

MIXNOTE INVESTMENTS (PVT) LTD

Versus

EVANS MAJOLA

And

**PROVINCIAL MINING DIRECTOR –
MATABELELAND NORTH N.O.**

And

MINES AND MINING DEVELOPMENT MINISTER

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 22 FEBRUARY & 2 MARCH 2017

Urgent Chamber Application

P. Madzivire for the applicant
L. Mpofu for 1st respondent
L. Msika for 2nd & 3rd respondents

MATHONSI J: The applicant is a mining concern which is involved in a mining dispute with the 1st respondent over mining claims situated at West Nicholson, Matabeleland South known as Ettrick Mine. The applicant is the registered holder of 10 gold reef claims called Ettrick Mine while the 1st respondent is the registered holder of claims known as Sally 5 Mine.

In the course of their mining activities the two clashed resulting in the dispute being referred to the Provincial Mining Director, the 2nd respondent herein, for adjudication. In response the 2nd respondent rightly commissioned a survey of the area which was carried out on 3 September 2014. Following recommendations of the Principal Mining Surveyor the 2nd respondent issued a determination dated 17 October 2014 which reads in relevant part as follows:

“The Matabeleland South Province Mine Dispute Resolution Committee found out that:

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1. Both Sally 5 and Ettrick Mines were duly registered and maintained up to date
 - Sally 5 Mine was first registered on the 27th August 1999 by Faison Siduli and transferred to Evans Majola on 15 December 2000 and is currently held by Evans Majola.
 - Ettrick Mine was first registered on 17 August 1999 and transferred to Mixnote Investments (Pvt) Ltd on 6 September 2011 and is currently held by Mixnote Investments (Pvt) Ltd to which Mr J. Chaya is a director.
2. The two mines are +- 136m apart from the nearest points. They do not have a common boundary.
3. There are workings at both Sally 5 Mine and Ettrick Mine, but the Sally 5 workings are currently abandoned.
4. Mrs E. Majola was working in Ettrick Mine shaft which is registered to Mixnote Investments (Pvt) Ltd instead of Sally 5 Mine.

Recommendations

Notwithstanding the fact that Mrs E. Majola has been working for many years at Ettrick Mine it does not change the fact that it is not her mine. Mrs E. Majola should stop working at Ettrick Mine and concentrate her activities at Sally 5 Mine which is registered in her name, according to section 177 subsection (8) (a) and (b) of the Mines and Minerals Act Chapter 21:05. The beacons of both Sally 5 Mine and Ettrick Mine must be established in their original positions as shown on the enclosed survey sketch plan and as lodged with Ministry offices at initial registration. Any aggrieved party may appeal to the Ministry of Mines and Mining Development Mine Dispute Resolution Committee.”

It is the last sentence giving advice on where to appeal to which has escalated the litigation between the parties because the 1st respondent took that advice hook – line – and sinker. The 1st respondent did appeal to the Ministry as advised. The Secretary For Mines and Mining Development then dealt with the appeal and pronounced judgment contained in a memorandum dated 17 November 2016 addressed to the 2nd respondent. It reads in pertinent part thus:

“RE: APPEAL AGAINST THE DECISION MADE BY THE PROVINCIAL MINING DIRECTOR: MRS E. MAJOLA OF SALLY 5 MINE REG GA 2020 vs MIXNOTE INVESTMENTS (PVT) LTD OF ETTRICK MINE REG GA 1190”

Reference is made to the above subject. After receiving an appeal on this matter and all the necessary considerations having been made you are directed to effect the following decision by the Permanent Secretary Ministry of Mines and Mineral Development:

1. Mixnote Investments should readjust their boundary so as not to encroach into Sally 5 Mine.
2. The Provincial Mining Director to apply section 58 on impeachment so that Mrs Majola stays on her claim since she has been working there for the past 15 years.”

To say that the decision on appeal is shocking would be an understatement. It defies logic bearing in mind that the survey commissioned by the 2nd respondent had confirmed that there was not boundary dispute between the parties and therefore there was no need for the applicant to adjust its boundaries. What the survey had shown was that the 1st respondent had “abandoned” her own Sally 5 Mine claim and was mining the applicant’s shaft at Ettrick Mine. That notwithstanding the Secretary decided to invoke the provisions of s 58 of the Mines and Minerals Act [Chapter 21:05] on impeachment of title which applies to a mining location which has been registered for a period of 2 years. The facts did not suggest that the 1st respondent had registered the claims which were already registered by the applicant.

Even more shocking is where the Secretary derived appellate jurisdiction over such mining dispute which would have been resolved by the 2nd respondent. Aggrieved by that turn of events, the applicant filed a review application in this court in HC 3062/16 arguing that the purported annulment of the Director’s decision was incompetent among other grounds. The review application is yet to be determined by this court.

Meanwhile the applicant has come back to this court on an urgent basis seeking the following relief:

“Terms of final order sought

1. Applicant and 1st respondent are hereby interdicted from carrying out mining activities on the disputed mining claim situated on Ettrick Mining claims in West Nicholson pending finalisation of case number 3062/16
2. Costs shall be in the cause.

Interim relief granted

Pending determination of this matter and on the return day the applicant be and is hereby granted the following relief:

Pending the outcome of this application 1st respondent should with immediate effect suspend all mining activities at 10 Gold Reefs, named Ettrick registered number GA 1190.”

In its founding affidavit deposed to by its director John Chaya the applicant complains that it has since discovered that despite the pending review application the 1st respondent continues to carry out mining activities at the disputed claim. Considering that mineral deposits can be exhausted, the 1st respondent’s activities are highly prejudicial to the applicant in that by the time the review application is determined the mineral deposits may be seriously depleted if not exhausted completely. For that reason the activities of the 1st respondent should be halted.

In his opposing affidavit the 2nd respondent makes the interesting point that he is “appointed by the Permanent Secretary who is the Mining Commissioner in terms of section 341 of the Mines and Minerals Act [Chapter 21:05].” He goes on to say that he had no obligation to stop mining activities where an application for review has been lodged and that he could not do so because the matter has already been determined with the 1st respondent being given the green light to carry out her mining activities. The 1st respondent also filed opposition protesting her entitlement to the mine.

In essence what the 2nd respondent is saying is that whoever is the mining commissioner has a second bite at the cherry as it were. If the mining commissioner is the Permanent Secretary, it means that he has delegated his functions as such to the Provincial Mining Director who now adjudicates over mining disputes in terms of the Act, obviously on behalf of the real commissioner. After the director has determined the matter exercising the powers reposed to the commissioner by the Act, the same commissioner who has delegated his powers to the director is still able to sit as an appeal court and determine the matter again. The question which arises is: In terms of what law is the commissioner entitled to act in that way?

Section 341 which the 2nd respondent relies upon in making this strange argument provides:

“341 Administration of Ministry

- (1) The Secretary shall be and is hereby vested with authority generally to supervise and regulate the proper and effective carrying out of this Act by mining commissioners or other officers of the Public Service duly appointed thereto, and to give all such orders, directions or instructions as may be necessary.
- (2) 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 administration 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.
- (3) The Secretary may exercise such of the powers by this Act vested in the Minister as may be delegated to him by the Minister.”

No matter what rule of statutory interpretation one employs they cannot, by any stretch of the imagination, come up with the meaning which the 2nd respondent has sought to assign to this provision. There is no way it could be understood to mean that the Secretary is the Mining Commissioner. While the Secretary is empowered to perform the functions of a mining commissioner at his own discretion, it cannot be said that he or she is a mining commissioner. The Secretary supervises and regulates the functions of the mining commissioner but there is nowhere in the Act where it says that he has appellate jurisdiction over the court of the mining commissioner.

In any event if the Secretary elects to perform the functions of a mining commissioner his or her powers remain governed by the Act. In other words he shall deal with a dispute referred to him or her exercising judicial powers of a mining commissioner provided for in s 346 of the Act. He would have to hold a court in the mining district of the mining commissioner appointed for that district and abide by that provision.

It therefore means that s 361 of the Act applies to any decision made by the Secretary sitting as a court of the mining commissioner. That section provides:

“Any party who is aggrieved by any decision of a mining commissioner’s court under this Act may appeal against such decision to the High Court, and that court may make such order as it deems fit on such appeal.”

Clearly therefore an appeal against the decision of the mining commissioner does not lie in the office of the Secretary but to the High Court. The 2nd respondent heard and determined the dispute of the parties as a mining commissioner. It was therefore incompetent to advise the parties to appeal to the Secretary who clearly has no appellate jurisdiction. This provision has been a subject of a number of judicial pronouncements. See *Muzuva v Simbi; Simbi v Muzuva* 2011 (2) ZLR 319 (H); *Rock Chemical Fillers (Pvt) Ltd v Bridge Resources (Pvt) Ltd & Ors* 2014 (1) ZLR 30 (H); *Nyamupinga v Muzanywa & Ors* HB-275-16.

In terms of the current provisions of the Act no appeal lies to the Secretary of Mines from a decision of a mining commissioner. Any purported appeal to the Secretary is therefore a nullity and a determination made by the Secretary exercising appellate jurisdiction which he or she does not have is equally a nullity.

It has been suggested by the 2nd respondent that in determining what was clearly an appeal informed by advice given to the parties by the 2nd respondent to appeal to the Secretary, the latter was acting as the mining commissioner. That assertion is completely without foundation because all the correspondence, some of which I have cited above refers to an appeal. If the Secretary was acting as a mining commissioner that means he was sitting to determine an appeal against his own judgment. There is no procedure for that and it would mean that he was already *functus officio* and could not have a second bite of the cherry as it were.

In my view, the applicant has an arguable case on review. If the 1st respondent is allowed to continue extracting gold from the mine the applicant will suffer prejudice if the matter is eventually decided in its favour. The solution is to stop all mining activities there until the review application is determined.

Accordingly the provisional order is hereby granted in terms of the amended draft.

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Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
Malinga & Mpofu Legal Practitioners, 1st respondent's legal practitioners
Civil Division of the Attorney-General's Office 2nd & 3rd respondents' legal practitioners