CHARLES MOYO

Versus

SECRETARY FOR MINES & MINING DEVELOPMENT N.O.

And

THE PROVINCIAL MINING DIRECTOR, MIDLANDS PROVINCE N.O.

And

WISDOM SHUMBA

And

MINISTER OF MINES & MINING DEVELOPMENT

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 6 OCTOBER 2020 & 11 MARCH 2021

Opposed Application

J. Tshuma for the applicant
P. Kunaka for 1st, 2nd, & 4th respondents
G. Sengweni, for the 3rd respondent

MABHIKWA J: The applicant filed an application for the review of the 2nd respondent's decision made on 23 August 2019 in determining a mining dispute between the applicant and the 3rd respondent. The grounds for review were as follows;

1. The procedure used by the 2nd respondent in determining the dispute using a Global Positioning System (GPS) survey was grossly irregular to the extent that it contravenes the principles and procedures laid out in the Mines and Minerals Act (Chapter 21:08).
2. The decision of the 2nd respondent in ordering that Shebeen King Mine registration 6734 must "revert to its docket position as at registration since its ground position encroaches both the ground and docket position of Confidence N W registration number 30846 was grossly unreasonable and irregular to the extent that it violates the principles in the Mines and Minerals Act (Chapter 21:05) which dictate that prior peggers on the ground will always take precedence in encroachment disputes.

The brief background history of the matter is as follows: On 4 July 1996 a block of 10 gold reef claims were registered by Boulder Mining Company at the Ministry of Mines in Masvingo and known as "Shebeen King". The registration number was 6724". The same block

of claims was then transferred to the applicant on 9 July 1996. A certificate of registration after transfer was issued in his name under number T 7057. This is not disputed by all the parties.

There is also no dispute that applicant has consistently paid his inspection fees and ensured that his registration certificate is up to date. The claim is currently paid up and valid to 4 July 2021. Applicant also states that he has made several developments and investments on the ground.

It is not disputed also that the physical block was marked in terms of the Mines and Minerals Act by six (6) beacons, namely A, B, C, D, E and F. It is also agreed that at the time of registration of the block of claims by the applicant in 1996, the survey department of the Ministry of Mines would follow up and carry out a survey of the claims to ascertain the actual positioning on the ground.

It was also common cause that on 22 October 2018, a Mr Edson Zinyama, in his capacity as Mine Manager of applicant's mine, made a report to the 2nd respondent and to the police to the effect that 3rd respondent had taken gold ore from applicant's claims at Shebeen King Mine. He also reported that 3rd respondent had destroyed applicant's permanent beacons on the ground and then pegged where he had removed the beacons. The 3rd respondent continued to mine and remove gold ore from those claims taking them to his mill.

On 13 December 2018 and 20 June 2019, follow up letters were written to the 2nd respondent asking him to resolve the matter as the 3rd respondent refused to vacate the claims.

It is also not in dispute that 2nd respondent then invited applicant and 3rd respondent to a dispute resolution hearing set down for 8 July 2019. The 3rd respondent did not attend. The hearing was postponed to 10 July 2019. The parties appeared on that date and were directed to provide 2nd respondent's office with the respective co-ordinates of their mining claims. They both submitted the co-ordinates as directed.

On 23 August 2019, the 2nd respondent made a determination based on the Global Positioning Survey (GPS) he had conducted. The 2nd respondent in using the GPS system, found that the location of the applicant's mining claim on the ground did not correspond with the position of the claim as per his GPS map.

By letter dated 23 August 2019, the 2nd respondent wrote a letter to applicant headed

> "REF: DETERMINATION OF MINING DISPUTE BETWEEN CHARLES MOYO (SHEBEEN KING MINE REGISTRATION NUMBER 6734) AND WISDOM SHUMBA (CONFIDENCE NW MINE REGISTRATION NUMBER 30846)"
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> In that letter, 2nd respondent starts by repeating the history of Shebeen King Mine from 4 July 1996, to 9 July 1996 right up to the paid up inspection to 4 July 2021. The letter shows that there is no dispute on the registration process and the registered owner. There is also no problem on the number of gold reefs (10).
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> Thereafter comes the part where the 2nd respondent wrote,

"Findings and Observations

Following the Global Positioning Survey (GPS) system that was conducted in the presence of both parties on the 15th of August 2019 the following was deduced.

- Confidence NW registration number 30846 ground and docket position match.
- Shebeen King registration number 6734 ground and docket position do not match at all.
- There is an encroachment between Confidence NW registration number 30846 ground and docket position and Shebeen King 6734 ground position.
- There is no encroachment on Shebeen King 6734 docket registration.

Determination

In view of the above findings and observations, it is concluded that Shebeen King Mine registration 6734 must revert back to its docket position as at registration since its ground position encroaches both the ground and docket position of Confidence NW registration number 30846."

It is in respect of the above findings and determination that the applicant has filed this application for review in terms of Order 33 of the High Court Rules, 1971.

For the avoidance of doubt, the court sought clarification on two points.

Firstly all the parties agreed that the applicant did not "re-peg" his claims. Secondly, they agreed that the applicant did not physically shift his beacons or co-ordinates from those done in July 1996. Having said that the parties agreed that the matter will therefore be decided on the law. Counsel for the 2nd respondent said he had nothing to add. He would stick to "his determination" filed of record as well as the heads of argument also filed. Applicant also did not have much to add save to reiterate that the GPS system was not yet part of our law but a bill at the time of hearing by this court.

The law

Section 58 of the Mines and Minerals Act, Chapter 21:05 states as follows;

> "When a mining location or a secondary reef in a mining location has been registered for a period of two years, it shall not be competent for any person to dispute the title in respect of such location or reef on the ground that the pegging of such location or reef was invalid or illegal or that provisions of this act were not complied with prior to the issue of the certificate of registration."

Whilst section 58 deals with the impeachment of title, section 177 relates to the priority of peggers. It reads as follows;

> "177 Priority of mining rights
> (1) For the purposes of this section –
> "pegger" means the person whose name or on whose behalf a mining location, reef or deposit was registered and each and every successor in title to the rights acquired by such person.

(2) For the purposes of subsection 3 –
"acquisition of title" shall be taken to mean the due performance of the 1st physical act required to be done under this act, or any previous law governing mining rights at the time where the act was performed, in order to acquire any exclusive rights in respect of any mining location, reef or deposit.

(3) Priority of title to any mining location, reef or deposit, if such title has been duly maintained, shall in every case determine the rights as between the various peggers of mining locations, reefs, or deposits as aforesaid and in all cases of disputes the rule shall be followed that in the event of the rights of any subsequent pegger conflicting with the rights of any prior pegger, then, to the extent to which such rights conflict, the rights of any subsequent pegger shall be subordinate to those of the prior pegger, and all certificates of registration shall be allowed to be issued subject to the above conditions." (the underlining is mine)

In essence, section 58 and 177 relate to the dispute resolution between title holders and location peggers of mining locations and reefs. The rule is simply that if such a mining location has been registered for a period of more than two (2) years, then no person can competently dispute the title. No one can therefore claim that the pegging of such location or reef on the ground was invalid or illegal.

In casu, applicant's claim was registered in July 1996 and has been marked and kept paid up right up to July 2021, a period of twenty five (25) years.

Secondly, in the event of a dispute between peggers, the rights of a prior pegger take precedent over those of a subsequent pegger. *In casu*, the applicant had registered the mining locations and had been working on them for twenty two (22) years. At the time the 2nd respondent conducted his hearing on the disputed claims in August 2019, the 3rd respondent was two (2) months in arrears on inspection dues whilst the applicant was fully paid, two years in advance.

In their own heads of argument, 1st, 2nd and 4th respondents state the following, which is very pertinent in this matter. They state that;

10. **Background**

1.1. Through transfer, the applicant registered a block of claims known as Shebeen King under …. Registration number T7057 on the 9th of July 1996.

1.2. At the time of registration of the block of claims there was no Global Positioning System that was used in Zimbabwe. However, in 2015 an exercise was carried out where all the miners who had pegged their claims prior to the GPS era were alerted to bring their co-ordinates for capturing and plotting and failure to do so would be to the miners' detriment in the event that a dispute arose.

1.3. A dispute arose between the applicant and the 3rd respondent in that the 3rd respondent had registered a subsequent claim which encroached into the applicant's claim.

1.4. Through the use of the GPS, it was established that Shebeen King Mine registration number 6734 must revert to its docket position as at registration." (emphasis is mine)

The 3 respondents admit clearly in that background that in the 22 years, applicant physically did not alter the claims or did nothing wrong. It was the new GPS system only introduced in 2015 that put him out of position allowing 3rd respondent's claim to encroach into the applicant's claim. It is clear also that the 2nd respondent used the GPS system only to resolve the dispute. He even goes on to state therein that miners who had pegged their claims prior to the GPS era had been alerted "to bring" their co-ordinates to his office for capturing and plotting. He says failure to do so was to the miner's detriment. The attitude is that it is the applicant's fault if he did not heed the warning.

In court, and as already stated above, counsel for the 3 respondents admitted that the GPS system is a new method that has been adopted in dispute resolution due to the recent "gold rush" happening and where people "have moved or shifted their blocks". The system is the "new kid on the block" so to speak but it is not yet law. To that extent it was improper and irregular for the 2nd respondent to use the GPS system only and base his findings on it in the face of sections 58 and 177 of the Mines and Minerals Act which outlines the procedure in dispute resolution between peggers.

The 2nd and 3rd respondents do not even raise or allege encroachment or failure to maintain beacons in their original positions by the applicant as envisaged by section 177 (8) of the Mines and Minerals Act. In fact in paragraph 3.1 of their own heads of argument 1st, 2nd and 4th respondents state as follows;

> "*In casu* the decision was for the applicant to revert to their position as at registration in line with the information that was held in the office. The thinking was that one acquires rights over the claim which would have been registered. This principle in the interest of justice has always been applied in mining disputes where it has been shown diagrammatically that one party has moved or shifted their block. The accepted practice is that a miner applies to re-adjust and is granted such permission … This adjustment is accompanied by relevant alterations being made in the master plan as held in the Mines Office to avoid disputes of this nature". (emphasis mine)

There is no allegation and in fact it is the 3rd respondent's submission that the applicant, did not re-peg his claims. He did not therefore physically encroach or fail to keep his beacons in their original position. He did not physically move or shift his mining block. It was therefore wrong for 2nd respondent to "punish" the applicant for failure to "bring his co-ordinates" to the Mines Office for "verification". There is no such law and that point has been admitted.

In any event, at the hearing, counsel for the 1st, 2nd and 4th respondents was challenged, and he failed to produce any copy of the notice purportedly put at all Mines' Offices for all miners to see, or a copy of the letter sent to the applicant if any. Counsel also admitted that even if that notice or letter were to be produced, they are not law.

The 3rd respondent on its part appears to be taking advantage of, and clinging onto the 2nd respondent's error on the law. He appears to believe that the mere fact that the 2nd respondent determined and advised that Shebeen King Mine "must revert back to its docket

position as at registration" is the law and that applicant was therefore in the wrong. What 3rd respondent failed to appreciate then, which he possibly appreciates now, is that the 2nd respondent had used the GPS system which is not yet part of our law and thus erroneously adopted a wrong procedure in the dispute resolution.

It is this court's finding also that the 3rd respondent's submission seems to suggest that the 2nd respondent went to the ground and established that the applicant had physically left his pegged mine, encroached onto someone else's mining claim and started operating outside his co-ordinates. Unfortunately this does not seem to be the submission by the 2nd respondent's counsel. Instead of going to the ground to examine the actual mining location and the actual positions of the co-ordinates to see if either of the two (2) miners had shifted or moved them, the 2nd respondent had merely used the GPS system to see if the applicant's GPS co-ordinates matched those in his map. As a result, this led 2nd respondent to ask himself the wrong question and found an equally wrong answer in determining that dispute as stated by COLTART CJ in *Hira & Anor* vs *Boysen & Anor* 1992 (4) SA 69 (A),

> "… In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal asked itself the wrong question or applied the wrong test or based its decision on some matter not prescribed for its decision or failed to apply its mind to the relevant issues in accordance with the behests of the statutes, and that as a result its decision should be set aside on review."

The above commentary was to be used with approval by MALABA J (as he then was) to a magistrate's decision in the Zimbabwe case of *Bridges and Hume (Pvt) Ltd* vs *Magistrate, Bulawayo & Anor* 1996 (1) ZLR 542 (H) where the learned judge commented that an examination of decided cases revealed that an error of law is likely to constitute a gross irregularity when committed among other facts;

> "where a wrong question of law is asked by the inferior court or tribunal, causing it to misunderstand the nature of the whole enquiry and misdirecting its mind to wrong matters".

In casu the Mines and Minerals Act prescribed how disputes between title holders, peggers or miners should be resolved. There is no provision for a GPS survey in the Act. The 2nd respondent is a creature of statute and cannot deviate from the principles and procedures laid down in the Act. It would be wrong especially when challenged, to merely state that the GPS system is now "common practice" or Global practice" and then ignore the Act. The use of the GPS has not been adopted by the Act and is therefore not the law. The 2nd respondent as a result pursued wrong solutions and committed an irregularity by stepping outside the confines of the Act.

See also *Mugugu* vs *Police Service Commission and Anor* 2010 (2) ZLR 185 (H) per GOWORA J (as she then was). In any event, all counsel eventually agreed that the GPS system is currently not yet law.

Accordingly, I order as follows that;

1. The application for review succeeds.

2. The decision by the 2nd respondent made on 23 August 2019 is hereby set aside.
3. The 3rd respondent and all those claiming occupation under or through him are hereby ordered to vacate the block of claims known as Shebeen King registered number 6734.
4. The 3rd respondent pays costs of suit.

Webb, Low & Barry inc Ben Baron & Partners, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st, 2nd & 4th respondent's legal practitioners
Hore & Partners c/o Sengweni Legal Practice, 3rd respondent's legal practitioner