(1) KINGSTONE MUDONHI HC 11234/17
versus
MINISTER OF MINES AND MINING DEVELOPMENT
and
THE ACTING PROVINCIAL MINING DIRECTOR
MANICALAND PROVINCE N.O.
and
AARON SHANJE
and
TICHARWA MUREHWA

(2) TICHARWA MUREHWA HC 5172/17
versus
THE MINISTER OF MINES & MINING DEVELOPMENT N.O.
and
ACTING PROVINCIAL MINING DIRECTOR MANICALAND N.O.
and
AARON SHANJE
and
KINGSTONE MUDONHI

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 19 July & 31 October 2018

Consolidated Opposed Matters

1. *D. Sanhanga*, for applicant
   R. Gezera, for 1st and 2nd respondents
   O.O. Takaendesa, for 3rd respondent
   G.R.J. Sithole, for 4th respondent

2. *G.R.J. Sithole*, for applicant
   R. Gezera, for 1st and 2nd respondents
   O.O. Takaendesa, for 3rd respondent
   D. Sanhanga, for 4th respondent

TAGU J: The applications in both files are basically for the setting aside of the first and second respondents' decision made on the 23rd of May 2017 reconstituting the boundaries and the

beacons of the applicants' mining claims and the awarding of the parts of the applicants' claim to the third respondent.

The applicants and the third respondent are gold miners in the Odzi area and have been involved in boundary disputes. The applicant in HC 5172/17 owns claim G 3385, applicant in HC 11234/17 owns claim G3445 and the third respondent in both cases owns claim G1243. The three claims are adjacent to each other. In 2014 a boundary dispute arose between applicant in HC 5172/17 and the third respondent. The third respondent then referred the dispute to the second respondent, the Acting Provincial Mining Director for Manicaland Province for determination. A determination was made on the 23rd of December 2014. All three parties continued to mine in what appeared to be in harmony. In July 2016, a year and 6 months later the third respondent wrote another letter of complaint to the second respondent asking the second respondent to review his decision of the 23rd December 2014 now complaining that the decision had made the applicants to encroach onto his mining claims. This letter of complaint dated the 4th of July 2016 was not copied to the applicants. After receiving the second letter of complaint from third respondent, the second respondent reviewed his own decision and by letter dated 22nd May 2017 which was copied to all the parties advised the parties of the altered beacons as follows-

> "After receiving an appeal on this matter and having all necessary considerations made, please be advised of the following decision by the Minister of Mines and Mining Development:-
>
> 1. Mr Shanje's position as a prior pegger should be maintained with the following beacons A36K 0436500 UTM 7904600 B36K 0437000 UTM 7904600 C36K 0437000 UTM 7904300 D36K 0436500 UTM 7904300.
> 2. Mr Mudonhi to adjust his position to exclude the area encroaching into Mr Shanje's block.
> 3. Mr Murehwa to adjust his position to exclude the area encroaching into Mr Shanje's block.
> 4. Mr Murehwa should not be regarded as a prior pegger in the disputed area as determined by the Provincial Mining Director (23/12/2014)
>
> Please find enclosed map
>
> Please be guided accordingly."

This reviewed decision did not go down well with the applicants for a number of reasons. The first reason being that the applicants were not consulted to make representations. The second reason being that the new decision in fact took away portions of their mine claims and gave it to the third respondent. They submitted that the first and second respondents made the decision aforesaid without the necessary jurisdiction to entertain the matter. That the determination is *ultra vires* the enabling legislation. The decision is a nullity and void as it was done by a body not entitled to make it at law. Further they submitted that the decision of the first and second

respondents is irrational and was motivated by bias and malice as it was made without hearing the applicants and other interested parties and without providing any reasons for the determination.

In his initial prayer the first applicant in case HC 11234/17 had asked the court to review the decision and order that-

> "1. The decision of the 1st and 2nd Respondent made by letter dated 22 May 2017 to reconstruct the boundary of the Applicant's mine and that of the 3rd and 4th Respondents be and is hereby set aside.
>
> 2. The 2nd and 3rd Respondents be and are hereby ordered to respect and adhere to the boundaries and pegs which existed before the decision of the 22nd of May 2017.
>
> 3. The 1st, 2nd and 3rd Respondents be and are hereby ordered to pay costs of suit."

The applicant in HC 5172/17 also sought the same relief.

On the 17th July 2018 the applicant in HC 11234/17 filed a Notice of amendment of the draft order in terms of Order 20, Rule 132 of the High Court Rules, 1971 deleting the above draft order and substituted it with the following:

> "1. The determination of the 23rd of December 2014 by the 2nd Respondent holding that 4th Respondent is the rightful owner over the mining area in dispute be and is hereby set aside.
>
> 2. The determination of the 4th July 2016 by the 2nd Respondent rescinding its own determination of the 23rd of December 2014 be and is hereby set aside.
>
> 3. The 2nd Respondent be and is hereby ordered to cause a survey of the mining locations being G344; G3385; and G1243 to be conducted in terms of Section 353 (1) of the Mines and Minerals Act (Chapter 21.05) within seven (7) days of this order.
>
> 4. The Respondent be and is hereby ordered to summon the Applicant, the 3rd Respondent and the 4th Respondent to make representations on the boundary dispute between them in terms of Section 348 of the Mines and Minerals Act (Chapter 21.05) within fourteen (14) days of this order.
>
> 5. The 2nd Respondent be and is hereby ordered to render its determination on the boundary dispute between the Applicant, 3rd Respondent and 4th Respondent within seven (7) days of hearing representations from the parties.
>
> 6. 1st, 2nd and 3rd Respondents to pay costs of suit."

At the hearing of the matter some preliminary points were raised by the applicants in cases HC 11234/17 and HC 5172/17 as well as by the third defendant.

Counsel for the applicant in HC 11234/17 raised the preliminary points that some documents that were filed by the first, second and third respondents after Heads of argument were filed should be expunged from the record as they were prejudicial to the applicant. The counsel for the first and second respondents consented to the expunging of those documents. The documents were duly expunged by the court. The counsel further raised a second point *in limine*

that the second respondent in HC 11234/17, that is, The Acting Provincial Mining Director – Manicaland Province N.O. was barred as he had not filed any Opposing affidavit and that an order be granted against him. The Acting Provincial Mining Director –Manicaland was duly barred by the court from making any submissions although the counsel for both first and second respondents had argued that both respondents intended to oppose the applications.

Lastly the counsel applied that the original draft order be amended as I stated above. Counsel for the applicant in case HC 5172/17 concurred to the amendment of the draft order as suggested by counsel for applicant in HC 11234/17 since according to them the new draft order would if granted resolve the dispute in both matters. The counsel for the first and second respondents did not opposed the amendment of the draft order since it captured both files which had been consolidated. The amendment of the draft order was only opposed by the counsel for the third respondent.

In my view amendments are generally granted where there is no prejudice. In light of the consolidation of the matters, if the amendment is allowed with appropriate amendments this will settle the matter before the court. I therefore will allow the amendment.

Also counsel for the applicant in HC 5172/17 took a preliminary point that the first respondent in that file who is the Minister of Mines and Mining Development N.O. had not filled an Opposing affidavit hence he was barred and must be bound by the court order that the court would grant. He therefore moved for an order against the first respondent in that file. I found the first respondent in HC 5172/17 duly barred and will be bound by the order this court will grant.

The third respondent also took three points *in limine* in HC 11234/17. The first point was that the order being sought by the applicant is incompetent because the third respondent's rights over block G1234 are superior and cannot be subordinated. Any order which has that effect will be *ultra vires* s 177 (3) of the Mines and Minerals Act [*Chapter 21:05*]. In my view this point *in limine* is ill taken if persisted with given the fact that the complaint by the applicants are that they were not given an opportunity to make representations before the decision of the 22nd May 2017 was arrived at by the second respondent in light of the amended draft. The applicants are not asking to be declared prior peggers. Section 177 (3) of the Mines and Minerals Act state that-

> "Priority of acquisition 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 dispute the rule shall be followed that, in the event of the rights of any subsequent pegger conflicting

> with the rights of a prior pegger, then, to the extent to which such rights conflict, the rights of any subsequent pegger shall be subordinated to those of the prior pegger, and all certificates of registration shall be deemed to be issued subject to the above conditions."

If the applicants had persisted with their initial draft orders then this point *in limine* would have been valid in the event that it is found that the third respondent was the prior pegger. This court is not being asked to determine as to who was the prior pegger but whether the decision of the 22nd May 2017 was properly arrived at. I will dismiss the first point *in limine*.

The second point *in limine* was that there was no application before the court because the applicant should have made his application for review within 8 weeks from receiving the Minister's decision and no condonation has been made. From the papers filed of record both applicants made an urgent chamber application before this court in HC 5627/17 which application was granted by FOROMA J in case HH 493/17 where the operative part of the provision order read as follows-

> "Pending the return date respondents and all those acting through them be and are hereby interdicted from implementing the determination of the 2nd and 3rd respondents handed down on 23 May 2017."

The final order that was then sought in that case was as follows-

> "Pending finalization of the review application under HC 5172/17 respondents are interdicted from repositioning the beacons on applicants mine situate at Odzi 12 situate on Fernicarry Extension approximately MNE of Old Odzi Mine."

It is clear that the applicant in HC 11234/17 had by then not lodged his separate application for review of the decision of the 22 May 2017, but he had jointly mounted an application in HC 5627/17 together with applicant in HC 5172/17 and that application had been filed timeously. Since the parties asked that the two applications be consolidated and be heard at once, if applicant in HC 11234/17 had decided to file a separate application late for reasons best known to himself, in the interest of justice and finality of the matter I will condone none compliance of the rules in terms of Rule 4C of the rules of this Court. Hence I will dismiss the second point *in limine*.

The last point *in limine* was that this matter was res judicata because this matter has since been decided by justice Foroma in Case No. HH 493/17 where applicant was seeking the same relief and he was denied the recourse. As I stated above HH 493/17 was an urgent chamber application seeking the respondents to be interdicted pending review of case HC 5172/17. That application was granted. It is false to say the relief sought was the same and that it was denied. *Res judicata* does not apply. This point is without merit and is dismissed.

AD MERIT

The applicants are alleging that the first and second respondents acted unlawfully when they reviewed their own decision without asking the applicants to make representations. The first and second respondents submitted that the applicants were consulted and that they made representations before the decision of the 22nd May 2017 was reached. Further they denied that the decision of the 22nd May was a determination. They alleged that it was a correction of an error made by the Secretary of the determination that was earlier made by J Makandwa on the 23rd of December 2014. They said this was done in terms of s 341 (2) of The Mines and Minerals Act [*Chapter 21.05*]. The relevant section reads as follows-

> "The Secretary may at his discretion assume all or any of the powers, duties and functions by this Act vested in any mining commissioner, and may lawfully perform all such acts and do all such things as a mining commissioner may perform or do, and is further empowered in his discretion to authorize the correction of any error in the determination or in the carrying out of the provisions of this Act, or to perform any other lawful act which may be necessary to give due effect to its provisions."

The respondents argued further that the applicants should have approached the Administrative Court in terms of s 404 of the Mines and Minerals Act.

Having heard submissions from counsels and reading papers filed of both records I found no evidence that both applicants were consulted and asked to make representations before the decision of the 22 May 2017 was made. If such representations were made the respondents would have filed the same. What we have is a bold allegation that the applicants were consulted and that they made representations. A reading of the letter dated 22 May 2017 which gave rise to these cases does not show that it was a correction by the Secretary in terms of Section 341 of the Mines and Minerals Act after hearing submissions from the parties. The letter reads in part as follows-

> "After receiving an appeal on this matter and having all necessary considerations made, please be advised of the following decision by the Minister of Mines and Mining Development:-."

In fact a new determination was then made altering the pegs and beacons of the parties. The letter never alluded to the fact the parties were ever heard. If it was an appeal as stated then some submissions either orally or in writing should have been made by the affected parties before a determination was made.

In my respective view the first and second respondents acted unlawfully and breached s 3 (1) of the Administrative Justice Act [*Chapter 10.28*] and failed to exercise Administrative Justice

and acted unlawfully when they reviewed their own decision when the Mines and Minerals Act [*Chapter 21.05*] does not provide for such a procedure and the first respondent through the permanent secretary does not have review powers. The applicants' right to fair and reasonable administrative justice was therefore violated. The second respondent being an administrative authority in terms of the Administrative justice Act he was obliged by section 3 of that Act to act as lawfully and as fairly as possible. Having acted *ultra vires* the Mines and Minerals Act [*Chapter 21.05*] the determination dated 22nd of May 2017 was invalid on these grounds alone.

In terms of s 68 of the Constitution of Zimbabwe the applicants have rights to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. Those rights cannot be derogated from at the whim of an impatient and overzealous regulatory authority. The respondents showed bias and favoritism towards the third respondent. The third respondent in his letter of complaint had not asked the respondents to correct an error but asked them to review their own decision in his favor which they went on to do after hearing one side only. Such a decision cannot be allowed to stand and must be set aside.

IT IS ORDERED THAT

1. The decision of the 1st and 2nd Respondents made by letter dated 23 May 2017 rescinding its own determination of the 23rd December 2014 be and is hereby set aside.
2. The 2nd Respondent be and is hereby ordered to cause a survey of the mining locations being G3445; G3385; and G1243 to be conducted in terms of Section 353 (1) of the Mines and Minerals Act (Chapter 21.05) within seven (7) days of this order.
3. The 2nd Respondent be and is hereby ordered to summon the Applicants and the 3rd Respondent to make representations on the boundary dispute amongst them in terms of Section 348 of the Mines and Minerals Act (Chapter 21.05) within fourteen (14) days of this order.
4. The 2nd Respondent be and is hereby ordered to render its determination on the boundary dispute among the applicants and 3rd Respondent within seven (7) days of hearing representations from the parties.
5. 1st, 2nd and 3rd Respondents to pay the costs of suit.

Matsika Legal practitioners, applicant's legal practitioners in HC 11234/17
Mawere Chikamhi Mareanadzo, applicant's legal practitioners in HC5172/17
Civil Division of the Attorney General's Office, 1st and 2nd respondents' legal practitioners
Machaya and Associates, 3rd respondent's legal practitioners