entitled to seek relief under any other law whether by way of appeal or review or otherwise if the court considers that domestic remedies should first be exhausted. It argued that the Administrative Court was the appropriate court to determine the land use and planning issues that arose in the case. It further submitted that the appellant was aware of this when it approached the Administrative Court under case ACC 47/20. It further submitted that the Administrative Court had not refused jurisdiction but had implicitly required the appellant to approach the court with a proper application.

**THE FIFTH AND SIXTH RESPONDENTS’ SUBMISSIONS**

15. The fifth and sixth respondents also raised preliminary objections. They averred that the appellant was forum shopping as it had approached the High Court under HC 848/20 seeking an interdict and also approached the Administrative Court in case ACC 47/20. When that appeal was unsuccessful the appellant instead of following the correct procedure, approached the High Court. The respondents argued that the court *a quo* ought to have declined to entertain the application in terms of s 7 of the Administrative Justice Act. It was argued that the appellant had other remedies available under the Administrative Justice Act and the Regional, Town and Country Planning Act.

**FINDINGS BY THE COURT *A QUO***

16. The court *a quo,* in determining whether or not it had jurisdiction to hear the application, found that s 7 of Administrative Justice Act was clear that the High Court may decline to entertain applications made under s 4 of the Act, firstly, if it considered that the applicant was entitled to seek relief through any other law, whether by way of appeal, or otherwise, secondly, if the High Court considers that such other remedies should first be exhausted. The court *a quo* declined jurisdiction on the basis that there were other available remedies for the mining dispute, which in terms of s 32 of Mines and Minerals Act fell under the purview of the Administrative Court.

17. Disgruntled by the decision of the court *a quo* the appellant approached this Court on the following grounds of appeal.

1. The court *a quo* erred in law and misdirected itself in finding that it lacked jurisdiction to determine the application brought by the appellant in circumstances where the Administrative Justice Act specifically grants the High Court jurisdiction to adjudicate over disputes brought in terms of Administrative Justice Act.
2. The court *a quo* misdirected itself in re-characterising the appellant’s cause of action from one brought in terms of s 4 of the Administrative Justice Act as appears in the appellant`s application to a dispute that should have been brought in terms of s 32 of the Mines and Minerals Act which action does not appear in the appellant`s application.
3. The court *a* *quo* erred in law and misdirected itself in finding that the dispute between the appellant and the respondents was a dispute between a land owner and prospector, this despite it being common cause and accepted by the court *a quo* that the appellant is a miner and not a holder of a prospecting license envisaged by s 32 of the Mines and Minerals Act.
4. The court *a quo* erred in law and fact by finding that the appellant last challenged the master plan when such a challenge was absent front the appellant’s application and relief which it sought.
5. The court *a quo* erred in law and misdirected itself in finding that it had discretion to refuse jurisdiction in terms of s 7 of Administrative Justice Act on the basis that the appellant should have approached the Administrative Court before approaching the High Court.

**SUBMISSIONS BEFORE THIS COURT**

18. Mr *Ncube*, counsel for the appellant, submitted that the court *a quo* erred in declining to exercise its jurisdiction to determine the matter. He argued that the court came to this finding by conflating s 7 of the Administrative Justice Act and s 32 of the Mines and Minerals Act. He submitted that the court *a quo* incorrectly intertwined the two provisions. He argued that s 32 was clear and unambiguous as it provides a precondition that the dispute must be between a prospector and a land owner. He argued that the appellant is not a prospector and that the dispute was not whether or not the land was open for prospecting. Counsel submitted that the court *a quo* erred by declining jurisdiction without making a proper interrogation of s 7 of the Administrative Justice Act whose provisions are not peremptory and allow the High Court to decline jurisdiction when it believes there are other remedies elsewhere. He argued that the court *a quo* improperly exercised its discretion when it declined jurisdiction.

19. *Per contra*, Mr *Tivadar*, counsel for the first respondent submitted that the appellant ought to have approached the Administrative Court. He submitted that ss 4 and 7 of the Administrative Justice Act are clear that the High Court can exercise its discretion and decline jurisdiction where there are other available remedies. There was according to counsel, no reason why the appellant would circumvent the Administrative Court which was open to it. He further submitted, that the appellant invoked s 31 of the Act as the basis of its case and this gave rise to the automatic application of s 32 of the Mines and Minerals Act. He submitted that in the circumstances the court *a quo* properly declined jurisdiction. Mr *P Ncube,* counsel for the fifth and sixth respondents, submitted that s 7 of Administrative Justice Act is clear in that the High Court has a discretion in dealing with such applications. He argued that s 38 of the Regional Town and Country Planning Act was also clear that the Administrative Court has jurisdiction and was the correct court for the matter. He further submitted that the appellant anchored its case on s 31 of the Mines and Minerals Act as espoused in its founding and answering affidavit. This, he submitted, brought in the application of s 32. He submitted that the court *a quo* properly declined jurisdiction.

**ISSUE FOR DETERMINATION**

20. The appellant raised five grounds of appeal attacking the judgment of the court *a quo*. It is apparent that all the grounds of appeal raise one clear and distinct issue which is:

Whether or not the court *a quo* erred in declining jurisdiction to hear the matter.

**THE LAW**

21. The appellant approached the court *a quo* in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*]. Section 4 provides:

“4 Relief against administrative authorities

1. Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section three may apply to the High Court for relief.”

Section 7 of the same Act provides as follows:

“Without limitation to its discretion the High Court may decline to entertain an application made under s 4, if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy should be first exhausted.”

22. The appellant in its grounds of appeal further attacks the High Court for mischaracterising the dispute to be between a land owner and prospector, thereby bringing s 32 of the Mines and Mineral Act into operation. It provides:

**“32 Disputes between landowners and prospectors.**

If any dispute arises between the holders of a prospecting licence or a special grant to prospect or an 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 decision.”

23. The appellant’s founding papers relate to s 31 of the same statute. It provides:

“31 Ground not open to prospecting.

1. Save as provided in parts V, VII, no person shall be entitled to exercise any of his right under any prospecting licence or any special grant to carry out prospecting operations or any exclusive prospecting order-
2. Upon any holding of private land except with the consent in writing of the owner or of same person duly authorised hereto by the owner or, in the case of a portion of communal land by the occupier of such portion, or upon any state land except with the consent in writing of the President or of some person duly authorised thereto by the President
3. ……
4. ……

Within four hundred and fifty metres of the site of any intended principal homestead, which site has been registered with the mining commissioner by the landowner. Provided that if a principal homestead is not erected on such a site within three years after the date of such registration, such site shall thereupon become open to prospecting.”

24. It is the court’s view that a reading of s 4 together with s 7 of the Administrative Justice Act gives the High Court the discretion to decline jurisdiction in applications made under s 4 where the High Court considers that there are other remedies which ought to be exhausted.

25. Section 31 of the Mines and Mineral Act spells out instances when the land is not open to prospecting despite the existence of a licence. This includes land within 450 metres of the site of any intended principal homestead, per s 31 (1) (a) (ii) of the Act.

Section 32 of the Act is clear that the Administrative Court has exclusive jurisdiction to deal with disputes between landowners and prospectors.

**APPLICATION OF THE LAW TO THE FACTS**

26. In *casu*,the appellant approached the court *a quo* seeking the setting aside of the decision of the third respondent who consented to an application for residential development of land by the first respondent. Despite the environmental hazard that would be occasioned by development of residential property, within an area of less than 450 metres from an active mine, the fifth respondent granted a development permit. The first respondent in March 2018, began work on the property with an intention of developing residential properties. It is clear from the founding papers and supporting affidavit of Professor Maisa that the appellant’s *causa* was on the fifth respondent’s failure to take into account the provisions of s 31 of the Mines and Minerals Act regarding the proximity of residential development to the mining operations of the appellant. Section 31 (a) is peremptory with regards to the maintenance of a 450 metre buffer zone.

27. It is evident from its founding papers that the appellant placed itself under the purview of s 31 (1) (a) (i) and (ii) of the Act and that was its cause of action. The meaning of cause of action was discussed by the court in *Abrahams & Sons v SA Railways and Harbours* 1933 CPP 626 at p 637 wherein WATERMEYER J stated that:

“The proper meaning of the expression “cause of action” is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.”

See also *Mckenzi v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16 at 23 and *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41. (H)

The appellant thus, by basing its case on s 31 (1) (a) (i) of the Act placed itself in the ambit of s 32. Section 32 is not ambiguous but makes it clear that disputes between land owners and prospectors fall under the exclusive jurisdiction of the Administrative Court. It is common cause that the Act does not define prospecting.

28. It is however, common practise that prospecting is almost invariably antecedent to and inseparable from mining. The process of prospecting by nature is associated with mining. In the present case, the appellant placed itself under s 31 in its founding papers and pleadings. It can therefore, not rely on a selective application of the law by advancing argument under s 31 on infringement of the 450 metres buffer zone on one hand and on the other hand resisting the application of s 32 which stipulates the Administrative Court as the court of jurisdiction. It is trite that a party cannot blow hot and cold. In the case of the *Trustees for the Time Being of Cornnerstone Trust & Ors v NMB Bank Ltd* SC 97/21, HLATSHWAYO JA (as he then was) at p 8 quoted *S v Marutsi* 1990 (2) ZLR (SC) at p 374B stating as follows:

“It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in proceedings. He can only do one or the other not both.”

29. In *casu* the appellant cannot blow hot and cold. After having extracted a procedure and stood on a *causa* emanating from the Act, that is s 31, the appellant cannot deny the application of s 32 of the same statute regulating the court of jurisdiction. The appellant submitted to the provisions of the same Act and was surely bound by same.

30. In any event it is important to look at the legislative intention in enacting the statute in question. The interpretation should not defeat the purpose and dictates of the statutory instrument. Considering that prospecting is antecedent to mining and that prospecting is not defined, it would be folly to rely on the literal difference between prospecting and mining without placing it in context. The appellant in its application submitted to s 31.

31. The starting point in relation to interpretation of statutes is the golden rule which denotes that the language in a document should be given its grammatical and ordinary meaning unless doing so would result in some absurdity or some repugnancy or inconsistence with the rest of the instrument.

32. In his book “*Principles of Legal Interpretation of Statutes, Contracts and Wills*” 1st ed at p 57, EA Kellaway states as follows:

“The dominating Roman Dutch law principle is that an interpretation which creates an absurdity is not acceptable (that is *interpretatio quae parit absurdum, not est admittenda.)*

The author at p 62, further states:

‘Even if a (South African Court) came to the conclusion that the language is clear and unambiguous, it is entitled to reject the purely literal meaning, if it is apparent from the anomalies which flow there from that the literal meaning could not have been intended by the legislative.” (My emphasis)

33. In the present case, the statute makes reference to a dispute between a prospector and land owner and the appellant denies being a prospector but a miner. The exclusion of the appellant on that basis would bring about an anomaly which would defeat the legislative intention in enacting the statute. By virtue of the fact that prospecting is almost invariably antecedent to, and inseparable from mining the exclusion of the appellant from the operation of the statute would defeat the legislature’s intention. The appellant itself sought to rely on s 31 of the same statute as the basis of its application. The dispute between the appellant and the first respondent falls to be determined under s 32. To that extent therefore, the court *a quo* cannot be faulted for declining jurisdiction.

Further, s 4 of Administrative Justice Act through which the appellant approached the court *a quo*, must only be resorted to after domestic remedies have been exhausted.

34. This position is elaborated in s 7 of the Administrative Justice Act which provides that the High Court has discretion to decline jurisdiction to entertain an application under s 4 of the same Act. The High Court may decline jurisdiction if it is of the opinion that the applicant is entitled to seek relief under any other law. In *casu* the court *a quo* exercised its discretion and declined jurisdiction.

35. It is trite that the exercise of a judicial discretion may only be interfered with on limited grounds. In *Barros & Another v Chimphonda* 1999 (1) ZLR 58 (S) the court held that:

“If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant consideration then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court.”

See also *Portland Holding Limited v Tupeloslep Investments Limited & Anor* SC 3/15.

36. Even if resort was not had to s 32, the court *a quo* had discretion in terms of s 7 to decline jurisdiction on the basis of the availability of other satisfactory domestic remedies. The appellant approached the court seeking redress for the infraction of s 31 of the Act. It alleged violation of the 450 metre buffer zone and as such recourse lay in s 32 of the Act. The Administrative Court had not thrown the appellant out of court but directed compliance with the rules. The court *a quo* therefore correctly exercised its discretion when it held that the appellant ought to have exhausted other available remedies. It therefore properly and correctly declined jurisdiction.

**DISPOSITION**

37. The appeal has no merit. It must fail. Costs follow the result. It is accordingly ordered as follows:

“The appeal be and is hereby dismissed with costs.”

**GUVAVA JA** : I agree

**MAVANGIRA JA** : I agree

*Web, Law & Barry*, appellant’s legal practitioners

*Gill, Godlonton & Gerrans,* 1st respondent’s legal practitioners

*Coghlan & Welsh*, fifth & sixth respondent’s legal practitioners