



Extractives Hub



The avoidance doctrine conundrum and its ramifications on mining investments in Zimbabwe

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CONTENTS

Acronyms	4
1. Introduction	5
2. Constitutional avoidance	6
3. The Anjin case	9
4. Ramifications of the Anjin case	11
5. Conclusions	13
6. Selected bibliography	14

ACRONYMS

CJ - Chief Justice

ConCourt - Constitutional Court of Zimbabwe

EMA - Environmental Management Agency

EITI - Extractive Industries Transparency Initiative

FDI - Foreign Direct Investment

GDP - Gross Domestic Product

GoZ - Government of Zimbabwe

IFFs - Illicit Financial Flows

JA - Judge of Appeal

MoFIT - Ministry of Foreign Affairs and International Trade

NDS-1 - National Development Strategy 1

OSISC - One Stop Investment Service Centre

RBZ - Reserve Bank of Zimbabwe

SACU - Special Anti-Corruption Unit

SDGs - Sustainable Development Goals

USA - United States of America

ZACC - Zimbabwe Anti-Corruption Commission

ZCDC - Zimbabwe Consolidated Diamond Company

ZERA - Zimbabwe Energy Regulatory Authority

ZIA - Zimbabwe Investment Authority

ZIDA - Zimbabwe Investment Development Agency

ZIDAA - Zimbabwe Investment Development Agency Act

1. INTRODUCTION

This article analyses the decision of the Constitutional Court of Zimbabwe (“ConCourt”) in the case of *Anjin Investments (Private) Limited v The Minister of Mines and Mining Development and 3 Others* (*Anjin* case).¹ The article highlights that the important issues the case raises bear significantly on access to justice by mining investors. The case raised constitutional issues that involved the protection of mining investments under a Special Grant in Chiadzwa, Marange District in eastern Zimbabwe.

The ConCourt is Zimbabwe’s apex court in constitutional matters and its decisions play a significant role in directing investors on whether Zimbabwe is legally safe and attractive for mining and other resource-related investments such as land. Decisions from superior courts such as the ConCourt which appear to treat investors arbitrarily work to the detriment of the country as they reduce Zimbabwe’s Foreign Direct Investment (FDI) and cast aspersions on Zimbabwe’s national business policies such as the ease of doing business. The World Bank ranks Zimbabwe at 140 among 190 countries in the 2019 ease of doing business, a very poor comparative ranking² that is likely to present an unfavourable case to potential foreign investors, who may choose to invest elsewhere.³

Mining, as a sector, matters greatly in Zimbabwe. Ores and metal exports as a percentage of merchandise exports in Zimbabwe were reported at 35.17% in 2019 according to the World Bank collection of development indicators.⁴ Zimbabwe’s mining sector is highly diversified with close to 40 minerals which contribute to 12 % of the country’s GDP.⁵ Further, it has been projected that the sector has the potential to generate US \$12 billion annually by 2023 if the Government of Zimbabwe (GoZ) addresses challenges such as policy uncertainties.⁶

¹ CCZ 6/18.

² A Mlambo (2013), Zimbabwe Policies Scare Away Investors: Report, The Newsday Zimbabwe.

³ www.tradingeconomics.com, accessed 23 April 2021 at 16:30pm.

⁴ Ibid.

⁵ USITA (2020) Zimbabwe Mining and Minerals Country Commercial Guide, US Department of Commerce, International Trade Administration.

⁶ Ibid.

2. CONSTITUTIONAL AVOIDANCE

“Constitutional avoidance” is a doctrine that is used by courts to sidestep important constitutional issues and in the result, fail to protect constitutional rights or undermine the development of the law.⁷ The doctrine should however not be used to avoid constitutional issues but to expand constitutional law in instances where constitutional issues are raised.⁸ Overly used, the doctrine undermines judicial independence since it interferes with the traditional roles of judges as officials who must decide cases and controversies in a polity.⁹ Because the avoidance doctrine is a nemesis to usual conceptualization of judicial activism,¹⁰ the avoidance doctrine should be applied together with creative re-interpretation of statutes if effective judicial mechanisms for remedying breaches on constitutional rights are to be fostered.¹¹ The above position is important for Zimbabwean Courts which seem to be following experimental constitutionalism, eight years after the adoption of a home-grown Constitution in 2013.¹²

The apparent current inclination of the ConCourt to invoke the avoidance doctrine runs contrary to the fundamental remarks that Chief Justice (CJ) Malaba made when he was opening the 2018 Legal Year. In those remarks, CJ Malaba noted in relation to access to justice that:

‘The concept of access to justice demands that there be no physical or technical barriers that frustrate litigants from accessing justice...access to justice is enhanced through rules that are in conformity with the new constitutional dispensation.’¹³

In surprising fashion though, the doctrine of constitutional avoidance and its variant forms seem to be creating and informing doctrinaire judges in Zimbabwe since the doctrines are

⁷ LA Kloppenberg (1994) *Avoiding Constitutional Questions*, 35 B.C Law Review 1003.

⁸ MR Slack (2006) *Avoiding Avoidance: Why Use of the Constitutional Avoidance Doctrine Undermines Judicial Independence-A Response to Lisa Kloppenberg*. *Case Western Law Review*, Vol. 56 (4) 1057.

⁹ *Ibid* at 1058.

¹⁰ Slack *ibid* argues that the avoidance doctrine can be an act of judicial activism since the judge is going beyond the traditional role of deciding cases to considering issues normally under the purview of the executive and legislature.

¹¹ See ES Fish (2016) *Constitutional Avoidance as Interpretation and As a Remedy*, *Michigan Law Review* Vol. 114: 1275.

¹² Experimental constitutionalism is a term that was used by Chief Justice Malaba to explain instances where litigants test the capacity of the constitutional courts to make judicial pronouncements on constitutional matters; see L Malaba (2018) *Speech Delivered by Honourable Justice Malaba, Chief Justice of Zimbabwe, on the Occasion of the Official Opening of the 2018 Legal Year*, available online at www.honeyb.co.zw, accessed 23 April 2021 at 09: 01am.

¹³ *Ibid*.

increasingly being used as technical tools to frustrate litigants who raise constitutional issues before the ConCourt.

Their invocation undermines the public's confidence in the apex court on constitutional rights and hugely bear on the fact that the ConCourt is not promoting effective access to justice by litigants. This is especially so since the doctrine is neither part of the Constitution of Zimbabwe nor the Constitutional Court's Rules.

Furthermore, eight years after the adoption of the Constitution of Zimbabwe in 2013, Zimbabwean superior courts have not shown an intention to move away from experimental constitutionalism especially in following borrowed judicial doctrines. From the perspective of the need to develop a stable constitutional jurisprudence on investment cases, superior courts in Zimbabwe are now obligated to cautiously deal with both the preliminary points and merits of cases before rendering their judgments. In the case of *McLoughlin v Jones*,¹⁴ Savid Steel J (as he then was) monumentally remarked that the appropriateness of preliminary issues depends on a judicial inquiry that:

- (i) Only issues which are decisive or potentially decisive should be identified;
- (ii) They should usually be questions of law;
- (iii) They should be decided on the basis of a schedule of agreed or assumed facts; and
- (iv) They should be triable without significant delay making full allowance for the implications of possible appeal.

Using the above approach, it should be aptly considered by courts of law that the avoidance doctrine is not a rule of law in Zimbabwe, but is simply a tool used by judges to dismiss cases that raise complex constitutional issues. It is thus not proper for the ConCourt to prejudice or frustrate the parties who approach it to have their constitutional rights protected by invoking mere judicial canons as tools to uphold the preliminary points which do not dispose of the case a whole. For instance, in the *Anjin* case, the parties were directed to either go back to the High Court or approach the Administrative Court for alternative relief. The ConCourt judges must have decided the case on its merits or based on fundamental issues that raised important issues that should have been ventilated by considering the approach to technical arguments as inconsequential in appropriate cases as was enunciated in the *McLoughlin* case above.

¹⁴ [2001] ECWA civ 1743.

Further, the ConCourt uses variants of avoidance doctrine by reserving judgments on the preliminary points. Reserved judgments take long to be decided and this effectively delays proceedings or access to remedies on the part of the litigants. Zimbabwe's justiciable Constitution has a progressive Bill of Rights and the ConCourt must go beyond technical arguments to promote dialogic constitutionalism or judicial review which then allows parties to have their cases properly ventilated by courts of law.¹⁵ Significantly, the ConCourt must now accept that the avoidance doctrine is both an interpretive tool and a constitutional remedy.¹⁶ Currently, the ConCourt simply uses the avoidance doctrine as an interpretive tool, albeit wrongly. The author of this Research Insight says "wrongly" because there is no attempt by the court to distinguish between constitutional and prudential ripeness doctrines especially where the litigant utilises the standing provisions in the Constitution as is now the norm in countries where the canon originated such as the USA.

Notably, the constitutional avoidance doctrine is not a constitutional rule of law in Zimbabwe, unlike jurisdictions such as the USA where it can be considered as a justiciable rule because the US Constitution permits for the avoidance doctrine to be used as part of the Fifth Amendment. Given this absence, Zimbabwean judges simply apply the constitutional avoidance doctrine as a comparative rule of judicial restraint, obviating the fact of it not being a Zimbabwean constitutional rule of law. Moreover, and as the Anjin case illustrates, in doing so they are liable to fail to properly determine the overlapping tests of the avoidance doctrine.

¹⁵ R Gargarella (2016) *Scope and Limits of Dialogic Constitutionalism*. In Bustamante T., Goncalves F.B (eds) *Democratizing Constitutional Law*. Law and Philosophy Library, Vol. 113, Springer.

¹⁶ Fish (n 11).

3. THE ANJIN CASE

The ConCourt in the Anjin case presented the case as one that was not yet ripe for consideration of constitutional issues.

Anjin had alleged a violation of its constitutional rights, but the ConCourt considered that legal remedy should be sought by the litigant from either the High Court or Administrative Court, not from it. This was despite that Anjin had already approached the High Court, but received no legal cure, ahead of taking its case to the ConCourt, relying on the standing provisions in our Constitution.¹⁷ The standing provision in the Constitution of Zimbabwe liberalizes the protection of constitutional rights beyond the Administrative Court as a specialised superior court and High Court as a court of inherent jurisdiction.

The avoidance doctrine was in the *Anjin* case used to deny the litigant an effective remedy on the basis that the Administrative Court or High Court could offer it some relief. Courts' due and fair recognition of the legal standing of litigants is a prerequisite to their obtaining justice through legal means. Surprisingly and in the need for judicial consistence in accepting constitutional matters, the late Chief Justice Godfrey Chidyausiku aptly remarked in respect of legal standing in the case of *Mawarire v Mugabe N.O & Others*,¹⁸ case that:

‘Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat.’¹⁹

The Court in the *Mawarire* case is lauded for having used creative re-interpretation of legal standing to protect legal rights, including the judicial finding that:

‘The fact that he (applicant) has an alternative administrative law remedy by way of mandamus does not, in my view, preclude his entitlement to approach this Court for

¹⁷ Section 85 of the Constitution.

¹⁸ CCZ 1/13.

¹⁹ Ibid.

constitutional relief. In this regard, I respectfully adopt the reasoning and conclusions of the late Chief Justice.²⁰

Put simply and in the opinion of this author, the ConCourt should have proceeded from the legal position that legal standing demands that proper applicants seeking a declaration of their rights should simply show that they have been or will imminently be injured. Considered through the lens of mining sector investors, declarations allow businesses or individuals to seek a court's direction at the early stages of a controversy, uncertainty or insecurity so that they can properly take a future course of action.²¹

²⁰ The reasoning enjoins constitutional courts to be innovative when dealing with cases that bear on constitutional breaches to constitutional rights. This visibilises and essentialises the need for courts to bulwark constitutional rights against violation by state functionaries or agencies. This is especially so since the Constitution of Zimbabwe enshrines and makes justiciable the duties to protect, promote, respect and fulfill human rights on the state, state institutions, agencies and natural or juristic person; see section 44 of the Constitution of Zimbabwe, 2013.

²¹ N.F Weinrich (nd) Declaratory Judgment Actions: When Are They Appropriate?

4. RAMIFICATIONS OF THE ANJIN CASE

There is need for courts to be reliably consistent in offering constitutional relief in important investment cases, not least with respect to the mining sector that is so central to Zimbabwe's economy. The *Anjin* case illustrates the absence of the above in Zimbabwe.

In the *Anjin* case, the ConCourt failed to offer a nuanced adjudication on the overlap between legal standing contemplated by section 85 of the Constitution and the ripeness doctrine which is a rule of judicial restraint. The ConCourt in that case used technical or preliminary arguments relating to the standing-ripeness dichotomy to deny the mining company the relief of a declaration premised on alleged violations of its rights to administrative justice, right to property and freedom of association. The litigation arose from the issue of a summary notice on 22 February 2016 declaring Special Grant No. 4765 to be void. The effect of the summary notice that the company had to cease its operations and vacate the mining areas in Chiadzwa, Marange Distrit, covered by Special Grants 4765 and 5247, in effect this amounts to State expropriation.

The ConCourt application followed Anjin's failure to get reprieve on an urgent basis at the High Court. Essentially, the ConCourt found it unnecessary to consider the constitutional issues raised by Anjin arguing that Anjin should have approached either the Administrative Court or the High Court. Eventually, the court wrongly relied, in the view of the author of this Research Insight, on the ripeness doctrine to dismiss the case, yet in surprising fashion, it admitted that constitutional matters involve issues to deal with the interpretation, protection and or enforcement of the Constitution. This result was very public and further undermined foreign investor confidence in the governance of Zimbabwe's mining sector.

The *Anjin* case may have wider ramifications for mining sector investment in Zimbabwe since it seems to be both part of a wider pattern, and the reinforcement of previous trends. For example, in citing the *Zinyemba v Minister of Lands* as precedent in the *Anjin* case,²² the ConCourt showed its inclination to consolidate the negative effects of judicial restraint by avoiding the merits of land and mining cases which raise constitutional issues.

However, Zimbabwe should avoid continuing to create instances such as those where its reputation for poor protection of investors is internationally publicised as was the case in the

²² CCZ3/2016.

Bernhard von Pezold and Others v Zimbabwe case where it was ordered to pay US\$ 65 million in compensation relating to violation of the expropriation, fair and equitable treatment and bilateral investment treaties.²³ The *Anjin* case does the reverse of this by reinforcing that sense internationally that investor protection is lacking for foreign mining investors in Zimbabwe.

²³ ICSID No. ARB/10/15.

5. CONCLUSIONS

The foregoing considerations demonstrate the need for the ConCourt and other superior or specialised superior courts in Zimbabwe to balance between preliminary points and merits when deciding constitutional cases relating to mining investments, and to do so without fear or favour.

Whilst the avoidance doctrine may be properly invoked in reviewing constitutional matters, there is need for ConCourt judges to properly apply the overlapping tests such as those relating to standing and ripeness.. At a minimum, which may be all what the litigants need, the ConCourt should properly balance between avoidance doctrine both as an interpretive tool and as a remedy. A syntopical judicial reading of the doctrine will also offer litigants in critical resource-related and investment-related court challenges effective protection by courts as the last defenders of constitutional rights.

Zimbabwe's financial dashboard demonstrates a country that is in dire need of attracting investors through effective protection of property rights and investment ownership, but the demonstrated threat of arbitrary State expropriation of property remains a sizeable obstacle to attracting FDI. To ameliorate this situation, judges especially ConCourt judges must provide protection of property rights. It is on this basis that the *Anjin* case provided the ConCourt with the opportunity to exercise its discretion to hear both the preliminary points and the merits of the case before dismissing an important and prominent case where justice has not been seen to have been done and that bears significantly on the atmosphere of investment in Zimbabwe.

Indeed, the *Anjin* case provided the ConCourt with the opportunity to visibly build on its previous, decisions such as the *Mawarire* decision where it innovatively allowed the applicant to approach the court on the basis of liberalised legal standing provision.

The ConCourt can avoid confusion when deciding on overlapping tests related to the avoidance doctrine such as the standing and ripeness. And by not unnecessarily avoiding judgement through constitutional avoidance judicial sidestepping such as those illustrated above, the ConCourt can far better serve the cause of fair and equal justice, whether for the citizens of Zimbabwe or those foreign investors attracted to the country.

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