

K & G MINING SYNDICATE

Versus

RONALD MUGANGAVARI

And

PROVINCIAL MINING DIRECTOR – MIDLANDS

And

MINISTRY OF MINES & MINING DEVELOPMENT N.O.

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 1 FEBRUARY & 1 JUNE 2017

Opposed Matter

T. Zishiri for the applicant

A. Chinamatira for 1st respondent

No appearance for the 2nd and 3rd respondents

TAKUVA J: This is an application for review in which the applicant seeks the following relief:

- “(a) The determination by the 3rd respondent dated 17 July 2015 cancelling Midway 21 Mining registration certificate held by applicant be and is hereby set aside.
- (b) The respondent to pay costs of suit only in the event of opposition.”

The facts are that a dispute arose between applicant and 1st respondent in connection with boundaries of a mining claim. First respondent had overlapped onto existing boundaries of applicant’s claim. The mining dispute was determined by the 2nd respondent after visiting the claim in Zvishavane. The determination was delivered on the 2nd of October 2014. This outcome was in favour of the applicant. In arriving at this determination 2nd respondent stated that:

“1. Midway 21 Mine registration number 9871

- Midway Mine registration number 9871 is owned by K and G Syndicate
- Registered on 19 October 2006 by Herbet Kwenzani
- Transferred under TR number 9070 to K and G Syndicate on 16 July 2007
- The block measures 8 hectares and was registered for gold reef
- Inspected up to 19 October 2015.

2. Clifton 15 Mine registration number 12578

- Clifton 15 registration number 12598 was registered by Ronald D. Mugangavari
- First registered on 20 February 2012
- Measures 10.3 hectares on registration papers
- Inspected up to 20 August 2012 and is long overdue for inspection

2.0 Findings and observations

- The registration documents reveal that Clifton 15 Mine and Midway 21 Mine share the same position on the Master Plan and docket as indicated by Beacons B, C and D except for Beacon A.
- On the ground, both surveyed blocks have the same hectrage of 6.79ha
- The blocks also share on the ground the same beacon positions and coordinates
- Both blocks did not have any permanent beacons on the ground but beacon positions were marked by cairns of stones.

3.0 Determination

- Clifton 15 Mine was pegged 6 years after Midway 21 Mine had already been pegged
- Registration cards confirm that Midway 21 Mine was inspected since 2007 up to 2015
- Clifton 15 Mine is due for inspection and was according to its registration card, last inspected up to 20 August 2012
- When Clifton 15 Mine was pegged Midway 21 Mine was still current thus in terms of section 31 and 177, of the Mines and Minerals Act (Chapter 21:05) Clifton 15 Mine was pegged on a ground not open to prospecting and pegging
- In terms of s177 of the Mines and Minerals Act (Chapter 21:05) Midway 21 Mine enjoys priority of rights
- In terms of section 50 of the Mines and Minerals Act (Chapter 21:05) Clifton 15 Mine is liable for cancellation
- In terms of section 375 and 51 of the mines and Minerals Act (Chapter 21:05) Midway 21 Mine should maintain and erect permanent beacons and resume mining operations as per coordinates submitted during registration (documents)”

The Mining Commissioner then cancelled the Clifton 15 Mine registration. The 1st respondent was dissatisfied and noted an appeal to the Minister of Mines and Mining Development who reversed the earlier determination and allowed the 1st respondent to resume his mining operations on Clifton 15 Mine. The reasons for nullifying the 2nd respondent's decision are contained in a letter signed by one K. Mlangeni the Acting Provincial Mining Director – Midlands Province for and on behalf of the Permanent Secretary for Mines and Mining Development. This was on 17 July 2015. Aggrieved, applicant filed this application on the following grounds:

- (a) The 3rd respondent arrived at his decision irrationally and that the decision thereof is grossly unreasonable in that the 3rd respondent's decision was not a product of the contents of the record of proceedings by the 2nd respondent. Instead of basing its decision on the records, the 3rd respondent relied heavily on new evidence. It was contended, relying on *Chevron Investments (Pvt) Ltd v Chihuri & Anor* 2006 (2) 188 (S) that it is undesirable to allow parties to lead new evidence outside of the record of proceedings as this would effectively lead parties to argue their cases differently.
- (b) The 3rd respondent's decision is clouded with illegality in that it did not follow provisions of the Mines and Minerals Act (Chapter 21:05) [The Act]. After making a finding that the applicant was the first pegger, 3rd respondent came to a surprising irregular decision in that he did not invoke the provisions of section 177 (3) of the Act which grants the 1st pegger rights of priority. It was submitted that because of this, 3rd respondent's decision is null and void due to its unreasonableness. Reliance was placed on *Macheza v Chaumbezvo* HC 5157/14; *Zambezi Proteins v Minister of Environment and Tourism* 1996 (1) ZLR 378 (H) and *Minister of Home Affairs vs Austin* 1986 (1) ZLR 240 (S).

Relying on *Affretair (Pvt) Ltd and Anor vs M K Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (SC), applicant argued that the decision arrived at by the 3rd respondent is irrational, irregular and outrageous in its defiance of logic that no sensible person who had applied his mind to the question could have arrived at it.

Finally, applicant applied to amend its grounds of appeal by adding a further ground, namely that the 3rd respondent lacked jurisdiction to hear the appeal in that in terms of s361 of the Act, an appeal from the Mining Commissioner shall only lie to the High Court. The 1st respondent was not averse to the amendment and I duly granted it.

A review may be brought to this court in terms of section 27 of the High Court Act (Chapter 7:06) on the following grounds:

- (i) absence of jurisdiction on the part of the court tribunal or authority concerned
- (ii) interest in the cause, bias, malice or corruption on the part of a person presiding over the Court or Tribunal concerned or on the part of the authority concerned as the case may be
- (iii) gross irregularity in the proceedings or the decision

In casu, the applicant raised the lack of jurisdiction together with gross irregularity in the proceedings or the decision as grounds for review. In my view, the 1st ground relating to lack of jurisdiction is decisive. I therefore consider it first. It is noteworthy that the 1st respondent conceded that this ground has merit. Section 361 of the Act provides:

“Any party who is aggrieved by any decision of a Mining Commissioner’s court under this Act may appeal against such decision to the High Court, and that court may make such order as it deems fit on such appeal.”

In the present case, it is common cause that the appeal was noted by 1st respondent against 2nd respondent’s decision to the 3rd respondent. Quite clearly this appeal is a nullity and so is the decision flowing from it. See MATHONSI J’s comments in *Mazuva v Simbi; Simbi v Mazuva* 2011 (2) ZLR 319 (H) and *Stanely Masumba v Collen Tshayana and 2 Others* HB-172-16.

The 1st respondent argued quite strongly that this court should also simultaneously review 2nd respondent’s decision which in his view, is anomalous in that Clifton 15 and Midway 21 are two different and distinct mining sites, which do not even share the same boundary. First

respondent urged this court to “take a judicial notice of the anomaly highlighted above and proceed to make a substantive judgment that would put to rest the entire dispute between the two parties.

I am not persuaded by this invitation. In my view, it would be improper to review proceedings in respect of the 2nd respondent as they are not properly before me. In any event, there is no basis to review these proceedings. If 1st respondent wanted proceedings by the 2nd respondent reviewed, he should have done so before appealing to the Minister.

I take the view therefore that the Minister’s decision is null and void for want of jurisdiction. Assuming I am wrong, I entertain no doubt that the decision is grossly irregular and unreasonable in that it ignored the clear provisions of section 177 (3) of the Act.

In the result, it is ordered that:

1. The determination by the 3rd respondent dated 17th July 2015 cancelling Midway 21 Mining registration certificate held by applicant be and is hereby set aside.
2. The 1st respondent to pay costs of suit.

Garikayi & Company, applicant’s legal practitioners
Mkusha, Foroma & Maupa, 1st respondent’s legal practitioners