MANYANGADZE MINING SYNDICATE
Versus
PENHALONGA VALLEY INVESTMENTS (PRIVATE) LIMITED
And
PROVINCIAL MINING DIRECTOR – MANICALAND
And
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 17th August 2023

Opposed Application

MUZENDA J: This application was set down for argument on 31 July 2023. On 18 July parties' Counsel agreed that the application be decided on the basis of pleadings and heads of arguments filed of record. Hence there were no appearances.

Applicant is praying for the following relief:

"*WHEREUPON after reading documents filed of record and hearing the parties, it is ordered that:*

1. *The second respondent's decision dated 11 March 2022 be and is hereby declared to be grossly unreasonable and in violation of the* ***audi alteram partem*** *rule.*
2. *It is declared that the Provincial Dispute Resolution Committee had no jurisdiction upon the dispute between the applicant and the first respondent.*
3. *The second respondent committed gross procedural irregularities which vitiated the proceedings.*
4. *The decision of and proceedings before the second respondent be and are hereby declared null and void.*
5. *The decision of the second respondent dated 11 March 2022 be and is hereby set aside.*
6. *The respondents, jointly and severally, one paying the other to be absolved, and ordered to pay costs of suit*."

First and second respondents are opposing the application for review.

Second respondent's determination dated 11 March 2022[1]

"*A Global Positioning System (GPS) ground survey was conducted on 8 August 2021 in the presence of both parties. This was following a dispute hearing of 5 February 2020, which was also attended by both parties. According to the documents presented by both parties during the dispute hearing, GPS ground survey and records held by this office, the following was deduced:*

[1] Annexure o; on page 34 of the record.

Findings

Penhalonga East A Mine Reg. No. G3764: Panhalonga Valley Investments (Pvt) Ltd

1. *Penhalonga East A Mine Reg. No. 3764 was registered on 15 September 2011 in respect of Gold by Penhalonga Valley Investments (Pvt) Ltd following a conversion of Pehalonga East Mine (Registration Number 18038BM) which had been originally registered by Hometake Mines (Pvt) Ltd on 3 October 1974 for copper.*
2. *Penhalonga East Mine (Reg. No. 18038BM) was transferred on several occasions from Hometake Mines (Pvt) Ltd to Athica Mines (Pvt) Ltd on 14 February 1980 (TR18494) then to Independence Gold Mining Zimbabwe (Pvt) Ltd on 9 April 1986 (T 20300).*
3. *Penhalonga East Mine (Reg. No. 18038BM) was again transferred from Independence Gold Mining Zimbabwe (Pvt) Ltd to John Chinonzwa on 10 March 2008 (T524). The mine was then subsequently transferred to Penhalonga Valley Investments (Pvt) Ltd (T735) on 22 August 2011.*
4. *The seven (7) hectare size of the mine has not changed during the transfers and even on conversion from a copper mine to gold.*
5. *The mine has never forfeited since registration in 1974.*
6. *The ground position of Penhalonga East A (Reg. No. 3764) and the docket position of Penhalonga East Mine (Reg. No. 18038BM) as at registration do not match.*
7. *Boundary beacons were in place during the dispute ground survey.*

Monarch B Mine Reg. No. 618: Manyangadze Mining Syndicate

1. *Monarch B Mine Reg. No. G618) was transferred to Manyangadze Mining Syndicate from B and D Mining Syndicate by Garikai Dumbura on 25 September 2001 (T141). Monarch B Mine (Reg. No. G618) had been originally registered by Garikai Dumbura on 16 November 2000.*
2. *The ten (10) hectare size of the mine has not changed during the transfers.*
3. *The mine has never forfeited since registration in 2000.*
4. *The ground position of Monarch B Mine (Reg. No. G618) and the docket position as at registration do not match.*
5. *Boundary beacons were in place during the dispute ground survey.*

Observations

1. *Penhalonga East Mine was originally registered on 3 October 1974 while Monarch B Mine was originally registered on 16 November 2000.*
2. *Penhalonga East Mine (Reg. No. G3764) and Monarch B Mine (Reg. No. G618) do not encroach each other as at registration.*
3. *The ground position of Monarch B Mine (Reg. No. G618) encroaches both the ground and docket position of 18881 (underground extension) for Coldawn Investments (Pvt) Ltd. (NB. Coldawn Investments (Pvt) Ltd, was not part to this dispute proceedings).*
4. *Penhalonga Valley Investments (Private) Ltd (G3764) is the prior pegger since it is only a conversion of 18038BM originally registered in 1974.*

Determination

In view of the above findings and observations, the Provincial Dispute Resolution Committee which sat on 8 March 2022, resolved as follows:

1. *Penhalonga East A Mine (Reg. No. G3764) for Penhalonga Valley Investments (Pvt) Ltd and Monarch B Mine (Reg. No. G618) for Manyangadze Mining Syndicate does not encroach each other as at registration.*

Therefore, Penhalonga East A Mine (Reg. No. G3764) for Penhalonga Valley Investments (Pvt) Ltd and Monarch B Mine (Reg. No. G618) for Manyangadze Mining Syndicate should revert back to original positions as at registration and work within the vertical limits of their respective mining locations.

The registration positions for both Penhalonga Valley Investments (Pvt) Ltd and Manyangadze Mining Syndicate are as follows as indicated on the accompanying survey diagram (UTM Arc 1950 datum)

Penhalonga Valley Investments Private Limited (G3764)

G3764 – (A) 0468460; 7912220 (B) 0468420; 7912500
(C) 0468700; 7912550 (D) 0468840; 7912440

Manyangadze Mining Syndicate (G618)

G618 – (A) 0468440; 7912210 (B) 0468940; 7912245
(C) 0468975; 7912020 (D) 0468475; 7911999

E.T Mugandari
Acting Provincial Mining Director: Manicaland

Applicant's Grounds of Review

(a) The second respondent breached the principles of natural justice by determining the dispute between the parties without affording the applicant an opportunity to be heard, cross examine witnesses and leading evidence from witnesses. The decision was thus made in violation of the ***audi alteram partem*** *rule.*
(b) The Provincial Dispute Resolution Committee had no jurisdiction to entertain, adjudicate and determine the dispute in question.
(c) The second respondent committed a gross irregularity by determining the dispute in question without following the procedures stipulated in the Mines and Minerals Act. The irregularity caused irreparable harm or prejudice to the applicant.
(d) *The second respondent's decision in question is grossly unreasonable*"

First respondent's opposing papers

First respondent raised preliminary points to the effect that there is no proper application before the court for want of form. It contended that the application is predicated on the repealed High Court Rules, 1971 and consequently the application is a nullity. Applicant invited respondent to file opposing papers on the repealed Form 29A and hence the papers are

fatally defective. Applicant moved this court to have the matter *struck off* with an order of costs on legal practitioner – client scale.

On merits, first respondent is adamant the applicant was heard, the process of inspection and identification of beacons is a reflection that shows applicant was afforded an opportunity to make representations, and to be heard before a determination was made. In any case, first respondent, added, applicant consented to the adjudication of the dispute resolution process. The hearing was conducted on 5 February 2020 followed by a ground survey on 8 August 2021. To the first respondent the determination made by the Acting Provincial Mining Director, (second respondent) reveals that there is no encroaching at registration and that parties should revert to their vertical boundaries as at registration.

First respondent then proceeded to file a counter application for eviction of applicant from first respondent's mine where applicant had encroached as per second respondent's determination.

Second respondent's opposing papers

Second respondent states in its opposing papers that first respondent's mine does not share boundaries with applicant because between the two there is Coldawn Investments (Pvt) Ltd, 18881. He added that he does not engage surveyors to put beacons on any claims. He denies that there is an outstanding dispute between applicant and one Edward Mandara. The second respondent added that applicant was consulted and heard before the determination was reached and alluded to a register and consent signed by all parties. It is also second respondent's averment that applicant attended the 15 February 2020 hearing as well as 8 August 2021ground survey. The 8th March 2022 which led to the 11th March 2022 decision was convened by second respondent to consolidate the findings and the decision was reached by second respondent and not the Dispute Resolution Committee. The second respondent further reiterated the facts that the position of the first respondent and coordinators have not changed and defended virtually all his decision. He prayed that the application be dismissed.

The second respondent did not comment on the first respondent's application for ejectment of applicant from first respondent's claims. It is not clear whether second respondent opposes the application or not.

Applicant's answering affidavit and response to first respondent's application

In its answering affidavit dated 1 July 2022, applicant raised a preliminary point attacking the validity of first respondent's opposing papers anchoring its battle on the belated period of filing its papers. Applicant contended that first respondent must be adjudged barred relegating all opposing papers into the dustbin, the same fate, it added, must be visited on the counter-application for eviction, since all were filed prior to the upliftment of the automatic bar. This point *in limine* had since collapsed after the upliftment of the automatic bar by consent.

In response to first respondent's point *in limine* applicant conceded to the wrong use of the prescribed form but went on to add that first respondent did not suffer any prejudice and equally attacked first respondent's non-compliance with this court's rules by filing a notice of opposition which is not on form number 24. Applicant threatened to attack the counter-application for eviction if first respondent persists with its preliminary point.

On the merits of the application applicant defended its founding affidavit and urged the court to grant the relief as per the draft order.

Points *in limine* raised by first respondent

The first respondent submitted that the application for review is not properly before the court on account of having been filed in terms of repealed rules. It added that a nullity cannot give rise to anything valid and cited the case of *Tamanikwa* v *President of the Board and Others*[2]. Although applicant comprehensively addressed the point *in limine* in its answering affidavit, it deliberately ignored to do so in its heads[3]. As such no authority on the subject comes from applicant. However I cannot ignore the naked fact that applicant addressed the preliminary issue in its pleadings. Indeed it is common cause that both applicant and first respondent used wrong forms in drafting their papers and applicant actually concedes. It did not apply for amendment to correct the *errata* but got the courage to threaten first respondent with an unspecified action which never saw light in applicant's heads of argument, it remained a scarecrow so to speak. It is important to reiterate the mundane clarion call to litigants to abide by the court rules in use, otherwise courts will not condone such abstention, an application may end up being struck off.

[2] HH 676/15
[3] See p147 of the record

I have critically looked at applicant's papers *in casu* and concluded that besides the wrong form cited, the rest of the information is apt for an application and first respondent was quite able to meaningfully respond to the application, and being satisfied with the contents and format of applicant's papers, proceeded to file a counter-application I am satisfied therefore that applicant substantially complied with the rules of this court and first respondent did not suffer prejudice. The point *in limine* has no merit and it is dismissed.

Issue for determination

Whether the decision of the Acting Mining Provincial Director dated 11 March 2022 should be interfered with and set aside**?**

Parties' Submission

Applicant's counsel in its heads of argument submitted that, second respondent ought not have filed opposing papers in this application, he should have simply informed the court that it will abide by the court's decision and proceeded to cite the case of *Leopard Rock Hotel (Pvt) Ltd* v *Wallen Construction (Pvt) Ltd*[4]. The applicant urged the court to expunge the second respondent's papers from the record for stating facts supporting the first respondent in its opposing papers.

Further applicant impugns the alleged formation of a "Provincial Dispute Resolution Committee" as being *ultra vires* of the legislature. It is the averment of applicant that the second respondent erred in delegating his powers to a Dispute Resolution Committee and concluded on that aspect that the 11 March 2022 determination allegedly made by the Provincial Dispute Resolution Committee was a nullity.

The applicant went on to submit that the Acting Mining Provincial Director did not follow the set procedure provided in the Mines and Minerals Act, [*Chapter 21:05*] more particularly in that he did not stick to ss 346, 347, 348 and 360 of the Act *ad infinitum* as well as s 353 and failure by second respondent resulted in irregularities which caused irreparable prejudice to the applicant. The applicant further submitted that it was not afforded an opportunity to see or object to the surveys, no witnesses were called and second respondent did not hear evidence from the parties. In effect applicant contended that second respondent did not abide by principles of justice and because of those gross irregularities the determination should be declared null and void.

[4] 1994 (1) ZLR 255(S) and cases cited therein

The applicant also attacks second respondent's determination on the grounds of reasonableness particularly with reference to the unresolved dispute between first respondent and one Edward Mandara. To applicant that resolution has a bearing in dividing its dispute with first respondent.

It is also the contention of applicant that second respondent violated the *audi alteram partem* rule and reiterates that it was not consulted by second respondent and alleges that second respondent did not follow provisions of s 3(1) and 3(2) of the Administrative Justice Act, [*Chapter 10:28*] and failed to observe principles of natural justice and proceeded to quote the case of *AG* v *Mudisi & Others*[5] and emphasised that applicant had a right to present its case[6]. The applicant condemned the second respondent's receipt of the surveyor's evidence without affording applicant an opportunity to controvert the contents of such a report. In light of the procedural irregularities it was applicant's submission that the determination ought to be set aside.

In its heads, first applicant contended that it reported an encroachment dispute to second respondent's office by the applicant. A Dispute Resolution Committee was assigned to probe and come out with a determination. The determination spoke of an encroachment by applicant on first respondent's claims and recommended a return to each's original pegs as per the date of registration. To first respondent applicant consented to the composition of the committee as well as to its mandate. The first respondent added that applicant by encroaching into first respondent's claims took the law into its own hands and went on to cite the case of *Garfield* v *Minister of Defence*[7].

The first respondent went further to refer the court to ss 172, 177(3) and 275(1) on the rights of a registered mining claim owner against all other claimants as well as the law on competing applications and urged the court to adopt mundane adage "*the general rule is that all else being equal, the application prior to point of time of filing should prevail and be entitled to proceed to registration. In a "quarrel" of that kind blessed is he who gets his blow in first.*[8]"

The first respondent defends the determination by second respondent and sees no basis to interfere with it. On the counter-application, first respondent added in its submission that once it is adjudged that applicant is occupying first respondent's claims, then applicant must be evicted from such claims and it cited the case of *Tasip Mining Syndicate* v *Savanhu*[9]. First

[5] SC 48/15 per Patel JA (as she then was) and Rwodzi V Chegutu Municipality 2003 (1) ZLR 601(H)
[6] See Chatarira v ZESA, SC 83/01
[7] 1986 (2) ZLR 112
[8] Victoria's Secret In v Edgars Stores Ltd 1994(3) SA 739 (A)
[9] HH 522/20

respondent prays for the dismissal of applicant's application for review and granting of the counter-application with costs.

The second respondent submitted that it chose to participate in this application to highlight absence of bias. The opposing papers it filed reflects the procedure it adopted in a bid to resolve the dispute. It afforded all parties an opportunity to present documentary evidence to it by both parties, sat down to consider same and came up with a determination, moreso concluding that applicant over pegged into first respondent's mining area on the ground. In doing all this second respondent further added that it followed the provisions of the Act and after all had been considered the outcome makes the first respondent's beacons align as at registration in accordance with the surveyor's report which was done on the ground in the presence of all concerned parties. Second respondent sealed its argument stating that the determination on 11 March 2022 followed due process. The Provincial Dispute Resolution Committee is not a decision maker but merely assists second respondent, it further clarified. It gathers information which second respondent would rely on to make a value determination. Second respondent denies acting irregularly, bias, malice or impropriety in coming up with the 11 March 2022 determination, it prays for the dismissal of the application with costs.

The Law

In the matters of (1) *Zaranyika* v *The Master & Ors*, (2) *Zaranyika* v *Zaranyika & Others*[10] it was held, further that:

> "…*that the purpose of the review process is to ensure that an individual receives fair treatment at* the hands of the *hands of the authority to which he has been subjected. It is however not within the ambit of the reviewing court's power to substitute its own opinion for that of the administrative body. The function of the court is to ensure that the administrative body does not abuse the lawful authority entrusted to it by treating the individual subjected to it under that lawful authority unfairly. If the circumstances under which the decision was made show that the decision was reached fairly and in a reasonable manner, then the court does not have the power to intervene*."

In *Zvomatsayi & Ors v Chitekwe No & Anor* [11], it was held that:

> "*A review is not concurred with the merits of the decision but whether it was arrived at in an acceptable fashion. The focus is on the process, and on the way in which the decision maker came to the challenged decision. Instead of asking whether the decision was right or wrong, a court on review concerns itself with the procedural irregularities*."

[10] 2019 (3) ZRL 288 (H) at p 290 B-C
[11] 2019 (3) ZLR 990 (H) at 990 G-H

A distinction is further made between purely administrative and quasi-judicial decisions.

The grounds for review of an administrative decision are restricted than that of a quasi-judicial decision. A purely administrative decision is one where there is an absolute discretion vested in the person making the decision and he is not obliged to make an enquiry while a quasi-judicial decision requires the person making the decision to consider the facts and the law. The grounds for review of a purely administrative decision are restricted to the following:

(a) The decision made was outside the powers of the authority, it was ultra vires.
(b) There was fraud, bad faith or improper motives on the part of the person making the decision, he or she was mala fides.
(c) No decision was made or any discretion exercised by the person required to make the decision or exercise the discretion.
(d) *A quasi-judicial decision may be reviewed because of failure by the decision maker to observe the principles of natural justice (such as right to be heard) and because the decision is grossly unreasonable.* [12]

In the South African case of *African Realty Trust v Johannesburg Municipality*[13] it was held:

"*If a public body or an individual exceeds its powers the court will exercise a retraining influence, and if, while ostensibly confirming itself within the scope of its powers, it nevertheless acts mala fide or dishonesty, or for ulterior reasons which ought not to influence the judgment, or with an unreasonableness so gross as to be in-explicable, except on the assumption of mala fides or ulterior motive, then the court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it then the court has no function whatever, it has no more power than a private individual would have to interfere with the decision merely because it is not one at which would itself have arrived*."

Applying law to facts

Both applicant and first respondent are registered owners of gold mining claims with specified boundary beacons which had never changed since their respective registration, albeit on different time lines. First respondent registered a complaint against allegations of encroachments on applicant's part with second respondent. Second respondent invited both parties to file all relevant information in order to reach at a determination. The record of

[12] See Mahlangu v Munanda & Ors S-101-93
[13] 106 TH 179-182

proceedings is evidently and patently replete with documents stretching from letters, invitations, diagrams, etc filed by both parties comprehensively presenting their respective views relating to the encroachment. Letters from the second respondent also allude attendances which both parties dutifully heeded to and participated in the processes initiated by the second respondent.

Ultimately on 11 March 2022 a decision was made by second respondent, reduced into writing and signed by the administrative authority, second respondent, effectively restricting parties to remain within the four corners of their registered beacons clearly specified in the decision.[14] Annexure "O" to applicant's founding papers extensively chronicle the entire enquiring process, the evidence relied upon by the second respondent as well as the registration history of both mines and the decision ultimately arrived at.

In an evaluation of Annexure "O", the determination by the second respondent exhibits and reflects a professional systematic accumulation of necessary data ordinarily required for one to make a determination on a dispute placed before him or her. I am not convinced by applicant when it vehemently allege that second respondent breached principles of natural justice. Second respondent is not a quasi-judicial body which required parties to go into a trial leading evidence orally and the adversary cross-examining that witness. I am convinced that applicant's agents participated in the enquiry, produced evidence to support their story pertaining to the encroachment. The applicant was also at liberty to approach second respondent and request clarification, if any, of the Surveyor's information, and if need be propose an oral hearing. These are basically informal proceedings where parties can present evidence in any format to assist an administrative body to reach a determination. I dismiss applicant's ground for review on allegations of the violation of the ***audi alteram partem*** principle. Facts point to a different scenario indicating full cooperative and participative conduct on applicant's part.

Annexure "O", the determination alludes in its body the involvement of the Provincial Dispute Resolution Committee. It accepted that the legislation, the Mines Mineral Act, does not have a provision for such a committee. However the letter or determination in dispute was signed by second respondent. The second respondent should be commented for being fairly inclusive and democratic. He decided to include more participants to assist him to collect as much information as possible before he makes a determination. Indeed more relevantly in

[14] See p. 36 of the record

doing so he required a helpful Surveyor's input relating to coordinates and beacons of both mines as well as vertical limits.

Such survey diagrams are critical to resolution of mine boundary disputes. Eventually though a dispute resolution committee participates in the dispute, the decision unavoidably is made by the second respondent. Applicant did not cite the Provincial Dispute Resolution Committee as a party to the proceedings and one can safely conclude that it exists maybe on paper under the discretion of the decision maker. The decision which is the subject for review was and remains that of second respondent.

First respondent submitted a complaint to the second respondent against applicant. Applicant cited second respondent in his capacity as acting mining director and not nominal official. Second respondent filed opposing papers in response to the application. In as much as I appreciate the objection by applicant for such conduct and agree with it that second respondent ought to have indicated to the court that it was prepared to abide by the court's judgment. I am constrained to rule that second respondent did so in bad faith or is biased against applicant. After receiving the application, second respondent felt obliged to place information before the court to show how it reached the decision. In my view such information is vital for this court to determine the aspect of rationality and reasonableness. Nothing material turns out from second respondent's papers, the identical information is depicted in first respondent's opposing papers. I am satisfied therefore that second respondent "***filed an affidavit setting out facts which he considers may be of assistance to the court.***"[15] In setting such relevant facts I am not satisfied that the second respondent failed to follow the provisions of the Act. The sections cited by applicant in its papers repose on second respondent such steps he can capably follow in order to reach at a decision. I am not persuaded by the applicant's submissions that second respondent side-stepped the procedures in the Mines and Minerals Act which will constitute an irregularity that caused irreparable harm to the prejudice of applicant's rights.

Second applicant's decision is aptly and precisely that applicant should be confined to its beacons. Would one say that given the contents of the determination, it is grossly unreasonable? Unreasonable as compared to what, whom and how? It is feasible for one to say that applicant was not happy with the substance of second respondent's determination and decided to bring an appeal disguised as an application for review. It is the outcome of the complaint which forms the pith of the grievance against second respondent. There is no harm in applicant being confined to its beacons. That is what it registered and it is the duty of second

[15] See Leopard Rock Hotel (Pvt) Ltd v Wallen Construction (Pvt) Ltd (*supra*)

respondent to make sure mine owners are confined to within their defined boundaries. I fail to see gross unreasonableness in such circumstances. All applicant's grounds for review are not supported by facts adduced before the court. It is not enough for a litigant to just allege issues of bias, malice and irregularity without laying out cogent, tangible and credible information to prove such allegations in an application for review. Applicant has failed to pass that hurdle, the application for review has no merit.

First respondent filed a counter-application for eviction which is opposed by applicant. Applicant did not spiritedly oppose the application both in opposing papers as well as heads of argument. One would be tempted to conclude that applicant is not opposing the counter-application, more particularly when one looks at the heads. Applicant's heads are confined to the main application for review. I almost granted first respondent's application as unopposed, had its papers been in order.

First respondent's counter-application lacks specificity and particularity. No draft order is attached, no particulars of beacons under occupation by the applicant are availed by first respondent. Applicant ought to have complied with the appropriate rules for this counter-application. The court is hamstrung as from which part of the mine, applicant must be ordered to vacate. I am not satisfied that first respondent placed before the court adequate information for the court to give an appropriate executable order. The counter-application is struck off.

The following order is returned:

1. ***The application for review is dismissed with costs.***
2. ***The counter-application for eviction is struck off with no order as to costs.***

Tandiri Law Chambers, applicant's legal practitioners.
Tabana & Marwa, first respondent's legal practitioners.
Civil Division of The Attorney-General's Office, second and third respondents' legal practitioners.