



IN THE HIGH COURT OF MALAWI
CIVIL DIVISION
PRINCIPAL REGISTRY
CIVILL CASE NUMBER..... OF 2022

BETWEEN

ERNEST MALATA (Village Headman Mwachande) AND
OTHERS..... CLAIMANTS

AND

SINOSKY INDUSTRIAL COMPANNY
LIMITED..... DEFENDANT

Before Hon Judge Jack N'riva
Ms. Ulemu Kanyongolo for the claimants
Mr Chitukula for the defendants
D. Nkangala, Court Clerk

RULING

The claimants have commenced in this Court this action arguing that they are being subjected to dust pollution as well as noise pollution during rock-blasting activities

They argue that they have suffered some damages due to the said pollution. It has been stated that the miners promised them to fix the damage but that did not happen.

When they inquired they allege they were told that the quarry had been sold to new owners,1 the defendants

The claimants said that they went on to Blantyre City Council to complain, among other things, that there was no city planning approval and also that they were not consulted on environmental impact assessment. For that reason, they argued that they had belief that the environmental impact assessment certificate was not properly obtained. The claimants claim that they are living in an unhealthy environment emanating from mining activities. They claim that there are cracks in their houses and loose earth as a result of the mining.

Therefore, they commenced this action claiming damages for injuries and destruction to property, damages for nuisance. Further, they seek a permanent injunction and declaration that the defendant is engaging in unlawful activities and violating the claimants' right to clean and health environment.

They commenced the matter together with an application for interlocutory injunction restraining the defendants from generally carrying out the quarrying activities.

The defendant put in a preliminary objection arguing that the Court has no jurisdiction to hear the matter. There is a sworn statement supporting the preliminary objection and also opposing the granting of the interlocutory injunction filed by a representative of the defendant. He states that he was advised by his lawyers that the claimants did not lodge a complaint with the Commissioner of Mines and Minerals as it is supposed to be under the law.

Further to that, the defendant disputed some of the assertions that were made by the claimants for example that there was no environmental assessment certificate and went on to state that the defendant was properly granted the licences. However, I must state that it is not the case that the claimant stated that the defendant did not have environmental assessment certificate. Rather, they said that they had the belief that the certificate might have been improperly obtained. The issue was that the claimants were not consulted on environmental and social impact assessments.

The defendant's further argument was that the claimants did not provide evidence that there was some damage to their houses.

The argument of the defendant is that notwithstanding that the High Court has an unlimited original jurisdiction to hear and determine any civil and criminal proceedings under any law (section 108 of the constitution) the issue of jurisdiction is pivotal in assuming jurisdiction. The defendant made reference to of *Mbale v Maganga* Miscellaneous Civil Appeal Number 21 of 2013.

He also referred to the Mines and Minerals Act in section 283(2). Counsel also made reference to the Environmental Management Act in Section 4. Counsel argued that one has to prove that he or she has suffered some injury or that the acts complained of harmful or deleterious to the environment; not a mere allegation. Counsel, therefore, argued that the Environmental Management Act seemed not to be applicable. Counsel said that in any event the Environmental Management Act has to be read together with the Mines and Minerals Act.

In summary, counsel for the defendants argued that the claimants did not have a claim to be tried because in the first place, they cannot make the claim in this matter but before the Commissioner of Mines and Minerals.

Counsel for the claimants argued that the claimants are basing their claim in a tort of nuisance and not under the Mines and Minerals Act. Counsel went on to state that this is not the first case for persons to claim damages in the High Court in a matter where the claim arises out of mining activities. Counsel cited in the case of *Nyasulu v Rocksize Mining Contractors* Civil Case 386 of 2021.

Counsel further argued that under section 4(4) of the Environmental Management Act, one does not have to prove that the acts are deleterious or injurious. I agree with that position. A fear of an unclean environment entitles any person to bring an action in court. Counsel also made some arguments in line of Section 4 (5) of Environmental Management Act, which I also agree with, that such person does not have to show a personal injury to herself. This, the standing is much more liberal to commence action in favour of environmental protection.

In that line of thought, counsel argued that there is a serious question to be tried and that the issue is not whether there is a

licence or not but the issue is about the injuries to the claimants and damages to their property.

Counsel for the defendant counter-argued that much as the dispute is on nuisance, the facts in this claim emanate from mining and the matter is required to be regulated by Mines and Minerals Act. Counsel argued that in *Nyasulu v Rocksize Mining Contractors* the issue did not arise of the complaint going to the Commissioner first before going to a court of law.

So, the question for determination is whether the matter has been brought to this Court prematurely. Specifically, the question is whether the matter had to first go to the Commissioner of Mines and Minerals.

First, section 283 of the Mines and Minerals Act provides that:

Except as otherwise provided in this Act, the Commissioner, in consultation with relevant authorities, may inquire into and decide disputes between persons engaged in reconnaissance, prospecting, exploration or mining activities, either among themselves, or in relation to themselves and persons with a legal interest, other than the Government, not so engaged, in connection with –

- (a) the boundaries of any mineral tenement area;
- (b) any act committed or omitted, or alleged to have been committed or omitted during the course of, or ancillary to reconnaissance, prospecting, exploration or mining activities;
- (c) the assessment and payment of compensation or any other consideration pursuant to this Act; or
- (d) any other matter described in the regulations; or
- (e) may refer the dispute for judicial determination.

My analysis of that provision is that the provision is concerned with complaints arising out of reconnaissance, prospecting, exploration and mining activities and that dispute has to be in the context of the Act. Not every act incidental to mining would be to inquiry and decision by the Commissioner. Issues to do with mainstream reconnaissance, prospecting, exploration and mining might fall under the Commissioner's inquiry and decision. My view is that there could be statutory and common law claims that would

be in connexion with reconnaissance, prospecting, exploration and mining activities but would not follow under the inquiry and decision of the Commissioner. I would not think that the draftsman intended that any dispute so long as it is at the mining site, or incidental to mining activities, has to be inquired into or decided by the Commissioner one would think of such cases as criminal offences and torts such as defamation and say false imprisonment or assault. One would not think that the Commissioner has to deal with labour disputes such as unfair dismissal or workers compensation just because the conflict has emanated from a relationship with a miner or because it has arisen at a mining plant. I believe the Act was meant to deal with disputes such as conflicting interests in reconnaissance, prospecting, exploration and the actual mining activities.

The Commissioner, in consultation with relevant authorities, may inquire into and decide disputes between persons engaged in the activities either among themselves, or in relation to themselves and persons with a legal interest therein. The dispute has to be in connection with, among others, any act committed or omitted, or alleged to have been committed or omitted during the course of, or ancillary to reconnaissance, prospecting, exploration or mining activities.

In short my point is that it cannot be the case that every case so long as it is incidental to mining (for purposes of claims herein) has to be dealt with by the Commissioner of Mines and Minerals.

The question, therefore, is whether the claim in this matter falls under the category of matters that have to go to the Commissioner before going to a court.

I have to look at the claim in the statement of claim. In Paragraph 2 the claimants complain of not being consulted about the mining activities. They go on to complain that the certificate might have not been properly obtained. Paragraph 3 complains of heavy noise and dust pollution arising from defendant's activities. Paragraphs 4 to 9 talk of the history of the complaints. For example in Paragraph 9, they are talking about a complaint, to Blantyre City Council, of an unhealthy environment. Paragraph 10 outlines the concerns that they have against the defendant namely inability to

manage run off water, illegal extension of mining operations, inability to conduct annual incremental inspection and inability to conduct social responsibilities to the surrounding areas. Paragraphs 11 to 13 talk of the escalation of mining activities and damages and injuries that the claimants are suffering. Paragraphs 14 to 19 talk of environmental issues such as lack of certificates and so on and so forth and also the right to clean and healthy environment. Paragraph 20 summarises the claims that the claimants claim from the defendants.

The claimants claim that they have suffered injuries, there has been damage to property and nuisance. Therefore, they ultimately seek permanent injunction restraining the defendants from conducting any activities and a declaration that the defendant is engaging in unlawful activities.

One can see that there is a mix of claims under common law and then under the Environmental Management Act. Much as there is no claim in the Mining and Minerals Act, a good number of issues arise emanating from that Act. These include issues in Paragraph 10 such as management of the run off water, illegal extension of mining activities and inability to improve works. As I have put it before, in the claims paragraph there is a prayer to stop the mining activity altogether.

In all this, my view is that mining is central to the claims in this matter. I believe that it is an issue that ought to be first be and inquired into and decided by the Commissioner in terms of 286 of Mines and Minerals Act. I am aware that, as counsel for the claimant suggested, there other or similar claims in the Courts. An example is the one that counsel for the claimant referred to. I have to make two observations. First, it might be the case that, in those other matters, the mining or cessation thereof, or indeed acts incidental thereto, might not have been central to the claims. The central claim could be, for example, a claim for damage arising from the said mining. Secondly, the issue raised in this matter might not have been raised in those other matters.

In this matter, I believe that the dispute is to all intent and purpose, rooted in mining whose regulating legislation is the Mines and Minerals Act. I state that the dispute is rooted in mining

because the claimants question the actual mining activities including that the defendant had to consult them prior to the commencement of the mining.

The jurisprudence arising from the superior courts is that whereas the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings, where there is a special court or tribunal to handle such matters, the High Court should generally refrain from hearing such matters: *Chilemba v Malawi Housing Corporation* 2008 MLLR 137, *Kamphoni v Malawi Telecommunications Limited* Civil Case Number 684 of 2004 *Cuepers v Armbruster* Civil Case Number 130 of 2016I among several other matters.

Now that this matter is rooted in mining and because the law says that matters of this nature have first to go before the Commissioner, my view is that this is such a matter that should go before the Commissioner. One pragmatic reason for matters to go to such tribunals and establishments is expertise: decisions would be made on the actual dispute based on usages of the trade or subject as opposed to having emphasis on the rules of evidence in court, for example.

In all this, I agree with the preliminary objection. The claimants might consider invoking section 286 of Mines and Minerals Act .

Before I finish, I should comment on the submission by counsel for the defendant that the Mines and Minerals Act in section 283 is not drafted in mandatory terms although the other provisions are so drafted in mandatory terms. Indeed it is true that section 283 is not in mandatory terms because it says that the Commissioner may in consultation with relevant authorities inquire into and decide such disputes. Inasmuch as the provision is not in mandatory terms there are other provisions which are actually in mandatory terms. For example, section 284 says that the Commissioner may or may not inquire or determine a dispute but in section 285 if the issue concerns compensation to be paid, it is mandatory that the Commissioner shall not refuse to act. Again, it is mandatory in section 286 that no person would commence proceedings in court unless the Commissioner has refused to decide on the dispute.

In conclusion, this is a matter that had to go before the Commissioner before turning to this Court. The matter is, therefore, prematurely in the Court. The Court upholds the objection by the defendants.

The defendant applied that the action should be dismissed with costs. Costs are in discretion of the Court. In exercising the discretion, the Court considers the conduct of the parties. The question that can arise is whether the claimant's claims are frivolous or whether the claimants have done anything in this Court that would lead me to order the claimants to pay costs. I do not think that this action is frivolous. Nor do I perceive any conduct necessitating condemnation of the claimants in costs.

I am not aware of this issue being raised elsewhere in the jurisdiction. The Mines and Minerals Act is a relatively new enactment. As I said I am aware of matters concern mining activities and have been commenced directly in this Court. This, therefore, is a novel concept in our legal system.

Therefore, I make no order on costs.

MADE in Chamber this 10th day of March, 2022


J. N'RIVA
JUDGE