

STANLEY MASUMBA
versus
COLLEN TSHAYANA
and
PROVINCIAL MINING DIRECTOR-MIDLANDS
and
MINISTER OF MINES AND MINING
AND MINING DEVELOPMENT N.O

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 21 JUNE AND 23 JUNE 2016

Urgent Chamber Application

T. Zishiri for the applicant
1st respondent in person
L. Musika for the 2nd & 3rd respondents

MATHONSI J: A mining dispute arose between the applicant and the first respondent because the applicant has been carrying out mining operations on his mine known as Belingwe Star 40 mine registration number 13185 located somewhere next to a farm where the first respondent is farming. The dispute arose not because of clash of activities between the first respondent's farming exploits and the applicant's mining operations but because the farmer located a tuck shop within the mining boundaries of Belingwe star 40 mined by the applicant.

The dispute was referred to the Mining Commissioner who issued a determination on 2 June 2015 in favour of the applicant. The first respondent appealed against that determination to the Secretary for Mines and Mining Development who issued a memorandum dated 11 March 2016 cancelling the certificate of registration of the mining claim belonging to the applicant. I say that because the results were communicated to the two antagonists by letter of the Provincial Mining Director- Midlands Province dated 27 April 2016. It reads:

"REF: FARMER-MINER DISPUTE BELINGWE STAR 40 MINE vs PLOT STAND 37 OF DUNNING FARM: MBERENGWA"

Reference is made to the above subject matter. Following the appeal against the Acting Mining Director's decision dated 30 April 2016 this office is in receipt of a memorandum from the Secretary for Mines and Mining Development dated 11 March 2016 which states that:

1. The certificate of registration issued to Belingwe Star 40 mine to be cancelled as it pegged on an area that was not open to prospecting and pegging in terms of section 31 of the Mines and Minerals Act [Chapter 21:05].
2. The area in question is land under cultivation and as such pegging in such a location can only be done with the consent of the farm owner.
3. Collen Tshayana's tuck shop should not be demolished as it is on his land which is less than hundred (100) hectares.

The certificate of registration for Belingwe Star 40 mine, registration number 13185, is hereby on this day, 27 April 2016, cancelled.”

If the date stamp on that letter for 5 May 2016 is anything to go by then the letter containing that decision must have been dispatched on that date. When the applicant received it, he was quick to file an application for review in this court in HC 1283/16 on 23 May 2016 against the present respondents. He sought a review of the decision on the grounds of illegality because an appeal against a decision of the mining commissioner does not lie with the Secretary for Mining but the High Court. He argued that the decision in question is *ultra vires* the Act and therefore a nullity.

The second and third respondents have opposed that application. In the opposing affidavit of Malcom Mazemo, the Provincial Mining Director for Midlands they sought to argue that the secretary did not determine an appeal because none was made. Instead he only corrected “an error which was done in the administration of the Midlands Office.” The Secretary is entitled to do so by virtue of s 341 (2) of the Act.

In my view the respondents are hiding behind a finger. They should have chosen a better object behind which to hide because the finger is just too small for that purpose. The letter I have reproduced above is clear and unambiguous. There was an appeal made against the decision of the Mining Commissioner. The Secretary upheld the appeal and cancelled the applicant's certificate of registration and gave reasons for doing so. There is no question whatsoever of correcting errors. No matter how hard the respondents may try to bring that action within the provisions of s341 (2) of the Act which empower the Secretary to authorize the

correction of errors in the administration committed by a mining commissioner, it simply will not work. This is a case where an appeal was directed to a tribunal with no appellate jurisdiction.

In fact we are now being made to plough through land that has already been tilled. In *Mazuva v Simbi; Simbi v Mazuva* 2011 (2) ZLR 319 (H), I was confronted with exactly the same issue. An appeal against the decision of the Mining Commissioner was purportedly made to the Secretary of Mines ignoring the provisions of s361 of the Act which 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.”

I still abide by the decision I took that such an appeal is a monumental nullity. The use of the word “may” in that section does not mean more than that the aggrieved person has a discretion to appeal. It does not mean that there are other avenues of appeal. It certainly does not repose upon the aggrieved party a discretion to appeal to the Secretary of Mines. No such appellate jurisdiction is given to the Secretary of Mines. It is in fact the height of desperation to find such jurisdiction in s341 (2) because it is simply not there. The appeal was a nullity and so was the decision flowing from it.

The applicant has, in the present application, sought a provisional order the effect of which would be to suspend the decision to cancel his registration certificate pending the determination of his application for review in HC 1283/16.

The first respondent who appeared in person stated that he is opposed to the application firstly because the applicant and himself attended at the office of the Secretary of Mines on 19 November 2015 and 3 December 2015. If he was objecting to the jurisdiction of the Secretary he should have done that long back and not to do so now. When his attention was drawn to the application for review, HC 1283/16, he stated that he had received the application and was yet to file his opposition. In my view failure to object to the Secretary’s jurisdiction cannot clothe the Secretary with jurisdiction he does not have.

Secondly, the first respondent submitted that the mining claim of the applicant is located on his land. He produced a map which he says was also submitted to the second respondent after

he had already made his decision, annexure A, and the latter underwent some damascene experience. He then advised him to approach the Secretary of Mines for recourse.

In my view, the applicant has shown that he has a *prima facie* right to the relief that he seeks. He has had his registration certificate cancelled on the decree of a Secretary of Mines who has overturned a decision taken earlier by the mining commissioner. That course of action was taken following an appeal made in violation on s361 of the Act. The applicant has already taken action in pursuit of a remedy by filing a review application in this court.

As that application is yet to be determined, he certainly requires protection in the interim. On the other hand as long as his certificate remains cancelled he cannot undertake mining operations. Doing so would be illegal. I perceive of no other remedy available to the applicant in the circumstances and the balance of convenience would seem to favour the grant of the provisional order. Until the decision of the Secretary, the applicant was lawfully mining and the first respondent confirmed that he neither has a registration certificate nor the wherewithal to conduct mining operations. He will suffer no prejudice whatsoever by returning to the *status quo*.

In the result, the provisional order is hereby granted in terms of the amended draft order.

Garikai and Company, C/o Moyo and Nyoni, applicant's legal practitioners
Attorney General's Office, 2nd & 3rd respondents' legal practitioners