

BMG MINING (PVT) LTD

Applicant

Versus

MINING COMMISSIONER BYO MINING DISTRICT

1st Respondent

And

CHIEF MINING COMMISSIONER

2nd Respondent

And

KAMATIVI TIN MINES (PVT) LIMITED

3rd Respondent

IN THE HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 13 JANUARY 2011 and 20 JANUARY 2011

Mr Majoko for the applicant

Ms Mashiri for the 1st and 2nd respondent

Mr Tsivama for the 3rd respondent

Opposed Application

MATHONSI J: The applicant seeks a declarator that it is the lawfully registered holder of mining claims called Kapata 11, registered number 11769 BM held by certificate of registration number T30249. All the respondents have opposed the application mainly on the ground that applicant's said claims overpeg already existing and registered claims of the 3rd Respondent.

Sometime in 2001, Kapata Syndicate hired an approved prospector Mr Mguni to conduct investigations and carry out due diligence search with a view to establish if it was appropriate to prospect, peg and register 3 special base metal block claims in the area. Mguni duly carried out the work which cleared the area for pegging resulting in the 3 claims being registered and registration certificates number 11 768 BM, 11769 BM and 11770 BM being issued to Kapata Syndicate by the Mining Commissioner Bulawayo. The claims are located in the Dete Area of Hwange.

Work on the area commenced thereafter to develop it resulting in boreholes being sunk and equipped, road networks were opened, geological exploration, mining engineering work, metallurgical plant designs and so on were done. In 2002 the claims were transferred from Kapata Syndicate to the applicant. The applicant maintained and paid for the claims throughout in accordance with the provisions of the Mines and Minerals Act, Chapter 21:05 ('the Act'). By letter dated 9 July 2009, Zimbabwe Mining Development Corporation ('ZMDC') complained to the 1st Respondent that the applicant's claims overpegged extant claims belonging to 3rd Respondent. The *locus stand in judicio* of ZMDC having been questioned at the hearing, counsel for the 3rd Respondent submitted that this entity owns 3rd Respondent 100%.

It turns out that in 1977 and 1979, the 3rd Respondent had pegged and registered certain Kapata claims some of which may have been encroached by applicant's claim number 11769BM. The position is not clear but what is pretty obvious is that a pegging dispute has therefore arisen. Both the applicant and the 3rd Respondent appear to hold title to conflicting claims.

In response to the complaint made by the 3rd Respondent the 1st Respondent addressed a letter to the Secretary for Mines dated 19 August 2009 in which she stated that a survey conducted by the Regional Survey Department had shown that applicant's claims encroached onto 3rd Respondent's claims and should thus be relocated.

Clearly therefore 1st Respondent determined that applicant should relocate to those of its claims which did not overpeg 3rd Respondent's claims. This was confirmed by the chief Mining Commissioner who said applicant's claims must be cancelled.

It is pertinent that 1st and 2nd Respondents have proceeded on the premise that the applicant's claims have been cancelled and that 1st Respondent's decision to cancel was based on a survey by the Regional Survey Department whose officials she says state that 3rd Respondent's beacons were in place and that applicant went to peg its own claims despite the existence of beacons. This conclusion is in sharp contrast with what the Regional Mining Surveyor says in his letter of 8 December 2009 addressed to the Regional Mining Engineer which reads as follows:

“Re: Survey of dispute between Kamativi Tin Mines and BMG Mining claims”

This minute is a reply to your request of the need to see the survey report of the beacons mentioned by the Mining Commissioner concerning the above issue. It is alleged that the Regional Survey office carried out a survey in the area and it was one of the fact (sic) that the Mining Commissioner used to determine the results of the dispute. The dispute was never ever brought to the attention of the Regional Mining Engineer's Department – Bulawayo.

I categorically state that there was no survey work carried out in connection with the dispute, that is the survey that helps the Mining Commissioner in reaching the conclusions in the determination of the dispute concerning the blocks of claims.

Mr Alex Saurombe, on or about 20 February 2008, approached the Survey office requesting for a GPS Survey to be carried out in his three special blocks of base metal claims (Kapata 1, Kapata 11 and Kapata 111) for the purpose of producing a general Surface Plan.

Before the Survey was done the Survey office checked the status of the blocks of claims to verify whether they were current or not, and whether the blocks of claims are marked on the claims plan of the state to a scale of 1:25 000 that is under the custody of the Mining Commissioner. The BGM claims were found to be in order and marked clearly on the claims plan and there were no Kamativi blocks of claims

appearing on the claims plan or plans kept by the Mining Commissioner. The Survey office was satisfied with the search.

Therefore, the Mine Surveyors went out into the field with the full knowledge that they were stepping on and carrying out the requested survey work on BMG Mining claims only.

Denis Eshmael Katema 'REGIONAL MINING SURVEYOR'
(Emphasis added).

It is therefore unlikely that the findings of the 1st Respondent regarding the conflicting claims were informed by a survey conducted by the Survey office as alleged. Having been disowned by the Regional Mining Surveyor, the 1st Respondent then prevaricated in her opposing affidavit where at paragraph 8 she says:

'(a) Applicant is now the registered owner of the claim and it is immaterial who did the pegging.

(b) It was an administrative error that Kapata Syndicate was allowed to register claims over current mining locations.

(c) The survey was carried out at the instance of the applicant. Officials from the Regional Survey Department informed the 1st Respondent that Kamativi beacons were in place. Contents of Annexure 'L' are factually incorrect and were not relied on in reaching the decision to cancel the said claims.'

This, coming from a person who earlier on said she relied upon the same survey, is difficult to understand. 1st Respondent is definitely not credible in this aspect and it remains a mystery on what basis she decided to cancel the applicant's claims. What is more, this puts into issue the question whether any beacons belonging to the 3rd Respondent existed.

Both 1st and 2nd Respondents claim that applicant's claim was cancelled but they are silent as to when and how the cancellation was affected. In her submissions Ms Mashiri for 1st and 2nd Respondents stated that the 'claims were cancelled in line with section 50 of the Mines and Minerals Act, Chapter 21:05 which provides for cancellation of such certificates of registration notwithstanding the provisions of section 58 of the same Act.'

The issue which then arises is whether such cancellation was done in accordance with the provisions of the Act. The applicant has vehemently argued that it was not and that because there was no compliance, it remains the lawful holder of claim number 11769BM. Applicant asks for a declaratory order to that effect.

If a cancellation is done by the 1st Respondent in breach of the Act, such cancellation is void *ab initio* because anything done by an official in excess of the powers conferred upon him or without following the procedure for such cancellation is null and void. Musara versus Zinatha 1992(1) ZLR 9 (H) at 13A. In

that case Robinson J went on to state at 13B –C that an interested person should be at liberty and entitled, at any time, to approach this court for an order declaring the act in question to be null and void and that the court should be slow to turn a party away where it seeks a declaratory order about its status. At 13F the learned judge concluded that:

‘I consider that the same approach should be adopted by the court in a civil case where, on the papers before it – the more so where those papers seek a declaratory order – an act of glaring invalidity is, as in this matter, staring the court straight in the face. For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void ab initio on some technical ground would, I agree, be to ignore the courts fundamental duty to see that justice is done which, after all, is the duty which the layman expects the courts to discharge’.

Accordingly, I do not agree with Mr Tsivama for the 3rd Respondent that the application for a declaratory order should not be entertained as it amounts to the court usurping the power of the 1st Respondent to adjudicate and cancel the registration certificate. To deny the applicant audience in the face of glaring inconsistencies on the part of 1st Respondent’s conduct and clear violations of the provisions of the Act amounts to an abdication of duty.

1st Respondent claimed to be acting in terms of section 50 of the Act in cancelling the claims. That section provides:

‘(1) Subject to subsection (2) the mining commissioner may, notwithstanding subsection (1) of section 58, at any time cancel a certificate of registration issued in respect of a block or site if he is satisfied that;

(a) At the time when such block or site was pegged it was situated on ground reserved against prospecting and pegging under section 31 or 35 on ground not open to pegging in terms of subsection (3) of section 258; or

(b) Provisions of this Act relating to the method of pegging a block or site were not substantially complied with in respect of such block or site.’

In a case which falls under subsection (1), the 1st Respondent is required to act in terms of subsections (2) and (3) which provide;

‘(2) At least thirty days before cancelling a certificate of registration under sub section (1) the mining commissioner shall give notice to the holder of the block or site of his intention to cancel such certificate and of the grounds for such cancellation and of the proposed date of such cancellation, and shall at the same time inform the holder that he may, at any time before that date, appeal in writing to the Minister against such cancellation.

(3) Such notice shall be given by registered letter addressed to the holder of the block or site at the postal address recorded in the office of the mining commissioner or, if no such address is recorded, by publication thereof in the Gazette'

There has been a signal failure to comply with any of these provisions relating to cancellation of the registration certificate. What the 1st Respondent has done is merely to announce the cancellation without more. So even assuming that section 50 applied to this case, which is unlikely given that the area was not reserved against prospecting and pegging under sections 31 or 35 and section 258(3) has no bearing and the pegging method has not been questioned, the 1st Respondent has not complied with the procedure for cancellation set out in subsections (2) and (3) of section 50. This therefore means that her actions not only offended the *audi alteram partem* principle but also that failure to comply with the mandatory procedural requirements renders her decision *ultra vires* section 50. See *Cluff Mineral Exploration (Zimbabwe Ltd versus Union Carbide Management Services (Pvt) Ltd Ors* 1989(3) ZLR 338(S) at 347E-F.

It was half-heartedly argued by Mr Tsivama that 1st Respondent has not yet cancelled the registration certificate and as such due process must be allowed to take its course. Unfortunately that argument directly contradicts the submissions made by Ms Mashiri on behalf of the 1st and 2nd Respondents. Ms Mashiri unequivocally, submitted that applicants 'claims were cancelled in line with section 50 of the Mines and Minerals Act Chapter 21:05' in paragraph 6 of her heads of argument and maintained that position during the hearing. Accordingly, the cancellation was effected and in view of the violations referred to above, it cannot be allowed to stand.

If the 1st Respondent has reason to believe that the registration of applicant's claims is questionable or that there may be a case of overpegging, she must investigate the matter thoroughly and act in accordance with the provisions of the Act. Overpegging complaints should be dealt with in terms of sections 353 and 354 of the Act and this has not been followed in this case.

1st Respondent appears to have acted in terms of the complaint made on behalf of the 3rd Respondent and did not conduct any meaningful investigation let alone commission a survey in terms of section 353. This explains why she has found it difficult to explain how she arrived at a decision to cancel the certificate and why she has found herself contradicting the Regional Mining Surveyor.

In the result the provisional order made on 15 January 2010 is confirmed in the following terms; that

1. It be and is hereby declared that applicant is the lawfully registered holder of claims named Kapata 11 registered number 11 769BM as recorded on certificate of registration after transfer number T 30249.
2. If there are any complaints of encroachment such should be dealt with by the 1st Respondent in compliance with the provisions of the law.
3. 1st and 2nd Respondents should bear the costs of this application.

Judgment No. HB 5/11
Case No. HC 33/10

Messrs. Majoko & Majoko, applicant's legal Practitioners
Civil Division of the Attorney Generals Office, 1st and 2nd Respondent's Legal Practitioners
Messrs Sawyer & Mkushi 3rd Respondent's legal Practitioners C/o Calderwood, Bryce Hendrie & Partners