

JIN YANG AFRICA

Versus

**ESTATE LATE GEORGE MAKURIRA
(Represented by ANGELA CHANDAENGERWA)
And
BEN MAKURIRA
And
PROVINCIAL MINING DIRECTOR, MIDLANDS
And
MINISTER OF MINES & MINING DEVELOPMENT
And
THE COORIDNATOR CID MINERALS**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20 JANUARY 2022

Urgent Chamber Application

C Makwara, for the applicant
TJ Madotsa, for the respondents

MAKONESE J: This is an application for the confirmation of a provisional order granted by this court on 27th March 2020. The interim order is in the following terms:

That pending determination of this application the following relief is granted:

- “1. That 1st and 2nd respondents and all those acting through them be and are hereby interdicted from conducting any mining operations at Bonsor South Mine and Bonsor South West Mine.
2. Should 1st and 2nd respondents and all those acting through them fail to comply with paragraph 1 above, respondents be found in contempt of court and should be arrested.”

Terms of final order sought

1. That 1st and 2nd respondents and all those acting through them be and are hereby ordered to cease any mining operations and Bonsor South Mine and South West Mine.
2. That 1st and 2nd respondents and all those acting through them be and are hereby interdicted from interfering in any way with applicant’s mine operations at Bonsor South Mine and Bonsor South West Mine.

3. That 1st and 2nd respondents be and are hereby ordered to bear the costs of suit on an attorney and client scale.”

The initial application was filed under case number HC 663/20. 1st and 2nd respondents did not file opposing papers. Respondents were therefore duly barred by operation of law. In view of the various cases that have been filed in this court in relation to this dispute it is necessary to put closure to this matter. The parties gave written consent for the court to finalise the matter on the basis of papers filed of record, more specifically, taking into account the consolidated report compiled by the Provincial Mining Director.

Factual background

Applicant, 1st and 2nd respondents have adjacent mining claims. There is a long history of claims and counter claims being filed in this court by the parties. Applicant owns mining claims known as Bonsor South and Bonsor South West. 1st respondent owns Olympia 7 mine. The parties have engaged the Provincial Mining Director, Gweru on countless occasions over the years. Several reports have been compiled and prepared by 3rd respondent regarding the mining dispute. No less than 8 applications have been filed under case numbers HC 1898/18; HC 663/20; HC 961/20; HC 991/20; HC 1355/20; HC 1446/20; HC 2198/20 and HC 1777/21. The matter has remained unresolved. By order granted under case number HC 1777/21 this court directed and ordered that a detailed survey of the locations and co-ordinates of the mining claims in respect of the disputed claims be prepared for the benefit of the court. This court is indebted to the 3rd respondent for the comprehensive and consolidated report on the field verification exercise conducted at the mining locations on 3rd December 2021. The report provides a useful insight into the historical cause for the dispute and what

has led to the encroachments complained of by the applicant. It is necessary to set out the summary of findings by the 3rd respondent as set out in the survey report.

1. The diagrams attached to the report shows that based on the beacons pointed out to the surveyor by the disputing parties, Olympia 7 and Bonsor South overlap each other.
2. Jin Yang Africa (Pvt) is the holder of a cluster of claims Bonsor N, Bonsor SW, and Bonsor S, all pegged and registered in the 1960s. Olympia 7 was pegged and registered in 2003.
3. It has been established through the many versions of the disputing parties' ground positions that beacons for these claims have been successively shifted in contravention of section 51. Consequently, there are now more than 5 versions of the disputing parties' mine positions since 2015.
4. The sketch plans indicate that there has been a migration of mining titles and registered positions by both applicant, 1st and 2nd respondents.
5. The sketch plan for Olympia 7 shows the existence an unidentified claim which was over-pegged at registration. It could not be ascertained whether the claim had been forfeited at the time of registration.
6. There has been a significant information decay resulting in the loss of critical pieces of information during the subsequent transfers.
7. The decay in information was illustrated by the fact that the registered claims changed location, size and orientation for one holder to another suggesting that the veracity of the information changed deliberately or unintentionally as time went by. This applies to both Bonsor claims and Olympia 7.

8. Consequently, it could not be concluded that the encroachment or overlap between the two parties could have been caused by shifting ground positions or some other factors.
9. After the ground verification exercise based on the beacons shown for the survey, 3rd respondent concluded that Bonsor South, registration number 5643BM and Olympia 7 (24678) are encroaching each other.
10. The ground verification was conducted over all the mining titles in the mining location, Bonsor North, Bonsor South West and Bonsor South, as well as Olympia 7. The real dispute is, however, largely between Bonsor South and Olympia 7.

The report details how the claims changed hands from 1965 to about 2013. It shall not be necessary to detail the entire sequence of the transfers that were facilitated by the department of mines. The report notes that the earlier peggings were done in an era where when the Global Positioning Systems (GPS) were not in use. This explains some of the anomalies in the ground positions and the specific locations in the maps held by 3rd respondent.

The report notes that one of the most intriguing and frustrating outcomes of the ground verifications conducted at the direction of the courts or the Ministry of Mines over the years in an attempt to resolve the dispute has been the inconsistency and variation of results obtained from each successive field exercise. The report notes that this, occurrence, whether a result of ineptitude on the part of each survey team, or a result of “moving targets” by disputing parties is a matter for the reader to fathom. This observation is the central feature of the dispute.

Recommendations by 3rd respondent

Following a detailed analysis of the dispute, the 3rd respondent concluded that:

1. Under normal circumstances Bonsor South (registration number 5643 BM) being the prior pegger in 1965 should have been protected under section 177 (3) of the Mines and Minerals Act (Chapter 21:05), which states as follows:

“Priority of acquisition of title to any mining location, reef or deposit, if such title has been duly mentioned, 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 conflicting with the rights of a prior pegger, then, to the extent to which such rights and 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 prior pegger and all certificates of registration shall be issued subject to the above conditions.”

2. The 3rd respondent opined that the protection provided under section 177 (3) of the Act have been eroded by the lack of consistence and agreement on the location of Bonsor South. Further, the benefit should be allowed to accrue based on the merits of submissions from the respondents.
3. Bonsor (registration number 5643 BM) and Olympia 7 (registration number 24678) co-existed for 12 years prior to the recorded disputes in 2015. The escalation of the dispute is against the grain and fabric of the provisions of section 58 of the Act which provides that:

“When a mining location or secondary reef in a mining location has been registered for a period of two years it should 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.”

4. The last recommendation by 3rd respondent is that information from the previous holder of the claims, Zimbabwe Iron and Mining Smelting Company (ZIMASCO) should be explored as an alternative route at resolving the disputes.

It is clear from the detailed report by the Provincial Mining Director that 3rd respondent has allowed Olympia 7 mine to exist merely on the basis that the over-pegging and co-existence of those claims has been allowed for 12 years.

The legal position on the resolution of the dispute

The report by the 3rd respondent contains a copy of a very significant letter written way back on 24th June 1965. The letter reflects how the over pegging arose and was allowed to exist over the years. The letter was addressed by the then Assistant Mining Commissioner, one John Peacock. The letter was directed to G. P. Arnott who had pegged an area which is currently Olympia 7 Mine. The letter states as follows:

“Prospecting licence number 4198 H

It has been observed that the block you pegged under the above-mentioned licence encroaches on a block recently registered in favour of Rhodesia Chrome Mines Ltd (Registration number 5643 BM Bonsor South) which is shown on the attached sketch plan copied from my records.

If your D.P peg falls within the boundaries of the block held by Rhodesian Chrome Mines Ltd, I regret that it will necessitate your pegging completely afresh with the exception of a prospecting Notice (your exiting one is valid until July 1965).

On the other hand, if your D.P peg has been established outside the boundaries of the block held by Rhodesian Chrome Mines Ltd. You will have to withdraw beacons B, F, and E on your block and to amend the registration notice and sketch plan which I am returning to you.”

As observed by the 3rd respondents, Rhodesia Chrome Mine registered block 5643 B in May 1965. The critical deduction is that the location of Bonsor South at the time described and identified in 1965 is the same Bonsor South as it exists today. The letter by the Assistant Mine Commissioner of June 1965 was a clear warning of an encroachment on that mining block. Up to this day and over 5 decades later to this date that encroachment presents itself in

the present dispute. Olympia 7 Mine has been allowed to exist illegally over the years. It will not serve any useful purpose to apportion blame on who has allowed the encroachment to continue.

The legal position is clear. A prior pegger has superior rights and section 177 (3) of the Act protects the applicant. I am not persuaded that section 58 of the Act can be applied to protect the rights of a claim that was pegged in an area not open for pegging. Once it is established that Applicant has prior rights, the court cannot and should not resort to section 58 of the Act. Olympia 7 Mine was registered encroaching into Bonsor South Mine. It was not supposed to be registered in the first place. It is liable for cancellation in terms of section 50 of the Act. This is because the rights of 1st and 2nd respondents are subordinate to the rights of the Applicant who is the first pegger. See the case of *K & G Mining Syndicate v Mugangavari & Ors* HB 131/17. In this instance Bonsor South and Olympia 7 cannot co-exist. This is what has led to the physical and at times violent confrontation between the disputing parties.

Whether applicant has satisfied the requirements for a permanent interdict

In an application of this nature, the applicant needs to satisfy the requirements for a final interdict. These requirements are well established and have been dealt with in various cases in this jurisdiction. In *ZESA Staff Pension Fund v Mushambadzi* SC-57-02, the Supreme Court held that the requirements for a final interdict are as follows:

- (i) a clear right which must be established on a balance of probabilities.
- (ii) irreparable injury actually committed or reasonably apprehended.
- (iii) the absence of a similar protection by another remedy.

The applicant has established that it is the registered owner of Bonsor South and Bonsor South West. The registration certificates have been filed as proof of registration. This is not disputed. The applicant succeeds on the first hurdle. Applicant has averred that 1st and 2nd respondents have been encroaching on its mining claims and conducting mining operations. This has been overwhelmingly supported by the submissions filed by the Applicant and the ground verification exercise conducted by 3rd respondent. There is clearly irreparable injury or harm perpetrated against the applicant. Gold is a finite resource and the extraction of gold ore from applicant's claims causes irreparable harm. There can be no other remedy available to the applicant.

Disposition

The applicant has satisfied all the requirements for the granting of a final interdict. An amended draft order has been filed by the applicant. Applicant seeks cancellation of the registration certificate for Olympia 7 Mine. Nothing has been placed before the court to show that Olympia7 Mine is not encroaching into Bonsor South. Both mining claims cannot exist without violent confrontations between the parties. The numerous reports by the Ministry of Mines indicate that the pegging of Olympia 7 was done in 2003. Over the years the Mines Office has not shown a willingness to resolve the matter. The illegal pegging of Olympia 7 Mine was carried from one owner to another. I can see no reason why this court should not bring finality to this litigation by correcting an error which has been allowed to continue for several years, with parties taking each other to court countless times over the same dispute, over and over again.

Before concluding, I must once again commend the 3rd respondent for undertaking a thorough ground verification exercise and providing the court with forensic evidence on the

historical dispute and origins of this mining dispute. It is important to note that the report is balanced, fair and factual. The report addresses the factual and legal disputes.

In the result, the court makes the following order:

1. The provisional order be and is hereby confirmed.
2. 1st and 2nd respondents and all those acting through them be and are hereby ordered to cease mining operations on Bonsor South and Bonsor South West.
3. 1st and 2nd respondents and all those acting through them be and are hereby interdicted from interfering in any way with applicant's mining operations on Bonsor South and Bonsor South West.
4. Olympia 7 Mine, registration number 24678, having been found to be encroaching into Bonsor South Mine, registration number 5643 BM which was pegged prior to it be and is hereby cancelled for having been pegged on ground not open for prospecting.
5. 1st and 2nd respondents to bear the costs of suit.

Mutatu & Mandipa Legal Practice, applicant's legal practitioners
Madota & Partners, respondents' legal practitioners