

KUDZAI LINDA SIMBA
and
EUNICE KARIDZA
and
JOHN KARIDZA
versus
THE DIRECTOR-GENERAL OF THE
ENVIRONMENTAL MANAGEMENT AGENCY
and
MINISTER OF ENVIRONMENT,
CLIMATE, TOURISM & HOSPITALITY INDUSTRY
and
THE MINISTER OF MINES AND MINING DEVELOPMENT
and
THE MINING COMMISSIONER MIDLANDS PROVINCE
and
SHENXIN INVESTMENTS (PRIVATE) LIMITED
and
THE MASTER OF HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 13 October 2023 & 15 March 2024

Opposed Application

Advocate *A S Ndllovu*, for the applicants
Mr *O Kondongwe*, for the 1st respondent
Mr *R Madenyika*, for the 2nd, 3rd & 4th respondents
Mr *T Sena*, for the 5th respondent
No appearance for the 6th respondent

MHURI J: This is an application in terms of s 4 of the Administrative Justice Act [*Chapter 10 :28*] (AJA) in which applicants are seeking:

- (a) An order declaring that first respondent did not comply with s3 of the AJA in the process leading to the award of a certificate in favour of the fifth respondent dated 21 September 2022.

- (b) Consequential relief in the form of an order setting aside the environmental impact assessment certificate number 8000112357 dated 21 September 2022.
- (c) An order directing the first and second respondent's to consider the submission on behalf of the applicants and thereafter to render a decision on the application by the fifth respondent for the grant of an environmental impact assessment permit.
- (d) An order barring fifth respondent from conducting any mining activities at ward 14 Boulder Fruit Farm and Umhlali F, Gweru pending the reconsideration of the environmental assessment.
- (e) Costs.

All the respondents except sixth respondent filed their opposing papers in which they raised a point *in limine* to the affect that applicants did not exhaust domestic remedies before bringing this application.

In substantiating this point *in limine*, first respondent's submission was that in terms of s 130 of the Environment Management Act [*Chapter 20:27*] (The Act) any person who is aggrieved by any decision of any authority in terms of this Act, may within 28 days after being notified of the decision or action of the authority concerned, appeal in writing to the Minister. Applicants ought to have appealed to the Minister after the adverse decision was made. They jumped the gun as such the application is improper and must be struck off with costs.

The second respondent's submission on this point was that applicants have not exhausted domestic remedies as required by the principles of AJA. Applicants were supposed to note an appeal against the issuance of the Environmental Impact Assessment Certificate (EIAC) to the Minister responsible for the Environment in terms of s130 of the Act. The applicants have jumped the gun and if the court allows the application, it is tantamount to usurping the powers of administrative authority.

Mr Sena for the fifth respondent associated himself with the submissions made by the other Respondents by submitting that the application is premature and on the wrong forum. Relying on s 130 of the Act and s 25 (2) of the Regulations S I 7 /2007, it was his submission that where a statute is peremptory, any act inconsistent with it is invalid. Applicants' failure to exhaust domestic remedies renders their application fatally defective. In terms of s 7 of AJA this court must decline to exercise its jurisdiction and strike off the application as no good reason has been proffered for not exhausting the domestic remedies.

Applicants’ opposition to the point *in limine* was that the point was ill taken especially in circumstances where respondent deprived applicants of the said domestic remedies. It was submitted that applicants were never heard, consulted nor notified prior to the issuance to fifth respondent with an EIAC.

There is no record of the internal adjudication and it is this internal adjudication that gives one an appeal. The situation created by respondents amounts to a good reason for the applicants to approach this court.

Further, it was submitted that in terms of sec 7 of AJA the court has a discretion to hear this matter and the court should exercise this discretion and hear this matter and remit it so that applicant can be heard.

It is common cause that first respondent issued an EIAC to fifth respondent in respect of the two adjacent properties belonging to applicants. Applicants were aggrieved by this issuance citing that the provisions of AJA were not complied with to wit that they were not notified or given an opportunity to be heard before the decision to issue fifth respondent with the EIAC was made.

Section 130 of the Act which provides for appeals against decision of authority states as follows:

“(1) Subject to this section any person who is aggrieved by any decision of any authority in terms of this Act, may within twenty- eight days after being notified of the decision or action of the authority concerned, appeal in writing to the Minister, submitting with his appeal such fee as may be prescribed:

Provided that such appeal shall not suspend the operation of any order, decision or action of the authority issued by the authority.

- (2).....
- (3).....
- (4).....
- (5).....”

The above provision is clear and unambiguous. It provides the right of appeal to the Minister to any person who has been aggrieved by the decision of the authority and in *casu*, the decision of the first respondent. It provides the domestic remedy which a person must follow.

Equally, the Environmental Management (Environmental Impact Assessment and Ecosystems Protection Regulations 2002) S I 7/2007 provides the same right as provided by the enabling Act.

Part VIII of the Regulations provides for appeals against the decision of an Officer, Director General or Minister. Section 25 thereof states:-

“(1) Any person who is aggrieved by any decision of the Officer or authorized person shall appeal to the Director General in terms of s 129 of the Act.

(2) Any person who is aggrieved by any decision of any authority shall appeal to the Minister in terms of s 130 of the Act, submitting with his or her appeal the fee prescribed in the first schedule.

(3) Any person who is aggrieved by any order of the Minister shall appeal to the Administrative Court in terms of s 130 of the Act.”

As I have stated above, these provisions provide domestic remedies which a person can utilize before approaching this court.

In *casu*, it is not in dispute that applicants did not utilize the above provisions before approaching this court with their application. This is the reason why respondents are averring that applicants have jumped the gun.

Where the domestic remedies provide effective redress, an aggrieved person can only jump the gun where there are good and sufficient reasons given as to why one has not exhausted the domestic remedies.

See *Matukutire v Medicines Control Authority of Zimbabwe* HH 59/2008 in which the position was stated that:

“The approach of our courts therefore is that where domestic remedies provide effective redress in respect of the complaint and where the unlawfulness alleged has not been undermined by the domestic remedies themselves, an aggrieved person should exhaust such remedies unless there are good reasons or special circumstances for approaching the High Court without having first exhausted the domestic remedies.”

Citing with approval, the case of *Musanhu v Chairperson of Cresta Lodge Disciplinary and Grievance Committee* HH 115/94,

BHUNU J (as he then was) in the case of *Tuso v City of Harare* HH 1/2004 emphasized the need to exhaust domestic remedies before approaching the courts. In the *Musanhu* case, SMITH J had this to say;

“In my view this court should not be prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to apply to court rather than to proceed by way of the domestic remedies. A litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for approaching the court earlier.”

Have any good reasons been proffered by applicants as to why they approached the court before exhausting domestic remedies, for this court to exercise its jurisdiction over the application? I did not find any cogent reason for me to exercise my discretion in terms of s 7 of AJA.

I am not persuaded by the reasons that there is no decision to take on appeal, there are no reasons given by first respondent to take on appeal, they cannot appeal what they are not aware of, the decision given by the first respondent is like a default judgment which one cannot appeal against. I find these reasons not convincing at all. Applicants were aware of the issuance of the EIA Certificate and from the date they were notified of the issuance of the EIA Certificate they had 28 days within which to appeal to the Minister. This they did not do for some unknown reason. Has there been a challenge to the effect that the domestic remedies do not provide effective redress, the answer is in the negative.

Section 7 of AJA which applicants rely upon provides for this court's discretion to entertain applications. It states:-

“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 such remedy should first be exhausted.”

Having considered that there is no good reason or special circumstances why applicants approached this court first before exhausting domestic remedies as provided in the Act and its Regulations, and also that the domestic remedies provide effective redress, I decline to exercise my discretion in favour of the applicants.

In that regard, I find that the point *in limine* has been well taken and I uphold it.

To that end the application is hereby struck off with costs.

Gambe Law Group, applicant's legal practitioners

Dube Manikai and Hwacha, first respondent's legal practitioners

Civil Division of the Attorney General's Office, second, third, fourth respondent's legal practitioners

Chimuka Mafunga Commercial Attorneys, fifth respondent's legal practitioners