

MASHINGAIDZE ZHOU
versus
PROVINCIAL MINING DIRECTOR (MIDLANDS)
And
FARAI MUSIPA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 24 November 2022, 16 January & 24 May, 2023

Opposed Application

L. Mudisi for the Applicant
C. Ndlovu, for the 2nd Respondent

ZISENGWE J: The applicant and the 2nd respondent both lay claim to the same mining block situated in the Mberengwa district of the Midlands Province, each apparently fortified in his claim by the mine registration documents granted his favour. Whereas the applicant's mine is known as *Lockhead 1* mine, that of the 2nd respondent goes by the name *Aqua 5* mine. The applicant acquired his mine in 2017 having taken all the necessary steps required by 1st respondent for such registration. The 2nd respondent on the other 'inherited' his mine from his late father Lazarus Musipa, the latter who had acquired registration papers in 2010. The dispute having thus erupted between them same predictably spilled over to the offices of the 1st respondent who superintends mining activities in the Midlands province.

Seized with that seemingly intractable dispute, the 1st respondent conducted a ground verification exercise in the presence of the two protagonists on 18 May 2022 following which he rendered a determination on the 14th of September 2022. That determination was in the 2nd respondent's favour. Disgruntled by that outcome, the appellant seeking to have same set aside on the basis of its alleged gross unreasonableness.

The main findings which informed 1st respondent's conclusion were the following:

1. That both *Aqua 5* and *Lockhead 1* virtually occupy the same ground position.

2. That Aqua 5's ground position does not correspond with its docket position.
3. That Lockheed 1's ground position generally (but not precisely) tallies with its docket position.
4. That the applicant had remained dormant after registering his mine and only to surface and lay claim over the disputed area after the demise of the 2nd respondent's father was demonstrative of applicant's lack of *bona fides*.
5. That ultimately however that because Lockheed 1 was registered (in 2017) some 7 years after Aqua 5 was registered (it was registered in 2010) then therefore by virtue of s177(3) of the Act, the rights of the 2nd respondent took precedence over that of the applicant.

The 1st respondent's overall evaluation of the situation is captured in the final paragraph of his report headed "*concluding remarks*" which reads as follows:

- i. The office has no record of a previous dispute between the two parties giving credence to the observation that Aqua 5 mine could have been working on the same ground all the time until the passing on of Mr. Musipa*
- ii. The current impasse shows that Lockheed 1 has come onto the same ground because we have no explanation why Lockheed 1 has raised this dispute now.*
- iii. Lockheed 1 was registered with a full complement of registered beacons, well after Aqua 5 mine has been in existence. It was therefore registered on ground not open to prospecting and pegging in contravention of section 31 of the Act.*
- iv. Workings claimed by Aqua 5 are the same workings claimed by Lockheed 1 holders putting paid to the fact the latter came after registration of Aqua 5 mine.*

Aggrieved by that outcome the applicant launched the present application seeking to have the same set aside. He enumerates several factors which to him undoubtedly point towards a faulty outcome. It is unnecessary to repeat them all here verbatim, suffice it to say that the following are the major highlights thereof.

- a) That having acquired a prospecting licence, with the assistance of a pegger he identified the piece of land in dispute following which he conducted due diligence on the same to establish whether that the area was open for prospecting. According to him the

- surveyor general's map indicated that indeed the area was open for prospecting and that therefore the 1st respondent could not purport to depart from that position.
- b) That no-one came forward to challenge or object his pegs despite their prominence and the prominence of the pegging notices he affixed thereto for the prescribed 30-day period.
 - c) That the respondent did not even have beacons as required by Section 51 of the Mines Minerals Act.
 - d) That his application for registration sailed through and was granted on 27 November 2017 apparently with no glitches. That thereafter he started mining initially by searching for samples. He claims to have started mining in earnest having obtained a sample in 2019. His operations were however interrupted by the COVID 19 pandemic and the restrictions attendant thereto.
 - e) According to him it was only upon resumption in April 2022 that he encountered the 2nd respondent, the latter who initially came looking for employment.
 - f) That Aqua 5's docket position falls outside the disputed area and conversely Lockheed 1's ground's position coincides with its docket position as clearly shown by the diagrammatic representation of the mines.
 - g) That the 2nd respondent was not even on the ground throughout applicant's procedure as enumerated above only to surface when applicant had sunk shafts and had commenced mining operations.
 - h) That he worked on the site for three months to the knowledge of the 2nd respondent without raising any objection thereto.

He therefore seeks an order in the following terms:

IT IS ORDERED THAT:

1. *The determination by the 1st respondent handed down on the 14th of September 2022 be and is hereby set aside.*
2. *The application be and is hereby declared the legal owner of Lockheed 1 Mine situated on the Mberengwa cited under the schedule marked as Á*
3. *2nd Respondent be and is hereby ordered to pay costs on an attorney client scale.*

ALTERNATIVELY

1. *It is ordered that another survey be conducted by different surveyors and submitted to court for determination.*

The applicant followed up this court application with an urgent Chamber application under cover UCA 29/22 seeking an interim order interdicting the 2nd respondent from conducting any mining (and other related activities) within the disputed area pending the outcome on the present application.

That urgent chamber application was opposed by the 2nd respondent who argued that the pre-requisites for the granting of such an interim order had not been met. More specifically he averred then, as he persists in the main application that he is the legitimate holder of rights in respect of the disputed area.

Ultimately however, the parties agreed to have the matter was referred for a second ground verification exercise by the Chief Government Mine Surveyor (herein abbreviated as “the CGMS”) The decision to do so was occasioned primarily by the assertions made on behalf of the applicant that the 1st respondent was biased against him, if not out rightly compromised.

The parties subsequently agreed to a consolidation of the urgent chamber application under UCA 28/22 and the main application under CAPP75/22 and that both applications be heard simultaneously and one decision be rendered. In due course the CGMS submitted the survey report, whose salient parts read:

5.1 Lockhead 1 Mine

- *Ground positions tally with their docket positions as at registration except for beacon Point D.*

5.2 Aqua 5 Mine

- *Ground position does not tally with docket position.*
- *Co-ordinates submitted at registration do not match drawn position on quarter map in docket*

6.0 Workings and shafts in dispute

- *Shafts and workings in dispute fall within both Lockheed 1 docket and ground position. Shafts and workings in dispute fall within Aqua 5 ground position and outside its docket position.*
- *Shaft 1 is timbered whereas shaft 2 has a timber platform on its bank.*

7.0 Observations / Findings

- *Lockheed 1 docket and ground positions match with the exception of one corner beacon D.*
- *Aqua 5 docket and ground position do not match*
- *Lockheed 1 and Aqua 5 mines over peg each other on the ground and there is partial encroachment on their docket positions.*
- *Both parties claim to have been working in the disputed shafts and workings.*

8.0 Conclusion

- Both parties are claiming the same disputed shafts and workings
- There is common ground as endorsed by the surveyed position of the two mining locations in dispute.

The CGMS's diagrammatic representation of the spatial location of the parties' mines which is attached to his report shows that the 2nd respondent's ground position is completely different from its docket position. In other words, its physical position on the ground where it is pegged and is conducting its mining operations is (save for a small triangular position) completely different from its docket position. Not only is it different from its docket position but is also at variance with what was referred to as the *quarter map* position.

The applicant's ground position on the other hand virtually coincides with its docket position. As a matter of fact, according to that diagrammatic representation the ground position pegged off by the appellant was slightly smaller than what its docket position reflects. Most significantly however, it was shown that the disputed mining shafts fall not only within the Lockheed 1's ground position but also its docket position. Consequent to the filing of the CGMS's report, the parties submitted supplementary affidavits consolidating their positions and streamlining the issues.

In this regard the applicant filed a supplementary affidavit to which he attached a supporting affidavit from one Ezekiel Masvasvike an independent but registered and approved prospector with the Ministry of Mines and Mining Development. Reference will be made to the contents of his affidavit I refer to shortly.

In attempting to explain the glaring variance between its ground and docket positions, it is the 2nd respondent's contention on that the pegging of its mine was done prior to the introduction of the GPS system the latter which not only came into existence post his acquisition of the mine, but also which system is not supported by the existing legislation. In this vein the 2nd respondent therefore essentially urged the court therefore to disregard the CGMS's conclusion as these were not supported by the Mines and Minerals Act [*Chapter 21:05*] Reliance was placed on two recent cases of the High Court namely *Tawanda Muchenurwa v Double M* prospects (being represented by *Ezekiel Musvasvike and S Mavhima*) and *Provincial Mining Director Midlands N.O. HB 147/21 and Moyo v Secretary of Mines and Others HB34/21*.

After everything is said and done two interrelated issues fall for determination. The first being whether the 2nd respondent's mine was pegged using the so-called foot pegging or the GPS system. This question is critical because if it was the latter then *cadit quaestio*, 2nd respondent would have no leg to stand on given that both reports (i.e., that of the 1st respondent and that of the CGMS) which were based on the GPS pegging system clearly show that Aqua 5's ground position is incongruent with its docket position. Put differently, if the pegging on both the applicant and 1st respondent's mines was done using the same (i.e., GPS) system and the applicant's ground position tallies with its docket position and the 2nd respondent's position does not, then the applicant's claim is unassailable.

If, however, the 1st respondent's mine was pegged using the archaic foot pegging system, the question that arises becomes whether its ground position matches that the docket position of that foot system. If it does the 1st respondent's is immensely stronger than that of the applicant by virtue of s177 (3) of the Mines and Minerals Act. The said provision as earlier stated dictates that in cases of conflict between two competing peggers over the same area, the prior pegger takes precedence over a subsequent one, it reads:

(3) 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, however, there is a mismatch between the 2nd respondent's ground position with its docket position despite it having been done through foot pegging then the applicant's position is significantly stronger.

Whether Aqua 5 Mine was pegged using “foot pegging” or the GPS System.

This is undoubtedly the crux of the matter. The parties presented diametrically opposite versions in this regard. The applicant's version is that Aqua 5 was pegged using the GPS system.

To buttress his position the applicant filed a supporting affidavit deposed to by one *Ezekiel Musvasvike*. In that affidavit, Masvasvike averred that he is a registered and appraised prospector with the Ministry of Mines and Mining Development. Pertinent for current purposes, he averred that in October 2010 he pegged Aqua 5 mine at the behest of the 2nd respondent's late father Lazarus Msipa. He did so by using two prospecting licences issued in the latter's favour. Most pertinently however, he averred that he did this pegging using the GPS system having received prior training on its use. He further averred that to the best of his knowledge, all mines in Masvingo which were pegged April 2002 were pegged using the GPS system.

He further averred that having so pegged the two blocks he submitted both for consideration with the Mining of Mines, one of which was refused but the other accepted. The successful block was then successfully registered as Aqua 5 mine. He claims to have contemporaneously entered the respective co-ordinates in his private note book.

He pointedly branded the respondent's averments to the effect that the GPS System was not in use in 2010 as totally false and unfounded. Further, he averred that the GPS System having been used in pegging Aqua 5 Mine, it followed that its ground position should be in tandem with its docket position. He further averred that an examination of all the relevant documentation relating to Aqua 5 (including the relevant map, the certificate of registration and the verification forms signed by the 1st respondent's office in Masvingo confirms that position.

He referred to the contents of his personal file as being which according to him coincide with the co-ordinates of Aqua 5 mine as being corroborative of the true position of Aqua 5 and that Aqua 5's mine ground position should be the one in its docket position.

The 2nd respondent on the other hand sought to point Masvasvike as being completely untruthful and urged the court disregard his averments. He insisted that his mine was pegged using the foot pegging system before the introduction of the GPS System. Ostensibly to support its position the applicant referred to the manner in which the location of the mine was described in one of the documents apparently shows that Aqua 5 Mine was situated “*On Mberengwa Communal Lands approximately 1,8km South West of an unnamed dam (Mberengwa)*”

According to him that description is in-consistent with a GPS System having been employed because the latter is precise and uses numerical grid references. Reliance was also placed on the decision in *Tawanda Muchenurwa v Double Prospects* (being represented by *Ezekiel Masvasvike and S Mavhima & Another* HB 147/21 where it was stated that in 2002 the GPS System was not yet in use. Further reliance was placed on *Charles Moyo v Secretary of Mines and Mining Development NO & Others* HB 34/21 where it was stated that the GPS was only introduced in 2015.

In the *Tawanda Muchenurwa* case the following was said:

“It is common cause that Zhara 5 Mine registration number 8162 block of claims was registered on 20th March 2002. Zhara Mine was transferred from the original owner Double M prospects on the 10th of March 2017. At the time Zhara 5 Mine was pegged in 2002 the Global position System (GPS) coordinates had not been adopted by the Mines development. The ground position for Zhara 5 Mine does not tally with its location on the map”

In the *Charles Moyo* case, the following was said:

“In court and so already stated, counsel for the 3 Respondent admitted that the GPS System is a new method that had been adopted in despite resolution due to the recent “gold rush” happening and where people have moved or shifter their blocks. The system is the “new kid on the block” so to speak, but it is not yet law. To the 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 s58 and s177 of the Mines and Minerals Act which outlines the procedure in dispute resolution between...”

From an objective assessment of the available evidence, one finds that the applicant’s position to the effect that Aqua 5 mine was pegged using GPS is considerably stronger than that of the respondents. To begin with the evidence of Masvasvike is quite telling. The 2nd respondent does not in the least dispute that he (i.e., Masvasvike) was his (i.e., 2nd respondent’s) pegger. Now if that was the case why would Masvasvike perjure himself by averring that he did so on the basis

of GPS System. He has nothing to gain by falsifying his evidence to suggest the same. To the contrary he risks reputational and with it, professional ruin by averring that he pegged Aqua 5 using the GPS when he had used foot pegging.

Secondly, the report by the CGMS indicates in paragraph 5.2 that the co-ordinates submitted in respect of Aqua 5 mine *upon its registration* do not match the position drawn on the quarter map. Implicit is the fact that there were co-ordinates submitted *at registration* and therefore that a GPS system was used. There was no basis for the 1st respondent to conclude as he did that the co-ordinates affixed to the 2nd respondent's documents were later extrapolated. The primary evidence in the form of the documents filed with the office of the 1st respondent does not in the least suggest such a position.

Related to the above is the fact the very existence of co-ordinates on the retrieved documents pertaining to 2nd respondent's mine defeats the 2nd respondent's position which was articulated in his heads of argument wherein it was stated that Aqua 5's location was only identified by reference to its location on "*Mberengwa Lands approximately 1,8km South West of an unnamed dam (Mberengwa)* and that this description is inconsistent with GPS System which is exact , numerical and has grid references. The fact that co-ordinates were submitted in respect of Aqua 5 *ipso facto* suggest the use of the GPS System. It also resonates with Masvasvike's averments. Having made the above finding the 2nd respondent's contention all but withers away. If both Mines were pegged using the GPS System and the 2nd respondent's ground position is completely discordant with its docket position yet conversely applicant's ground position is congruent with its docket position then the applicants claim is unassailable.

Section 177 (3) of the Act therefore cannot come to the 2nd respondent's aid given that Aqua 5 as with Lockhead 1 was pegged using the GPS system. The GPS system being exact implies that the ground positions of each of those two mines must match their respective docket positions. Any contrary interpretation would potentially yield absurd results. It would mean for example that a prior pegger would be entitled to claim any mining block in the vicinity no matter how remotely related to his docket position solely on account of being the prior pegger.

Similarly, the decisions relied upon by 2nd respondent are distinguishable from the present matter as both related to disputes between a prior pegger and a subsequent one, which is not the case in *casu*.

It has not escaped me that according to the report by the CGMS, the co-ordinates submitted by Aqua 5 at its registration were at variance with what was marked off on the quarter map. This implies that the co-ordinates submitted in that application did not correspond with the accompanying map (the quarter map) that quarter map is depicted on the CGM's diagram differs not only Aqua 5's ground position but also with its docket position.

One finds upon an assessment of the CGM'S diagram that Aqua 5's ground position bears absolutely no relation whatsoever to its docket position nor to its quarter map position. Such an occupation of the ground position cannot be attributed to error or oversight. Aqua 5 mine is simply situated on an area that is not its own. It occupies a space which bears no resemblance whatsoever to its officially recognised area and it is futile for 2nd respondent to rely on a provision meant for situations of genuine overlap which overlap or over-pegging leads to dispute between a prior and a subsequent pegger.

The description that the 2nd respondent desperately clings onto which refers to *a certain distance from an unnamed dam in Mberengwa* was obviously meant for other purposes (say directions to the place) as opposed to an official description of its actual location on the ground. It is inconceivable if regard is had to the provisions of the Act, particularly Section ss47 & 48 that such a description would constitute its position as envisaged in that section. Those provisions require that the description of any mining claim be given in some comprehensive detail and accompanied by a plan based on a map issued under the authority of the State.

Similarly, one finds that s58 of the Act is of little assistance to the 2nd respondent. The said provision reads:

58 Impeachment of title, when barred

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.

A proper construction of this above provision shows that it is meant to protect a miner from the loss of a claim despite a defect or illegality in the pegging of the block provided that such registration has subsisted for two or more years. The above provision would perhaps have come to the 2nd respondent's rescue had it been shown that he is the registered owner of this particular

claim. The relevant documents filed with the Ministry of Mines and Mining development reveal that Aqua 5 is registered for a different area. Further, I find on the probabilities that there is truth in the applicant's averments that the 2nd respondent was not even occupying the area which he now claims to be his and was driven by some motive to claim ownership of the disputed territory. This also explains why the applicant was able to identify the block in question as being open for prospecting and why he was able to peg it off without hindrance or objection before registering it with the Ministry of Mines and Mining Development. The findings of the 1st respondent are bewildering to say the least. The applicant's mine situated precisely where its registration papers entitles it to be, yet 2nd respondent's mine is located in a place completely divorced from its registration papers, how then could the 1st respondent question applicant's *bona fides* in those circumstances? Applicant's *bona fides* could have been called into question had he been claiming (as the 2nd respondent does) a place different from his what his registration papers depict.

The 1st respondent in his report also questioned why the dispute over ownership of the block has only erupted at this point in time and not at some other earlier time insinuating as he did that it is because the applicant is taking advantage of the demise of the 2nd respondent's father. In my view he applicant was able to give a cogent explanation for this. He gave a clear chronological history of his acquisition of the mine and how his then nascent mining operations were interrupted by the COVID-19 pandemic. A fortiori, those lingering questions concerning his *bona fides* would perhaps have found traction had the applicant been claiming a block which bears no nexus with his registration papers. I just cannot comprehend how applicant would take advantage of the demise of 2nd respondent's father to lay claim over a mine for which the registration papers entitle him to own.

In the final analysis therefore, I find that the applicant managed to prove his claim on a balance of probabilities.

Costs

There is no justification to award costs on the superior scale as sought by the applicant.

Accordingly, the applicant's claim succeeds as prayed in the draft order subject to costs being on the ordinary scale.

Mutendi, Mudisi & Shumba; Applicants legal practitioners
Civil Division of the Attorney General's office; 1st Respondent's legal Practitioners
Ndlovu & Hwacha; 2nd Respondent's legal practitioners.