

KINGSTONE MUDONHI
versus
THE PROVINCIAL MINING DIRECTOR
and
MANICALAND N.O
and
SECRETARY FOR MINES AND MINING DEVELOPMENT N.O
and
MUREHWA TICHARWA
and
AARON SHANSE

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 28 October 2023 & 10 January 2024

Civil Appeal

Mr *K Kachambina*, for the appellant
Mr *P Garwe*, for the first & second respondent
No appearance, for the third respondent
Mr *K Chimiti*, for the fourth respondent

WAMAMBO J: This is an appeal against the decision of the Provincial Director Matebeland North sitting as a Mining. Commissioner`s Court at Manicaland Province. The sitting of the Provincial Commissioner`s Court was a result of an order rendered by MUZENDA J by consent of the parties under HC 203/18 on 18 September 2019. Said order provides in the main as follows:

HC 203/18 and HC 212/18 were referred to the Permanent Secretary of the Ministry of Mines and Mining Development for the appointment of a Provincial Mining Commissioner, other than the Provincial Mining Commissioner Manicaland.

The said Provincial Mining Commissioner`s mandate is to carry out a survey of mining locations G 3445, J G 3383 and G 1243 so as to determine their exact GPS mining locations and sizes in terms of registration coordinates. The further mandate was for the Mining Commissioner to determine the extent and excess or otherwise of the hectareage of G 1243 G3385 and 3445 in compliance with the 10-hectare requirement pursuant to s 43(2) and (3) of the Mines and Minerals Act [*Chapter 21:05*].

The Mining Commissioner was also mandated to determine whether third respondent (Murehwa Ticharwa)'s application for adjustment was approved by the first and second respondents.

The Mining Commissioner was also ordered to summon the parties to make representations in terms of s348 of the Mines and Minerals Act on how the excess hectarage should be dealt with in terms of the said Act. Finally, the Mining Commissioner was ordered to render a determination.

The appointed Mining Commissioner adhered to the order by MUZENDA J and the record contains his report dated 30 October 2019 and titled "RE- COMPLIANCE WITH A COURT ORDER CASE NUMBER HC 203/18 REF CASE NUMBER 212/18. The findings contained here under are the source of the appeal before us.

The Mining Commissioner compiled the above report after proceedings appearing at pp 14 to 21 of the record. The proceedings were attended by various stakeholders namely the Provincial Mining Director and HRO Matabeleland North, legal practitioners for the parties, the applicant, third and fourth respondent.

For purpose of clarity it is necessary to provide a factual background.

According to the Mining Commissioner's report the following emerges:-

A& L Mining Syndicate pegged mining location G 1243 on 19 September 2005. Rodney Hall pegged the mining location G3445 on 10 March 2010. Same now belongs to the appellant.

Third respondent pegged his mining claim G 3385 on 12 May 2010. A & L Mining Syndicate never shifted their pegs or beacons. The certificate issued to A & L was for 10 hectares although 15,3 hectares were pegged on the ground. Rodney Hall encroached A& L Mining Syndicates G1243 which was already registered. A& L Mining Syndicate was the prior pegger. Appellant made adjustments but is still encroaching on A & L Mining Syndicates G 1243 block.

Third respondent is currently mining at an area where he holds no registered mining claim and is mining illegally. Third respondent's mining block encroaches onto appellant's block. Appellant is a prior pegger to third respondent. At the end of the day the Mining Commissioner made a determination contained at page 12 of the record.

At the hearing a preliminary point was raised that the citation of the first respondent was in error as the correct citation should have been the Provincial Mining Director Matebeland North. While noting the error it does not change the complexion of the matter or prejudice any of the parties.

The grounds of appeal as raised by appellant attack the findings of the Mining Commissioner by averring firstly that his findings are not supported by evidence. Secondly, that the finding by the Mining Commissioner that appellant's mining location encroached A & L Mining Syndicate Mining location despite evidence that Ministry of Mines and Mining Developed registered and confirmed appellant's current mining location was incorrect.

The third ground of appeal is that the Mining Commissioner erred by not realising that s 177 of the Mines and Minerals Act has no application to this case and in any case applies only to a lawfully registered and duly maintained mining locations, reef or deposit"

The grounds of appeal are not as elegantly expressed as would be expected. In the heads of argument more flesh is added to the grounds of appeal. I find the attack contained in the first ground of appeal unjustified for the following reasons:

The findings by the Mining Commissioner clarifies that the measurements on the docket map and on the ground differ. This anomaly appears possible considering that human error may creep in when such measurements are made. There was reference to the fact that the pegging took place where there was no GPS and pegging was conducted using estimates (See page 11 of the record).

In this case however the Mining Commissioner's findings are buttressed by a map reflecting the respective positions and sizes. In other words, his findings were not thumb sucked but drawn from a map wherein coordinates drawn from registration certificates of the parties were used to construct said map.

There is also the Mining Commissioners finding that on the original docket map appellant's mining location is regular in shape while it is irregular on the ground.

That appellant has made previous adjustments supports the finding that he is encroaching onto A & L mining Syndicate's claim.

Page 11 of the record reflects that Mr Sithole made submissions which were not countered to the following effect:

"LR Mr Sithole: There was a dispute between Mr Mudonhi and Mr Murehwa. That dispute was resolved in favour of Mr Murehwa. Because of the resolution it was then incumbent upon Mr Murehwa to adjust his beacons"

In the circumstances I am satisfied that the first ground of appeal lacks merit. The second ground of appeal appears to be split from the first ground. Essentially the second ground of appeal attacks the finding that appellant encroached onto A & L Mining Syndicate block. This is the same issue raised in ground one. The only differences is that in ground two reliance

is placed on the basis that Ministry of Mines and Mining development officials registered and confirmed appellant's current mining location. I have already adverted to possible errors being occasioned through estimates and human error. The later development of GPS Technology must have clarified a lot of measurements in the mining sector.

Appellant in his heads of argument places reliance on previous determinations by the Provincial Mining Director Annexure H' The determination was made on 11 July 2016. In direct response to this issue, first and second respondents heads of argument reflect at para 9 that the determination of 11 July 2016 was effectively set aside.

The determination dated 11 July 2016 concerned an alleged underground encroachment between appellant and third respondent. The determination does not seem to have been brought to the attention of the parties during the proceedings before the Mining Commissioner.

Besides the fact that the Mines authorities made recommendations to the feuding parties I am not aware of its relevance to this case. The A & L Mining Syndicate was not party to the dispute as the dispute was between appellant and fourth respondent.

The third ground of appeal deals with the issue of prior peggers. The ground of appeal appears vague. It baldly states that s 177 of the Mines and Minerals Act has no application to this case. Section 177 of the Mines and Mineral Act [*Chapter 21:05*] provides as follows:

"177 Priority of mining rights. For the purpose 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.

Section 177 (3) of the Mines and Mineral Act [*Chapter 21:05*] provides that where there is a dispute between the rights of a subsequent pegger and a prior pegger the rights of a subsequent pegger shall be subordinate to the rights of a prior pegger. The evidence is clear that A& L Mining Syndicate was the prior pegger.

The evidence is clear that A& L Mining Syndicate was the prior pegger. This was never dislodged during the proceedings before the appointed Commissioner Appellant was a subsequent pegger and his rights are subordinate to that of A& L Mining Syndicate, I also find the third ground of appeal unmeritorious. To that end I find that the appeal stands to be dismissed.

Third respondent's counsel sought costs on a higher scale. I am not convinced that costs on a higher scale are justifiable on the facts of this case. It would appear to some extent that errors were made in measurements on the docket as compared, to those on the ground by

officials of first and second respondents. Appellant sought clarity vis a vis his mining location. He deserves clarity and a determination before the Court. To that end I find that costs on an ordinary scale are relevant in this case.

I ORDER AS FOLLOWS:

The appeal be and is hereby dismissed with costs.

MUCHAWA J : AGREES

Matsika Legal Practitioner, appellant's legal practitioner
Civil Division of the Attorney General's office, first and second respondent's legal practitioner
Machaya and Associates, second respondents legal practitioners