

G and W INDUSTRIAL MINERALS (PVT) LTD
versus
THE SECRETARY FOR MINES AND MINING DEVELOPMENT
and
SELDO MINING (PVT) LTD
and
THE PROVINCIAL MINING DIRECTOR-MASHONALAND CENTRAL

HIGH COURT OF ZIMBABWE
CHITAKUNYE & CHIRAWU-MUGOMBA JJ
HARARE, 15th and 16th May 2018

Civil Appeal

S. M Hashiti, for the appellant
P. Macheka, for the 1st and 3rd respondents
E. T Muhlekiwa, for the 2nd respondent

CHIRAWU-MUGOMBA J: The appellant noted an appeal in terms of section 361 of the Mines and Minerals Act [*Chapter 21:05*] against the decision of the first respondent purportedly acting as a Mining Commissioner in terms of Section 341(2) of the Act, made on the 18th of September 2017 in regard to a boundary dispute between the appellant and the second respondent.

The grounds of appeal were framed as follows:

1. That the first respondent erred in law in interpreting the following sections of the Mines and Minerals Act and therefore failed or neglected to comply with the provisions of the Mines and Minerals Act-
 - a. Section 177(3) of the Mines and Minerals Act in terms of which the Appellant has superior rights to those of the 2nd Respondent as its claim was registered in 1998 being 25955 BM on which its plant in Rushinga is located;
 - b. Section 31(1)(a)(iv) of the Mines and Minerals Act in terms of which 2nd respondent should not have been permitted to peg and register block 37310 BM on the ground as area was not open to prospecting.
2. Further, the 1st respondent erred in law in overlooking or ignoring the following pertinent issues, which have a direct bearing on the outcome of the dispute-

- a. That the docket containing information regarding Appellant's registration of the claims in dispute was missing from the Ministry's office;
- b. That at the time of registration of the Appellant's claims in 1998 the area designated by the mining claims was correctly established by beacons established in terms of the Act; and
- c. Notwithstanding the fact that the three sets of readings were taken during the inspection (the Surveyor's reading, the Appellant's reading and the 2nd respondent's reading) the Surveyor's report omitted to include Appellant's readings in his report consequently resulting in an incorrect conclusion.
- d. Further, the Surveyors report included reference to two unidentified readings not made by any of the parties and thus reliance was placed on incorrect information in arriving at the conclusion.

The appellant sought an order setting aside the determination of the first respondent issued on the 18th of September 2017 and the substitution with the following;

- a. The appeal is upheld
- b. The decision of the 1st respondent dated the 18th of September 2017 upholding the determination of the Provincial Mining Director dated 31st August 2015 directing Appellant to relocate to its original position be and is hereby set aside;
- c. The Appellant be and is hereby reinstated to its original position on the ground as at 1998;
- d. 2nd respondent shall pay the Appellant's costs of appeal.

In support of its appeal, the Appellant on the 21st of November 2017 filed a document titled, " Summary of facts in regard to notice of appeal filed in terms of Section 361 of the Mines and Minerals Act [*Chapter 21:05*]" . In this document, the appellant set out what it viewed as a summary of the facts; annexure A being a letter dated the 2nd of November 2017 addressed to the appellant and the second respondent by the third respondent acting on behalf of the first respondent; annexure A1 being a memorandum addressed to the third respondent by Permanent Secretary for Mines and Mining Development captioned, "Complaint against the decision made by the Provincial Mining Director; G and W Industrial Minerals vs. Seldo Mining(pvt) Ltd mining claims- Rushinga; annexure A2 being a letter addressed by the third respondent to the appellant's legal practitioners to which was attached a report from the

surveyors dated the 4th of September 2015; annexure A3 being a report from the Mining Commissioners Office based on a site visit conducted and other observations and annexure A4 being a letter from appellant addressed to the Permanent Secretary of the Ministry of Mines dated the 30th of September 2015. This summary also contains site maps and diagrams of the disputed area.

On the 18th of December 2017, the first and third respondents filed what they called a record of proceedings in the matter. What is pertinent to note is that some of the documents contained in the appellant's summary are also contained in this record except for the following which appear only in the first and third respondent's record;- minutes of the meetings of the disputes committee held on the 20th of July: 9:00 hours in the 4th floor, Boardroom, ZIMRE centre; site maps (these are different from the ones that appear in the appellant's summary) and a report from the office of the Provincial Mine Surveyor for Mashonaland Central addressed to the third respondent based on a site visit that was conducted.

There are therefore two different records of proceedings before the court. At the hearing, the second respondent's legal practitioner *Mr E Muhlekiwa* raised a preliminary point with regard to the record of proceedings in this matter. He averred that it is the duty of the registrar to prepare the record of proceedings but in this case, it was supplied by the appellant without seeking leave of the court. There is no such procedure and the act of the appellant is tantamount to an attempt to a re-hearing of the appeal as if the court is hearing the matter afresh. As such, the summary of facts by appellant is improperly before the court and should be expunged from the court's record. In response *Mr Hashiti* for the appellant contented that the summary was submitted in terms of section 9 of the HIGH COURT (MISCELLANEOUS APPEALS AND REVIEWS) RULES, 1975. The registrar had accepted the summary and hence it was properly before the court. The issue of the record becomes important when regard is had to the fact that the appellant approached this court purportedly on the basis of section 361 of the Mines and Minerals Act which reads,

“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 the court may make such order as it deems fit on such appeal”.

There is therefore need to ensure compliance with the HIGH COURT (MISCELLANEOUS APPEALS AND REVIEWS) RULES, 1975 regarding records which reads as follows:

“9. Record

- (1) Within fifteen days of receipt of a notice, the tribunal or officer concerned shall—
(a) if a formal record of the proceedings was kept, lodge it with the registrar;
(b) if no formal record of the proceedings was kept, lodge with the registrar reasons for the decision concerned, together with all papers relating to the matter in issue.
(2) Where a formal record is lodged, the provisions of Order 33, rule 260 of High Court of Zimbabwe Rules, 1971, shall, *mutatis mutandis*, apply.
(3) Where no formal record is lodged, the registrar may require to be submitted such additional copies of the papers as he deems necessary.”

Tribunal is defined by the rules as “*any court, tribunal, council, board or other body against whose decision an appeal lies to, or whose proceedings may be reviewed by a judge or the court.*”

The record of proceedings ought to have been lodged with the registrar by the 1st respondent assuming that he was as alleged exercising powers of a mining commissioner within 15 days of receipt of the notice of appeal. Thereafter, the provisions of Order 33, Rule 260 would come into play. The rule relates to certification of the record as true and correct; the litigants or their legal practitioners are given an opportunity to inspect the record and also agree that it is a true reflection of the proceedings or point to any anomalies; the record must be paginated from the first to the last page; it must also contain a complete and correct index of the evidence and all documents and exhibits in the case and the nature of the exhibits being briefly stated in the index. The record must also disclose the names of the parties and the tribunal whose proceedings are being appealed against as well as the names of the legal practitioners of the parties. Merely formal documents shall be omitted and no document shall be set forth more than once.

The two ‘records’ filed by the appellant and the first and third respondents are not in compliance with the rules. Apart from not emanating from the first respondent’s office to that of the registrar through the correct procedure, they also contain some documents that are the same thus setting forth documents more than once. It is therefore the court’s finding that there is no proper record of proceedings before it.

In the result it is ordered as follows:

- a. The matter be and is hereby struck off the roll.
- b. There shall be no order as to costs.

CHITAKUNYE J: I agree

Hussein Ranchod and Company, appellant's legal practitioners
Civil Division, 1st and 3rd respondent's legal practitioners
Muhlekiwa Legal Practice, 2nd respondent's legal practitioners