CHANAKIRA MASUKU
versus
TARIRO NDHLOVU N.O.
and
MISTOPHER KHAN
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O.

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 15 November 2022

Court Application for Review

Mr *V Masvaya with* Mr *J Gwapedza*, for the applicant
Mr *I Salanje*, for the 1st and 3rd respondents
Mr *D Mujaya*, for the 2nd respondent

DEME J: On 15 November 2022, I delivered an order to the effect that:

"1. The application for review be and is hereby granted.
2. The determination by the 1st Respondent, which was delivered on the 19th July 2022 be and is hereby set aside.
3. The proceedings that led to the determination in clause 2 above be and are hereby quashed in their entirety and that the matter is remitted back for rehearing by a different administrative authority appointed by the 3rd respondent or his assigned delegates.
4. There shall be no order as to costs."

The second respondent requested for the reasons for the order made. Thus, this judgment seeks to supply the reasons for the 15 November 2022 order.

The applicant approached this court seeking an order for the review of the first respondent's determination. The relief sought by the applicant is couched in the following manner:

"1. That the application for review be and is hereby granted.
2. The determination by the 1st respondent, which was delivered on the 19th of July 2022 be and is hereby set aside.
3. The proceedings that led to the determination in clause 2 above be and are hereby quashed in their entirety and that the matter is remitted back for re-hearing by a different administrative authority appointed by the 3rd respondent or his assigned delegates.
4. The costs of this suit shall be paid at attorney-client scale by any party or parties opposing this application, jointly and severally, the one paying absolving the other(s)."

The applicant sought to challenge the determination of the first respondent based on three grounds which are bias, gross irregularity and gross unreasonableness or irrationality.

By way of background, the applicant who is a natural person was aggrieved by the decision made by the first respondent who is cited in his official capacity as the functionary who gave the decision under review, with the second respondent being the beneficiary thereof. The conclusion for the first respondent's determination, which is on p 32 of the record, is as follows:

> "1. Somerset 16 enjoys the priority of mining rights and no beacons from subsequent pegger should interfere with any of its established beacons.
> ii. Somerset 16 and Old Crick 11 are located in proximity to each other and that should be maintained on the ground in accordance with their spatial description on the reef cards.
> ii. Old Crick 5 does not share boundary with Somerset 16. This should be maintained on the ground.
> iv. Somerset 791 should adjust its location is (sic) line with section 177(3) of the Act giving priority to Somerset 16 and Old Crick 5.
> v. Somerset 792 falls completely within Old Crick 11 and is recommended for cancellation. It was pegged in breach of section 31 of the Act."

The applicant averred that on 14 September 2019 he entered into a partnership agreement with the second respondent which agreement was for joint mining operations on the land that the second respondent presented as his registered claim called Somerset 16. The applicant further alleged that for purposes of this agreement he was to inject capital for the opening of mining shafts and milling of gold ore and for the establishing of all mining infrastructure. All in all the applicant allegedly invested US$200 000.

It is the applicant's case that he became suspicious of the second respondent's claim of ownership of the mining claims after noticing that the second respondent would evade the police whenever they visited the site. According to the applicant, the second respondent's conduct prompted him to investigate with the office of the first respondent and this is when he discovered that the area he had invested in was not covered by the second respondent's claim. The applicant further claimed that he realized that the area was open for prospecting and pegging and this meant that he stood to lose his investment in the event that another person proceeded to peg the said area. The applicant affirmed that he, consequently, sought the services of a qualified pegger and proceeded to register the disputed mining claim, namely Somerset 791 and Somerset 792. The applicant also asserted that during this process the pegger found that the disputed area was once a mining block called Somerset 7 which was forfeited on 28 January 1999 and which had not been re-pegged thereafter.

It is the applicant's case that the pegging which he did was approved by the first respondent and the applicant was issued with a certificate of registration. According to the applicant, upon discovering that the applicant had successfully registered the mining block, the second respondent cancelled the partnership agreement and initiated the mining dispute. The applicant further maintained that the first respondent conducted a survey on 14 June 2022 after which he promised to communicate his findings. Applicant also alleged that on 23 June 2022 the first respondent called him and the second respondent to his offices where he informed the applicant that he was going to lose the dispute because he had pegged in an area subject to the partnership agreement with the second respondent. The applicant also alleged that the first respondent told him that the survey report favored him. The applicant affirmed that however the first respondent highlighted that he was not going to rule in his favor because of the partnership agreement.

According to the applicant, the first respondent then proceeded to order the conducting of another survey on 7 July 2022 which survey the applicant believes was conducted to benefit the second respondent. The applicant asserted that on 19 July 2022 parties were notified that the survey report was now available. It is the applicant's belief that the new report was now different from the first one. The applicant additionally averred that the new report now showed that some of the applicant's mining blocks were in the second respondent's mining claim.

The application was opposed by the first and second respondents. In response the first respondent denied the allegations levelled against him by the applicant. He asserted that the applicant pegged on land that was not open to pegging and prospecting. He stated that his determination was guided by factual findings and the applicable laws in the matter. He denied that there was any bias or gross misconduct on his part in reaching a determination in the dispute between the applicant and the second respondent. He also asserted that the second survey was upon the request of the second respondent who had raised some complaints against the first survey. The first respondent additionally affirmed that he did not make a predetermination of the dispute as alleged by the applicant. Rather, the first respondent asserted that he explained to the applicant the provisions of the law which were not in his favour. It is the first respondent's case that the present application is littered with misconceptions and misinterpretations of the law made by the applicant and hence prayed for the dismissal of the application.

The second respondent, in opposing this matter, averred that the applicant did not invest the US$200 000 that he alleged he did and that the applicant did not meet any of his contractual

obligations in terms of the partnership agreement. The second respondent also denied the averment that he acted suspiciously when the police came to the site. He averred that he had no reason to evade the police as his paperwork was in order. The second respondent also raised a query regarding the fact that the applicant failed to cite Shungu Mining Syndicate as the applicant had also pegged within a claim owned by them.

The second respondent disputed the allegation by the applicant that the first respondent, on 23 June 2022, communicated his determination. It is also denied by the second respondent that a second survey was conducted to benefit him in any way.

The second respondent denied that there was bias in favor of himself in the proceedings. The second respondent averred that the applicant's re-pegging of Somerset 7 was illegal as he did not get the consent of the person who imposed an exclusive prospecting order on it. It was further alleged on behalf of the second respondent that there is no proof that the applicant re-pegged Somerset 7 since the first respondent made a finding that the applicant had pegged within Somerset 16.

The second respondent denied any irregularities within the proceedings and maintained that the first respondent's determination was valid, reasonable and enforceable. The second respondent, therefore, prayed for a dismissal of the present application.

The second respondent raised three points *in limine*. Firstly, the second respondent raised an objection that the application was filed out of time. However, this was not pursued in the second respondent's Heads of Argument which leads to the presumption that this was abandoned. Further, the point *in limine* could have been abandoned as a result of the applicant's response in the answering affidavit who pointed out the correct date of the determination of the matter by the first respondent.

Secondly, the second respondent also highlighted that Shungu Mining Syndicate which is an interested party must have been cited. In response, the applicant argued that there is no need to cite Shungu Mining Syndicate which is not a party to the determination of the first respondent. The applicant also submitted that the issue of misjoinder does not make the present application fatally defective in terms of the Rules.

The second respondent also raised an objection that the present application is defective as the court application and the founding affidavit bear different dates with the court application having an earlier date. In response, the applicant contended that there is no requirement in the Rules that the court application and the founding affidavit must have been prepared on the same date.

The applicant, towards the date of the hearing of this matter, raised a fresh point of law by way of supplementary heads of argument. The applicant now argued that the first respondent, who is a Provincial Mining Director, had no jurisdiction to hear the mining dispute. I inquired from the second respondent's counsel, Mr Mujaya, whether he was prepared to respond to the new point of law which had been raised at the eleventh hour by the applicant and he replied in the affirmative. Mr Salanje advised the court that the first respondent was no longer opposing the application.

I proceeded to deal with the point of law which was raised by the applicant as this goes to the root of the dispute between the parties. The point of law concerned is capable of disposing of the matter. With respect to the points *in limine* raised by the second respondent, I am of the view that these are not capable of disposing of the matter and hence the reason not to deal with them at first.

Consequently, my immediate duty shaped by the fresh point of law was to make a determination of whether or not the first respondent has jurisdiction to determine a mining dispute. If he has no jurisdiction, that would mean the end of the matter. There would be no reason for dealing with other issues.

In motivating the new point of law, Mr Masvaya referred the court to the cases of *Gombe Resources Pvt Ltd* v *Provincial Mining Director Mashonaland Central and ORS*[1] and *Pahasha Somalia Mining Syndicate* v *Eathrow Investments Pvt Ltd and Ors*[2]. The counsel for the applicant, Mr Masvaya, submitted that the first respondent is not recognised by the Mines and Minerals Act, [*Chapter* 21:05]. As a result, Mr Masvaya submitted that this non-existent officer cannot perform statutory functions. He further contended that the first respondent wrongly assumed the functions of the Mining Commissioner. He also maintained that the Mines and Minerals Act [*Chapter* 21:05] confers upon the Mining Commissioner and the High Court the power to hear the mining disputes. The first respondent, who is not recognised by the Act, has no jurisdiction to hear mining disputes, according to the applicant's counsel. Mr Masvaya also argued that there is nothing on record suggesting that the first respondent had assumed the powers of the Mining Commissioner through delegation. For these reasons, Mr Masvaya urged the court to set aside the determination of the first respondent for want of jurisdiction.

[1] HH405/18.
[2] HH450/21.

In response, Mr Mujaya, on behalf of the first respondent, argued that the applicant was smuggling the ground of review through the point of law. He further submitted that this new issue ought to have been part of the grounds of review. He also contended that the ground for review had been improperly raised and flies against the decision of *Isau Mugugu* v *Police Service Commission and Commissioner of Police*[3].

In the case of *Gombe Resources (Pvt) Ltd* (*supra)* MUREMBA J beautifully propounded the following critical remarks:

> "As was correctly contended by the applicant, the Act does not give powers to a Provincial Mining Director to issue injunctions. There is no provision in the Act for a Provincial Mining Director. The Act was not amended to repeal or replace the Mining Commissioner with a Provincial Mining Director. Section 343 which deals with the appointment of officers states that in respect of every mining district, there shall be a Mining Commissioner who shall perform the functions imposed upon him under this Act or any other enactment."

In the case of *Pahasha Somalia Mining Syndicate* (*supra*) CHINAMORA J made the following observations:

> "It was contended by the 1st respondent that the office of Provincial Mining Director does not exist at law. Consequently, the argument was advanced, the 3rd respondent is not properly before the court. The 1st respondent submitted that the correct party who should have been cited is the Secretary for Mines and Mining Development and relied on *Gombe Resources (Private) Limited v Provincial Mining Director, Mashonaland Central& Ors* HH 405-18. The point made in this case was that if the Provincial Mining Director lacked authority to make the orders he made, then the relief that was being sought was academic. The applicant accepted that, a Provincial Mining Director is not cited anywhere in the Mines and Minerals Act, but was a *de facto* position that existed in the Ministry of Mines and Mining Development. In its heads of argument, it extended the argument to submit that "the Provincial Mining Director is clothed with responsibilities of the Mining Commissioner". Indeed, the applicant correctly pointed out that section 346 (2) of the Mines and Minerals Act provides that a mining commissioner shall hear and determine disputes concerning mining claims. However, the 1st respondent's argument was that, as the position of Provincial Mining Director was not provided in the Mines and Minerals Act, the 3rd respondent was not properly before the court."

Further, the court, in the case of *Pahasha Somalia Mining Syndicate* (*supra*) made the following comments:

> "Owing to the admitted position that the position of Provincial Mining Director does not exist in the Mines and Minerals Act but that of "mining commissioner", this begs the question: On what basis has the present application been brought against the 3rd respondent? The applicant accepts that sections 345 and 346 of the Act envisage the hearing and determination of disputes by the mining commissioner, but it has not articulated why the 3rd respondent has been cited."

[3] HH157/10.

It is clear from the above authorities that the first respondent is a *de facto* official whose existence is not recognised by the Mines and Minerals Act [*Chapter 21:05*]. From the submissions made by the parties, there is no evidence that the first respondent was operating under the delegated authority of the Mining Commissioner when he determined the mining dispute between the applicant and the second respondent. To this end, I am of the view that the first respondent had no authority or jurisdiction to determine the mining dispute.

The case of *Isau Mugugu* (*supra*) relied upon by Mr Mujaya extensively dealt with the scope of the right to be heard. In this case, GOWORA J, as she then was, excellently postulated the following comments:

> "The applicant has suggested that the failure by the first respondent to call him or his legal practitioners for the appeal amounted to an irregularity. He has argued that the conduct of the first respondent was in breach of the *audi alteram partem* rule. He has referred this court to a decision of the Supreme Court *Metsola* v *Chairman, Public Service Commission & Anor*[4] as authority for that proposition. I believe that the applicant's counsel failed to appreciate that in the authority he quoted the respondents were not acting as an appeal tribunal but were in fact the equivalent of a court of first instance. The case however is instructive as the court went to discuss what constitutes a fair hearing for purposes of the *audi alteram* rule."

Upon confirming that he was ready to argue the matter on the hearing day, I am not able to figure out the exact grounds for alleging that the second respondent was not afforded the right to be heard. Having formulated an opinion that the points *in limine* raised by the second respondent were not capable of disposing of the dispute, it was necessary to start by dealing with the point of law.

It is now settled that points of law may be raised at any time as the same may be capable of decisively resolving the dispute between the parties. It is not a requirement that points of law must be pleaded. Reference is made to the case of *Ampthill Peerage*[5], where LORD WILBERFORCE remarked as follows:

> "Any determination of dispute of fact may, the law recognises, be imperfect; the law aims at providing the best and safest conclusion compatible with human fallibility, and having reached that solution it closes the book. The law knows. And we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry."

[4] 1989 (3) ZLR 147

[5] *1977]* AC 547 at 569.

Reference is also made to the case of *Schweppes Zimbabwe (Pvt) Ltd* v *Blakey Investments (Pvt) Ltd*[6], where CHITAPI J opined as follows:

> "In my view, the point *in limine* raises questions of law and either party would be permitted to raise a point of law at any stage of the proceedings. Whilst ordinarily the point *in limine* as raised by the defendant would best have been raised by way of special plea, exception or application to strike out, the court has a discretion to condone the way that the point *in limine* was raised in the plea. The decision to condone is largely informed by the consideration whether or not there would be irreparable prejudice to the opposite party. Such prejudice is not apparent from the papers and in any event, the plaintiff did not allege any prejudice to its ability to answer the point *in limine*."

In casu, the second respondent, through his counsel, indicated he was ready to proceed despite the raising of the point of law at the eleventh hour. The first respondent indicated that he was no longer opposing the application after the raising of the point of law. In my view, there was no prejudice occasioned by the raising of the point of law.

The second respondent's counsel argued that the point of law was improperly raised as the applicant ought to have raised this as part of the grounds of review. In light of the above case of *Ampthill Peerage* (*supra)* and *Schweppes Zimbabwe* (*supra)*, it is apparent that the point of law, though not pleaded, may be accepted if it is capable of disposing of the matter. *In casu*, the point of law in question is able to dispose of the matter. Hence, there is need to have regard to that point of law in order to deal with the irregularity.

This court is the court of law and cannot allow individuals to breach provisions of existing statute. There is a justification or logic why legislature delegated the function of determining mining disputes to the Mining Commissioner and not to the Provincial Mining Director. This court's mandate under such circumstances is to give effect to the intention of the legislature if doing so would not lead to absurdity or repugnance. Allowing the first respondent's determination to stand would be a direct assault on the spirit and purpose of the legislation as promulgated by the legislature. Consequently, for the reasons highlighted, I saw it prudent to set aside the determination of the first respondent in order to allow the rehearing of the mining dispute by an appropriately and suitably qualified officer.

[6] HH601/21 at page 5.

Holding otherwise would be tantamount to promoting pandemonium in the mining sector.

Chitsa and Masvaya Law Chambers, applicant's legal practitioners
Civil Division, first and third respondents' legal practitioners
Mawadze and Mujaya Legal Practitioners, second respondent's legal practitioners