CRG QUARRIES (PRIVATE) LIMITED
versus
THE PROVINCIAL MINING DIRECTOR
and
ZIMBABWE INTERNATIONAL QUARRIES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 24 February 2023 & 8 March 2024

Opposed Application – Review of Administrative Decision

Mr *N Madya*, for the applicants
Mr *T Marira*, for the 1st respondent
Mr *A Demo*, for the 2nd respondent

MUSITHU J: This is an application for review in terms of which the applicant seeks the setting aside of the decision of the first respondent in a mining dispute that arose between the applicant and the first respondent. The relief sought is set out in the draft order as follows:

"**IT IS ORDERED THAT: -**

1. The decision of the first respondent dated 19 July 2022 be and is hereby set aside.
2. The applicant's title to the disputed area is no longer open to challenge by virtue of s 58 of the Mines and Mineral's Act [*Chapter 21:05*].
3. The second respondent be and is hereby ordered to adjust its claims outside of the applicant's claims named Mutuwi 6 within 30 days of this order.
4. There shall be no order of costs if the application is not opposed. In the event of opposition, the respondent to pay costs of this application.
5. Further and/or alternative relief."

The application was opposed by both respondents.

The Applicants' Case

The applicant is the registered holder of mining rights in 24 black granite claims named Mutuwi 6 which are situated in the Mutoko Communal Lands. The claims were registered on 24 December 1999. The second respondent is also the registered holder of mining rights in black granite claims called Mutuwi 3 and 4. The parties have coexisted peacefully from 2001 to 2017. The relationship was so cordial that at some point between 2001 and 2009, the applicant utilised the second respondent's workers' accommodation.

Problems started when the second respondent, in a letter dated 3 April 2017, accused the applicant of illegally mining in Mutuwi 3 and 4 over the past years. It requested the applicant to remove its blocks and vacate its claims. In its response of 5 May 2017, the applicant denied the allegations and proposed that the parties conduct a ground survey. The applicant claims that its letter did not elicit a response from the second respondent. On 6 June 2022, the second respondent made a complaint of vandalism of beacons and encroachment to the first respondent. On its part, the applicant also made a report of encroachment against the second respondent. The second respondent was accused of erecting beacons within the applicant's boundaries thus distorting the original demarcations.

On 9 June 2022, the first respondent invited the parties to attend a meeting to resolve the dispute. The meeting was attended by the parties' representatives. It was resolved at the meeting that a ground survey should be conducted. After the ground survey, a surveyor in the first respondent's office generated a report dated 9 July 2022. The first respondent decided on the dispute by copy of a letter dated 19 July 2022. The relevant part of the decision reads as follows:

> "3.1 According to section 177(3) of the Mines and Minerals Act [Chapter 21:05], C.R.G Qaurries (Pvt) Ltd's mining rights falls subordinate to Z.I.Q (Pvt) Ltd's mining rights since C.R.G Qaurries (Pvt) Ltd is the subsequent pegger and Z.I.Q (Pvt) Ltd is the prior pegger.
> 3.2 C.R.G Quarries (Pvt) Ltd's block of claims named Mutuwi 6 (registration number 26905BM) should be adjusted outside of Z.I.Q (Pvt) Ltd's block of claims named Mutuwi 3 and 4 (registration number 26728-9BM) by the 10th of August 2022."

It is that determination that triggered the present application before the court.

The grounds for review

The first respondent's decision is attacked on two bases. The first ground is that the decision is grossly irregular because it was made in terms of s 177 of the Mines and Minerals Act [*Chapter 21:05*] (the Act), when the first respondent was barred by s 58 of the same law from impeaching the applicant's title. According to the applicant, its claims were originally registered on 24 December 1999. The applicant acquired the claims from the original pegger in 2001. It was issued with a certificate of registration in its name on 11 June 2001. The applicant took occupation of the claims in 2001 and has been in continuous occupation including the portion of the claims in dispute.

The applicant contends that it is protected by s 58 of the Act since its claims were registered for more than two years before the second respondent raised a complaint in June

2022. Its title was therefore unimpeachable. The applicant's representative had submitted at the hearing that the applicant had been working on the claims for more than two years, but the first respondent ignored those submissions choosing to rely on the priority of mining rights principle. The applicant averred that had the first respondent taken into consideration the provisions of s 58 of the Act, then he would have made a finding that he was barred from impeaching the applicant's title to the mining rights.

The applicant also argued that s 58 of the Act was a statute of limitation which defined timeframes within which one's title to a claim could be challenged. Placing reliance exclusively on s 177 at the expense of s 58 of the Act would bring about uncertainty in mining titles, which s 58 of the Act was intended to guarantee. The first respondent's decision was grossly irregular since he entertained a complaint which was not raised within two years from the date of registration of the applicant's claims.

The alternative ground for review was that the decision of the first respondent was grossly irregular in that he ordered the applicant to adjust its block of claims in the absence of evidence which showed over pegging between the parties' respective block of claims. The first respondent ordered the applicant to adjust its block of claims on the basis that the second respondent was a prior pegger while the applicant was the latter pegger. The applicant averred that although the second respondent's registration certificates were purportedly issued on 26 November 1999, and the applicant's certificate of registration was issued on 24 December 1999, there was no other evidence that the second respondent had acquired title earlier.

The applicant argued that in terms of s 177(2) of the Act, title to a mining location was acquired by the due performance of the first physical act required to be performed under the Act. In the context of s 177, the first physical act denoted visiting the mining location and pegging the claim. Having a certificate of registration was not enough to assert acquisition. On its part, the second respondent had not produced any evidence of acquisition apart from relying on certificates of registration. The applicant urged the court to consider the following findings made in the survey report.

- The parties mining claims were pegged before the GPS era and there were no recorded coordinates.
- Dockets of the mining locations went missing at the first respondent's offices when it transferred from Harare to Marondera.
- During the survey, some of the second respondent's beacons were missing.

The applicant submitted that the findings above all but confirmed that there was no evidence on which a finding of over pegging could have been made. Instead, the first respondent invited the parties to point out where their boundaries were located. After being shown the second respondent's boundaries that were allegedly overlapping with the applicant's claims, the first respondent did not independently verify the parties conflicting versions. The applicant argued that there was no basis upon which the first respondent made a finding that the ground in dispute was part of the second respondent's claim and not the applicant's. The applicant further argues that in the absence of records showing the original positions, the second respondent ought to have considered other independent evidence to confirm the correct positions.

The applicant also averred that the first respondent failed to consider evidence that the second respondent only started erecting beacons in the applicant's claim around 2017, and the applicant resisted the approach. This was confirmed by the correspondence at the first respondent's disposal. Nothing was done and the applicant continued in occupation of the disputed area carrying out its mining operations as usual. The applicant further contended that the siting of its works plan that were submitted to the first respondent in 2003 did not support a finding of over pegging between the parties' claims. If the works plan were plotted on the map attached to the first respondent's findings, then it meant that the applicant's dump area, the loading bay, the reserve tank and compound would all be in the second respondent's claim. If that was indeed the case, then the second respondent would not have taken many years to raise a complaint of encroachment by the applicant since the applicant was always in occupation of the disputed area.

The applicant averred that in the absence of evidence showing over pegging between the parties' claims, it was grossly irregular for the first respondent to order the applicant to adjust its block of claims. The applicant averred that it was the second respondent that should have been ordered to adjust its claim to the original boundary, since it was the one alleging that the boundaries of its claim extended to the area covered by the applicant's claim.

The first respondent's decision did not set out the basis upon which it accepted the second respondent's version ahead of that of the applicant. The first respondent is accused of just relying on the indications made by the second respondent in coming up with its decision. The first respondent's determination is impugned as being grossly unreasonable that no reasonable person applying his mind would arrive at such conclusion.

Attached to the applicant's founding affidavit was the supporting affidavit of Dzingai Nyabote, the applicant's Quarry Manager. He has been an employee of the applicant since 2005. He claimed that the applicant had been in occupation of Mutuwi 6 since 2001. That also included the compound occupied by the applicant's employees. Nyabote further averred that within the applicant's claim there is a 25 000-litre diesel storage tank, a loading bay and the dump area which have been in existence since 2003.

According to Nyabote, there had not been any allegations of encroachment by the second respondent against the applicant for the past 15 years, yet the above facilities were clearly visible to it. Nyabote claimed to have once stayed in the second respondent's compound when they relocated their workings to another area. There was never a dispute concerning the boundaries. The boundaries were never moved, and the positions had remained the same since then.

The First Respondent's Case

The opposing affidavit was deposed to by Tendai Kashiri in his capacity as the Provincial Mining Director for Mashonaland East Province. He insisted that his decision was made in terms of the law. It was done in terms of s 177 of the Act. It was the relevant law since it set out the factors to be considered in resolving the conflict between holders of mining rights. Section 58 of the Act did not have the effect of granting one mining rights over another party's mining title. According to the first respondent, s 58 applied to disputes involving a land occupier and a miner. In the present matter, the subsequent pegger's mining rights were subordinate to those of the prior pegger in terms of s 177 of the Act.

The first respondent also claimed that there was ample evidence of over pegging between the second respondent's claims Mutuwi 3 and 4 and the applicant's claim, Mutuwi 6. The survey diagrams from the Surveyor showed the existence of an over peg between the claims. The surveyor picked co-ordinates of the ground positions of the blocks in question and plotted a survey diagram after the ground visit.

It was also averred that the second respondent was the prior pegger, having been registered on 26 November 1999, while the applicant was registered on 24 December 1999. The first respondent claimed to have used information in its possession to determine the prior pegger and the subsequent pegger between the two parties. The first respondent further claimed that by letter of 3 November 2017, he requested all miners to submit their ground co-

ordinates. The applicant and second respondent duly complied with the request in 2018. This is the information that the first respondent used to come up with his decision.

According to the first respondent, both parties showed the surveyor their ground positions during the ground visit. Where beacons were vandalised, the survey team was shown the ground position of the beacons by the parties themselves. The first respondent contends that there was a small variation between the beacon positions submitted in 2018, and the ground positions which the parties pointed out to the Surveyor during the field visit. While admitting that the absence of information for both miners compromised their submissions, his office relied on information that the parties submitted to his office before the dispute arose.

The Second Respondent's Case

The opposing affidavit raised three points *in limine*. The first concerned the form of the application. It was averred that the grounds upon which the application is based were not shortly and clearly stated. The first ground did not state how the first respondent was barred from impeaching the applicant's title. The second ground did not state the applicant's basis for concluding that there was no evidence of over pegging, when evidence gathered during the survey pointed to over pegging. As regards the relief sought, it was averred that the application did not state the exact terms of the relief sought other than making a general statement. For the above reasons, it was argued that the application was a nullity as it did not comply with r 62(2) of the High Court Rules, 2021 (the Rules).

The second preliminary point challenged the validity of the grounds for review. It was averred that the applicant was essentially challenging the substantive correctness of the first respondent's decision. The grounds submitted were for appeal rather than review.

The third objection concerned the use of a wrong procedure. It was argued that the applicant ought to have challenged the first respondent's decision by way of an appeal in terms of s 361 of the Act, and not a review. The application was therefore not properly before the court.

As regards the merits, the second respondent outlined its case as follows. On 24 February 1999, it made an application for a Special Grant over the area in question since it was a reserved area. The Special Grant giving the second respondent mining rights over the area concerned was duly issued with the same co-ordinates. The area was first pegged when the second respondent applied for a Special Grant.

According to the second respondent, in October 1999, the reserved area was lifted, and the second respondent applied for mining certificates over the area concerned. On 26 November 1999, the second respondent was issued with certificates of registration in respect of both Mutuwi 3 and 4 claims. The second respondents maintained the same beacons and co-ordinates despite the change in the status. It commenced mining on the two claims before moving to open other sections. The second respondent contends that it pegged and commenced mining operations on Mutuwi 3 and 4 before the applicant acquired its claim. For that reason, it claims to have acquired superior title in terms of s 177(3) of the Act. The applicant as the subsequent pegger, had rights which were subordinate to those of the second respondent. As the subsequent pegger, it was the applicant which over pegged the second respondent's claims and not vice versa.

The second respondent acknowledged that the two parties were in peaceful co-existence and that is why it never suspected that the applicant would vandalise its beacons as well as encroach into its claims. The second respondent claims that the encroachment was discovered by its employees during beacon maintenance sometime in 2013. It engaged the applicant with a view to resolve the matter amicably. Following the engagement, the applicant moved away from the disputed area for years and the second respondent thought the issue had been resolved. The applicant resumed operations on the second respondent's claims in 2017. All attempts to engage and resolve the dispute amicably were in vain, prompting the second respondent to approach the first respondent.

The second respondent claimed that the applicant used heavy machinery to vandalise its claims. It also claimed that during the ground survey, the applicant's Quarry Manager, Mr Nyabote admitted in the presence of the Provincial Mining Surveyor that the applicant had removed some of the second respondent's beacons using a front-end loader.

The second respondent denied that s 58 of the Act was applicable to the present dispute. The said section had nothing to do with occupation but registration of title. The second respondent's claims which covered the disputed area were registered some twenty-three years back, and had the protection of s 58 of the Act since they had been registered for more than two years. The second respondent had commenced mining operations on both Mutuwi 3 and 4 in the year 2000, before the applicant purchased its claim from the previous owner. The second respondent accordingly had a superior title.

The second respondent denied that there was no evidence of the location of the beacons, since not all the beacons were removed. Even in respect of those that were vandalised or removed, there would still be signs or evidence of such beacons on the ground as would enable a surveyor to decide on whether there was over pegging or not. At any rate, the applicant was attacking the substantive correctness of the decision, which was unprocedural since this was meant to be a review.

The physical inspection revealed that there was over pegging. That finding was based on real evidence on the ground. The applicant had not explained why its claim, which had 24 hectares in extent on registration, currently had 26 hectares. That could only point to over pegging.

The supporting affidavit of Nyabote was dismissed as adding no value to the applicant's case. It was mostly based on hearsay since the applicant joined the applicant in 2005. The structures referred to by Nyabote were all in the second respondent's claim, and physical evidence on the ground confirmed that there was over pegging.

The Answering Affidavit

The applicant averred that the first respondent's opposing papers were not properly before the court as they were filed out of time. The application was served on the first respondent on 5 September 2022, and the opposing papers were expected on or before 19 September 2022. They were only filed on 23 September 2022. The opposing papers ought to be struck out for being improperly before the court.

The applicant denied that the first respondent's decision was made in terms of the law. It had to be set aside on the basis that it was made pursuant to a complaint that breached s 58 of the Act.

As regards the notice of opposition by the second respondent, the applicant urged the court to dismiss them for lack of merit. The preliminary points raised by the second respondent were dismissed for lack of merit. The applicant denied that the grounds were not shortly and clearly stated. The relief being claimed was also clearly stated. It was further averred that even if the application did not state the exact relief prayed for on the face of the court application, the court could still exercise its discretion and condone the non-compliance in terms of r 7(a) of the High Court rules, 2021 (the Rules).

The applicant denied that it was challenging the substantive correctness of the first respondent's decision. It averred that the first respondent's failure to consider s 58 of the Act

was a ground for review. A decision that had no basis could also be challenged on review. The applicant also denied that it used the wrong procedure by filing a review instead of an appeal in terms of s 361 of the Act. It averred that the existence of a right of appeal did not oust the review jurisdiction of this court. Further, s 361 applied to appeals against decisions made in the Mining Commissioner's Court. The decision being impugned herein was not one from the Mining Commissioner's Court.

The applicant also argued that there was no proof that even though the second respondent applied for a special grant, that application was subsequently granted. The applicant also denied that the second respondent maintained the same beacons and coordinates for the special grant and the mining certificates.

The applicant denied vandalising the second respondent's beacons and encroaching into its claims. The applicant also denied being engaged by the second respondent in 2013, and that after the engagement it moved away from the area in dispute. The applicant insisted that it was in occupation of the disputed claims from 2001 to the present date. It further insisted that the allegations of encroachment were made for the first time in 2017.

Attached to the applicant's answering affidavit was the supporting affidavit of Frank Katsande Chitekairo. He is an approved prospector and the initial owner of the applicant's claims. He was registered as an approved prospector by the Ministry of Mines and Mining Development on 22 April 1998. He was issued with a prospecting license which enabled him to search and peg a block of mineral claims in Mutoko Communal Lands. The second respondent's representatives were present at the time he pegged the claims. They showed him the boundaries of the second respondent's claims, which ensured that there was no encroachment into the other party's claims. There was also a stream that separated the party's respective claims.

A certificate of registration was issued in his name on 24 December 1999. Following a sale, his claims were transferred to an entity called Goldbar Trading (Private) Limited on 20 March 2000. Goldbar sold the claims to the applicant, and the claims were transferred into the applicant's name on 11 June 2001.

The deponent claimed that after the applicant's determination of 19 July 2022, the applicant's quarry manager sought his views on the allegations of encroachment. His own observations were that the second respondent had crossed the stream and erected its beacons within the applicant's claims, and that the applicant had maintained its beacons position as at

the time of registration. His conclusion was that the disputed area belonged to the applicant since at the time of prospecting and pegging, the second respondent's representatives did not claim the area and he had not seen any pegs or beacons.

Also attached to the applicant's answering affidavit was the supporting affidavit of Dzingai Nyabote. He denied ever admitting that the applicant removed the second respondent's beacons using a front-end loader. He also denied that the applicant vandalised the second respondent's beacons. He averred that at any rate the deponent to the second respondent's opposing affidavit was not present during the ground survey and his evidence was at most hearsay.

The deponent also averred that although he joined the applicant in 2005, the compound, reserve tank, loading bay and dump area were all in their current positions. The second respondent never disputed the location of these structures. That confirmed that the applicant was always in occupation of the disputed claims.

The Submissions

At the commencement of the oral submissions, the bar operating against the first respondent in respect of the late filing of the notice of opposition was lifted by consent. Mr *Demo* for the second respondent abandoned the second respondent's points in *limine.*

In his submissions, Mr *Madya* submitted that the first respondent's failure to advert to s 58 of the Act made his decision impeachable. That point was alluded to by a representative of the applicant during the meeting held on 9 June 2022. That is the same meeting that recommended a ground visit to the disputed area. Counsel further submitted that s 58 was prescriptive. Once a party failed to assert their rights before the expiry of the prescriptive period, then they could not assert such rights after the lapse of the prescriptive period. Such a claim would have prescribed. The first respondent's decision did not address that issue. It was argued that had the first respondent addressed the applicant's submission based on s 58, then he would not have entertained the second respondent in view of the position of the law. Section 58 was intended to create certainty within the mining industry.

Mr *Madya* further submitted that once it was established that a party was in occupation of a mining claim for a period more than two years as prescribed by s 58, then the question of illegalities did not arise. He urged the court to depart from the decision of this court in *Jin Yang Africa v Estate Late George Mukuwa and Provincial Mining Director,*

Midlands[1], cited in the first respondent's heads of argument. Mr *Madya* argued that the case was not correctly decided. In that case the court held that s 58 of the Act did not protect rights in a claim that was pegged in an area not open for pegging. The court also held that once it was established that a party had prior rights in terms of s 177(3) of the Act, the court could not resort to s 58.

Mr *Madya* further submitted that the first respondent had admitted that there was no evidence of over pegging. Over pegging could only have been resolved by reference to the original papers. The information relied upon by the first respondent was submitted after a dispute had already arisen.

Mr *Marira* for the first respondent submitted that the starting point was to determine whether the area in question was open to prospecting and pegging. The second respondent was the prior pegger, and the applicant occupied an area that was not open to prospecting. The courts had already set a precedent in the *Jin Yang Africa* case.

Mr *Demo* argued that the applicant's contention that the first respondent failed to consider s 58 of the Act in his decision, was not one of the grounds for review as required by r 62 of the Rules. Mr *Demo* further submitted that the decision of the first respondent was unimpeachable. The law to be applied in resolving a dispute involving several peggers was s 177 and not s 58 of the Act. The case fell on all fours with the *Jin Yang Africa* case. Counsel also referred to the case of *Earthrow Investments (Pvt) Ltd v Minister of Mines & Mining Development & Ors*[2], where the court held that s 58 did not protect a party in the position of the applicant where a dispute concerning the parties title arose.

Mr *Demo* further submitted that following the meeting of 9 June 2022, the deponent to the applicant's founding affidavit agreed as part of the meeting that a ground visit be conducted as part of the dispute resolution process. By agreeing to the physical inspection, it ought to have occurred to the applicant that its title may be impeached. The applicant could not turn around and seek refuge in s 58 when it agreed to the ground verification. Section 177 was therefore properly applied. The applicant waived its rights to invoke s 58.

As regards the alternative ground for review that there was no evidence to support the decision, Mr *Demo* submitted that the Surveyor knew what he was doing. He went to the ground and made the necessary verifications having seen the pegs. Mr *Demo* further submitted that the report by the surveyor confirmed that the blocks maintained their

[1] HB 18/22
[2] HH 823/22

measurements. None of the parties tempered with the pegs or beacons. It was not correct that the second respondent planted new pegs. The registration certificates were there to confirm the correct position. The surveyor's report was conclusive and could just not be thrown away. Relying on the cases of *Masuku v State* HB 116/18, and *ZIMSCO (Pvt) Ltd v F Mudzengi & Ors* HB 121/18 counsel further submitted that the court could not ignore the evidence of experts in the absence of alternative credible evidence.

In his brief reply, Mr *Madya*, submitted that the applicant could not be taken to have waived its rights by agreeing to undertake the ground verification. As regards the evidence of the surveyor, counsel argued that one needed to interrogate what the said expert did apart from just accepting the indications made by the parties. The indications were based on what the parties said after the dispute arose. The surveyor's report did not qualify to be called an expert report.

The Analysis

Whether the first respondent's decision is grossly irregular for applying s 177 instead of s 68 to the dispute

The applicant's first ground for review attacks the first respondent's decision on the basis that he erred in resolving the parties dispute in terms of s 177 instead of s 58 of the Act. It is clear from a reading of the first respondent's determination that he did not consider s 58 of the Act in reaching his conclusion. It is critical to consider the implications of the two provisions at this stage. Section 58 states as follows:

> **"58 Impeachment of title, when barred**
> When a mining location or a secondary reef in a mining location has been registered for a period of two years it shall 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."

It is the applicant's contention that its title could not be challenged once it was proved that its mining rights were registered for more than two years before the second respondent's complaint. It is not in dispute that the applicant's mining location was registered for more than two years before the dispute arose. The first and second respondents on their part argued that s 58 was not relevant to the resolution of the dispute. The first respondent argued that section 58 applied to disputes between a landowner and the holder of mining rights. Section 177 was applicable because it set out the factors to be considered in resolving conflicts between holders of mining rights. The second respondent

argued that s 58 was concerned with the registration of title. It was not concerned with occupation.

In motivating its argument, the applicant referred to the judgment by KUDYA J (as he was then) in *Buchwa Iron Mining Company (Pvt) Ltd* v *Mumbire & Ors*[3], where the court had this to say about s 58:

> "Mr *Uriri,* however, submitted that the first respondent's title was protected by s 58 of the Act as his rights had been registered for more than two years. The precursor to s 58 of the present Act was s 55 in the Mines and Minerals Act [*Chapter 203*]. An interpretation of that section was rendered by DAVIES J in *Robinson* v *Trojan Nickel Mine Ltd* 1969 (2) RLR 571 (GD). In that case a certificate of registration was issued by the Mining Commissioner on the false representations of the predecessor of Trojan Nickel Mine that it had the permission of the predecessor of Mrs Robinson to peg mining claims within 50 feet of her cultivated lands but not within 500 yards of her homestead. At the time of registration the registered area was not open to prospecting and could not be registered. Mrs Robinson's application for a declaration of invalidity of the registered mining claim was dismissed on the ground that despite the allegation of fraud the provisions of s 55 protected the defendant's title from attack as it had been registered for more than two years.
>
> It seems to me that like s 55 before it, s 58 protects title from attack two years after registration, firstly, on the ground that such title was acquired through invalid or illegal pegging; and secondly, on the ground that before the certificate of registration was issued, some provisions of the Act were not followed. The declaration of invalidity sought by the applicant is based, amongst others, on the ground that pegging in Reserved Area 854 was illegal. Such a ground is hit by s 58 unless the challenge is raised within two years from the date of registration. The other ground on which the declaration is sought was that the first respondent prospected in Reserved Area 854 in contravention of s 31 (1) (a) and s 35 (1) of the Act. In other words, the ground for invalidity was that the first respondent did not comply with the provisions of the Act. Again, this submission flounders on the s 58 rock if it is raised after two years of such registration.

The critical question to be answered is under what circumstances does s 58 apply? From a reading of s 58, one's title in a mining location cannot be impeached on the basis that the pegging of that location was done illegally, or that a provision of the law was not complied with before a certificate of registration was issued. How does one reconcile s 58 with s 177 of the same Act? This is because s 177 (3) seeks to resolve disputes concerning mining rights on the bases of priority of such mining rights. Section 177 provides as follows:

> **177 Priority of mining rights**
> (1) For the purposes of this section—
> "pegger" means the person in whose name or on whose behalf a mining location, reef or deposit was registered and each and every successor in title to the rights acquired by such person.
> (2) For the purposes of subsection (3)—
> "acquisition of title" shall be taken to mean the due performance of the first physical act required to be done under this Act, or any previous law governing mining rights at the time when the act was performed, in order to acquire any exclusive rights in respect of any mining location, reef or deposit.

[3] HH 152/12

> (3) Priority of acquisition of title to any mining location, reef or deposit, if such title has been duly maintained, 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, then, to the extent to which such rights conflict, the rights of any subsequent pegger shall be subordinated to those of the prior pegger, and all certificates of registration shall be deemed to be issued subject to the above conditions.

The applicant's contention is that its title is unimpeachable because it acquired mining rights in respect of its claim and has been in possession for a period of more than two years. Its title was therefore protected by s 58. On the other hand, both first and second respondents argue that s 58 is inapplicable. Rather, they contend that the applicable provision was s 177 because it seeks to resolve disputes between peggers by the application of the priority mining right principle.

A closer reading of the two sections suggest to me that they both seek to preserve the title of a pegger albeit in different ways. In the case of s 58, one simply needs to establish that the mining location has been registered for a period of two years. In the case of s 177(3), the rights of a prior pegger take precedent ahead of those of a subsequent pegger in the event of the rights of the subsequent pegger conflicting with those of the prior pegger. The apparent conflict that arises between s 58 and s 177 is that while a prior pegger can seek refuge under s 177(3), a subsequent pegger can also invoke s 58 if no claim was made within the two years that the mining location has been registered. This is the scenario in the present dispute.

An apparent conflict between provisions of the same statute must be resolved through the rule of harmonious construction. The basis of this rule is that the legislature must not have intended to contradict itself. The statute must be read harmoniously as one to give effect to the intention of the law maker. Further, a provision of a statute should be given a meaning which is consistent with the context in which it is found. See *Tapedza & Ors* v *ZERA & Ors*[4] and *Kunaka* v *Master of High Court & Ano*[5].

Section 58 falls under Part IV of the Act, which deals with the acquisition and registration of mining rights. Section 177 on the other hand deals with rights of claim holders and landowners. From my reading of the law, the invalid or illegal pegging alluded to in s 58 refers to the original process of pegging or setting out of boundaries by the mining authority at the time that mining rights are acquired. The mining authority is estopped from denying the validity of the process that led to the acquisition of mining rights when it is the very authority

[4] SC 30/20 at p 4
[5] HH 293/23 at p 11

that granted those mining rights to the claim holder. I hold this view because of the wording of s 50 of the Act which states as follows:

> "**50 Cancellation of certificate of registration**
> (1) Subject to subsection (2), the mining commissioner may, notwithstanding subsection (1) of section *fifty eight*, 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 *thirty-one* or *thirty-five* or on ground not open to pegging in terms of subsection (3) of section *two hundred and fifty-eight*; 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."

Section 50 permits the mining commissioner to cancel the certificate of registration if, at the time that a block or site was pegged, it was situated on ground that was not reserved for pegging or prospecting or on ground that was not open to pegging in terms of the other provisions of the Act cited therein. The fact that it is the mining commissioner who can invoke s 50 as read with s 58 speaks to the significance of those provisions. As already noted, both s 50 and s 58 fall under the part of the Act that deals with the acquisition and registration of title. That part of the Act relates to the process in which title was acquired.

In my view, s 58 was intended to deal with a conflict between the regulator and the holder of mining rights. This explains why s 50 permits the mining commissioner to cancel a certificate of registration. It is the mining commissioner who is presumed to know the exact locations of the mining claims and is presumed to have carried out due diligence before issuing out a mining certificate. It is the mining commissioner, who as regulator, enforces compliance with the mining law. In my view, the reason why the regulator is estopped from impeaching the holder's title in terms of s 58 is because by that time the holder would have carried out massive investments on the mining location. At any rate, the only party that can legitimately impeach a miner's title in the manner envisaged under s 58 is the mining commissioner as the regulator. It is the regulator that must enforce the provisions of the law.

Disputes involving claimholders must be resolved under Part X, which as already noted, applies to rights of claimholders. In my view, it could not have been the intention of the legislator to resolve the question of title or boundary disputes on the basis of a two-year prescriptive period, thus denying legitimate claims by aggrieved peggers. One can conceive of the very complex nature of mining operations and the size of mining claims which my run into thousands of hectares in extent. It could take a miner years to discover an encroachment into their claim.

Mr *Madya* urged the court to depart from the dictum in the *Jin Yang Africa* case. In that case the court held that s 58 of the Act could not protect the rights of a claim that was pegged in an area not open for pegging. I have already stated that from my reading of the law, s 58 does protect the pegger to the extent that the regulator seeks to impeach the pegger's title after the lapse of two years. For that reason, I would agree with applicant's counsel that the *Jin Yang Africa* case may not have reflected the correct position of the law.[6]

It is for the foregoing reasons that I determine that s 58 is not applicable to the present dispute. While the first respondent was correct in applying s 177(3), the reasons given in his founding affidavit and the submissions made by his counsel for rejecting s 58 were wrong.

The court determines that there is no merit in the first ground for review.

Whether there was no evidence of over pegging thus making the decision of the first respondent grossly irregular

The applicant's contention was that there was no sufficient information at the first respondent's disposal to support the conclusion of over pegging. The applicant also pointed to the supporting affidavit of Frank Katsande Chitekairo which was attached to the answering affidavit. In that affidavit, Chitekairo averred that the second respondent did not peg the disputed area ahead of the applicant. He also stated that the second respondent's representatives had assured him that the now disputed area was open for pegging. In its heads of argument, the second respondent attacked the propriety of the supporting affidavit as it effectively introduced fresh evidence.

I agree with the second respondent's submission that the supporting affidavit placed new evidence before the court that the second respondent had no opportunity to refute in opposition. The proper procedure would have been for the applicant to seek the court's leave to file an additional affidavit if it was so minded. The supporting affidavit of Frank Katsande Chitekairo is accordingly expunged from the record.

The applicant's complaint must be considered in the context of the events that preceded the decision of the first respondent. Items 2 and 3 of the minutes of the meeting of 9 June 2022 confirm that the meeting was seized with a complaint of encroachment. The surveyor who was part of the meeting pointed to the need for a ground visit. A decision was taken to carry out a ground visit. Following the ground visit, the surveyor generated a report in which he made the following ground observations:

[6] See also the views of the court in *Barrington Resources (Pvt) Ltd v Pulserate Investments (Pvt) Ltd & 4 Ors* HH 446/23 at p 14

> "A GPS survey of the ground beacons was done as the disputants showed their beacons. This confirmed that the overlap area is 5,6 hectares as shown on the accompanying map. Almost all the beacons belonging to CRG were intact on the ground but some beacons for ZIQ were missing and they allege that their beacons were vandalised"

The results of the survey were captured as follows:

> "All three blocks are plotted on the accompanying map from the GPS survey. The table below show the area comparison of the blocks at registration against current area:

Name of claim	Area at Registration	Current area
26728BM (ZIQ)	25 hectares	25 hectares
26729BM (ZIQ)	11 hectares	13 hectares
26905BM (CRG)	24 hectares	26 hectares

> All three blocks have maintained their areas as at registration because the changes are minor considering that they were not registered by GPS"

The surveyor recommended that the prior pegger be given precedence over the subsequent pegger in terms of s 177 of the Act.

Paragraph 1.3 of the first respondent's determination makes it clear that he relied on the findings of the survey report. Paragraph 2.1 of the first respondent's determination states that:

> "There is an over-peg between Z.I.Q (Pvt) Ltd's block of claims named Mutuwi 3 and 4 (registration number 26728-9BM) and C.R.G Quarries (Pvt) Ltd's block of claims named Mutuwi 6 (registration number 26905BM)."

The map that was attached to the surveyor's report to confirm the alleged overlap area of 5,6 hectares is not clearly labelled to show the parties respective locations on the ground. One cannot tell by merely looking at the map which claim belongs to either the applicant or the second respondent. From his ground observations, the surveyor noted that all the beacons belonging to the applicant were intact, while those belonging to the second respondent were missing, it being alleged that they were vandalised.

Further, it will be noted from the table above that in respect of the second respondent's claim 26728BM, its size as at the time of registration was 25 hectares. That had not changed at the time of the survey. In respect of claim 26729BM, the area was 11 hectares at time of registration. At the time of the survey, it had risen to 13 hectares. In respect of the applicant's claim 26905BM, the claim measured 24 hectares at the time of registration. At the time of the survey the size had increased to 26 hectares.

The surveyor's comment that "all three blocks have maintained their areas at registration because the changes are minor considering that they were not registered by GPS" is rather inconclusive. In respect of the second respondent's claim 26729BM, the survey established a variance of 2 hectares from the time of registration and the time of the ground survey. There is a similar variance of 2 hectares in respect of the applicant's claim 26905BM, from the time of registration and the time of the survey. There is no explanation of the variances noted in respect of the two claims. This is where the problem arises. If the second respondent's claim 26729B increased in size by 2 hectares, and the applicant's claim also increased by the same margin, which party overlapped into the other party's claim? In his report the surveyor had observed that all the applicant's beacons were intact while some of the respondent's beacons were missing. So, on what basis did the first respondent make a finding that it was the applicant that encroached into the second respondent's claim? Both the surveyor's report and the first respondent's determination do not say.

In interrogating the first respondent's determination, this court must look at the reasons that he gave for his decision. The first respondent is an administrative authority for purposes of s 2 of the Administrative Justice Act (the AJA).[7] Section 3(1)(a) of the AJA commands an administrative authority to act lawfully, reasonably and in a fair manner.[8] What is implied by the law is that where the administrative authority renders a decision that affects the rights of a person, then it must justify that administrative action. Both the surveyor's report and the first respondent's determination do not clearly show how they both reached a conclusion of encroachment and over pegging, especially in the face of the discrepancies in the hectarage of the respective claims noted in the table above.

Section 177(3) of the Act indeed recognises the rights of a prior pegger. There must be a basis or a mechanism that must trigger the application of that law to a dispute between miners. Based on the papers that were placed before the court, I find no justification for the decision of the first respondent to direct that the applicant's block of claims be adjusted outside of the second respondent's block. The surveyor's report that the first respondent relied on was itself inconclusive. Indeed, in the background to his report, the surveyor acknowledged the absence of the dockets of the mining locations, which went missing when their office transferred from Harare to Marondera.

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[7] [*Chapter 10:28*]
[8] See also section 68(1) of the Constitution

In his opposing affidavit, the first respondent sought to justify his decision by alleging that he used information on the ground co-ordinates submitted by the parties in 2018, pursuant to the request he made in November 2017. However, nowhere in his determination does the first respondent ever refer to the co-ordinates submitted by the parties in 2018. It is not clear what exactly those co-ordinates showed and how they helped the first respondent make his decision. In short, the first respondent failed to give reasons for his determination. He failed to justify his decision save to rely on the inconclusive report of the surveyor. His attempt to justify his decision in his opposing affidavit does not help his case.

The court determines that there is merit in the applicant's alternative ground for review. In view of the glaring shortcomings in the first respondent's determination, it cannot stand. It must be set aside. The issue is what must this court do, having determined that the first respondent's decision was grossly irregular. In para 2 of its draft order, the applicant wanted the court to determine that its title to the disputed area is no longer open to challenge by virtue of s 58 of the Act. That part of the relief is no longer competent by virtue of the conclusion that the court reached on the first ground for review. In para 3 of the draft order, the applicant wants the second respondent ordered to adjust its claims outside of its claims within 30 days of this order. That prayer is incompetent because as already determined by this court, the evidence on the findings of over pegging or encroachment is also inconclusive.

The best approach is perhaps found in the words of McNALLY JA in *Affretair [Pvt] Ltd & Anor* v *M K Airlines [Pvt] Ltd*[9] where he said:

> "The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislator'. Thus it is said that: '[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness."

The powers of this court on review are set out in s 28 of the High Court Act[10]. That section provides that on a review of any proceedings or decision the High Court may, subject to any other law, set aside or correct the proceedings or decision. This is not the kind of dispute where the court can substitute its own decision for that of the first respondent. As the

[9] 1996 [2] ZLR 15 [S] at p 25D-F
[10] [*Chapter 7:06*]

regulating authority, the first respondent must carry out comprehensive investigations and render a decision that accords with the law. The report by the surveyor which the first respondent relied upon was not comprehensive enough to resolve the material issues that arose for determination. It was inconclusive. There is also nothing in the first respondent's decision that suggests to the court that he exercised his own mind on the dispute apart from relying on an inconclusive survey report. After all it is the first respondent's decision that must pass the threshold set by the law for it to be unimpeachable.

Costs

The parties are in court because of the deficiencies in the decision by the first respondent. Neither party deserves to be penalised with an order of costs because they are all affected by a determination that was based on inconclusive findings that were made as result of an inconclusive ground survey. It is befitting that each party is ordered to bear its own costs of suit.

Disposition

Resultantly it is ordered that:

1. The decision of the first respondent dated 19 July 2022 be and is hereby set aside.
2. Each party shall bear its own costs of suit.

Wintertons, legal practitioners for the applicant
Civil Division of the Attorney General's Office, legal practitioners for the first respondent
Chihambakwe, Mutizwa & Partners, legal practitioners for the second respondent