

REPORTABLE (01)

STONEZIM GRANITE PRIVATE LIMITED
v
(1) THE PROVINCIAL MINING DIRECTOR MASHONALAND
EAST (2) YANG SHENG MINING PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & MWAYERA JA
HARARE: 25 SEPTEMBER 2023 & 11 JANUARY 2024

Mrs R Mabwe, with E Mubaiwa and C Mavhondo, for the appellant

Ms N Mpande, for the first respondent

T. Zhuwarara, for the second respondent

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MATHONSI JA: In a classic case of putting the cart ahead of the horse resulting in structural changes far outstripping statutory reform, authorities at the Ministry of Mines and Mining Development introduced the office of Provincial Mining Director to replace that of Mining Commissioner provided for in the Mines and Minerals Act [*Chapter* 21.05] (“the Act”).

The authorities may have done so in anticipation of the coming into effect of new legislation or out of sheer inattention. Whatever the case that precipitous action has meant that the phenomenon of the status of Provincial Mining Directors in the country’s mining regime is one that has preoccupied the courts for a long time with no end in sight. This is perhaps because of the visible lethargy on the part of the makers of the law in bringing the

mining laws in sync with the situation obtaining on the ground. Instead, the authorities have contented themselves with running mining affairs in the country through delegated powers.

Contending that a public functionary operating under the title of Provincial Mining Director had no jurisdiction to deal with a mining dispute placed before it by the parties, the appellant approached the High Court (“the court *a quo*”) with an application for review in terms of Rule 62 of the High Court Rules, 2021 as read with s 27 of the High Court Act [*Chapter 7:06*].

In a judgment pronounced on 9 March 2023, the court *a quo* found no merit in the appellant’s contestations holding instead in the main that a Provincial Mining Director had jurisdiction to deal with a mining dispute and in this case had, in fact, procedurally dealt with the dispute. It promptly dismissed the review application. This appeal is, thus, against that judgment of the court *a quo*.

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THE FACTS

The appellant and the second respondent, who are both in the mining business, locked horns over a dispute concerning mining claims. The first respondent is the Provincial Mining Director for Mashonaland East.

The appellant is a registered holder of a block of twenty dolerite claims named Chidje 5, situated in Uzumba approximately 6.2 km north-east of Nyakasikana, having acquired it in 2016. The appellant is also the registered holder of several other blocks of claims including Chidje 3, 4, 6 and 7. Similarly, the second respondent is an owner of mining claims that are contiguous to the appellant’s Chidje 5 block known as Chipfunde 1 registered as situated in Chipfunde, approximately six kilometres east of Chipfunde School.

In July 2022, the appellant noted that the area description of Chidje 5 was incongruous with the actual area of the block. This prompted the appellant to write a letter to the Ministry of Mines and Mining Development seeking what the appellant termed “the correction of the description”. The contents of the letter dated 13 July 2022, are reproduced below for their relevance in the resolution of this appeal:

“ATT: THE PROVINCIAL MINING DIRECTOR MASHONALAND EAST

REF: CORRECTION OF AREA DESCRIPTION

We have a mining Block that was pegged in 1993 in Uzumba Area Reg Number 23175 BM named Chidye’5’ that we seek to have the area description on the certificate rectified. The description on (the) certificate is different from the ground position and it’s the only one of our eleventh blocks in the area that is wrongly described.

Therefore, we seek your resolve to this issue (sic).”

On 31 August 2022, about a month and a half after the above letter was penned, the appellant noted that the second respondent was encroaching and dumping deposits on its claims. Perturbed by this, the appellant addressed yet another letter to the Ministry of Mines and Mining Development dated 31 August 2023. It reads as follows:

“Att: The Provincial Mining Director Mashonaland West (sic)

Dear Sir/Madam

RE: COMPLAINT AGAINST ILLEGAL MINING ACTIVITIES BY YANGSHEN IN STONEZIM MINING CLAIMS 26607 & 26608

Stonezim Mining Company seeks to register a formal complaint against Yangshen mining company who are carrying mining activities in our claims registration numbers 26606BM and 26608BM in Mutawatawa area which we share boundaries with. As our neighbours we have approached them mid July 2022 to show each other boundaries of our sites both with our pagers on ground. We thought that we had solved the issue since both parties agreed mutually but to our surprise they are still operating in our mining claims and dumping rubbles in these areas which will eventually be our liability when they leave. Furthermore, Yangshen tempered with the stream which is passing through our claim and depositing polluted water into the Chidye river.

We request your intervention to this regard so as to stop these illegal mining activities by Yangshen company as soon as possible before they destroy our mining area and they should remove all rubble which they deposited in our sites.”

A dispute meeting or hearing was in due course convened by the first respondent to resolve the matters concerning Chidje 5 and the complaint of encroachment registered by the letter cited above. The appellant’s general manager, who was representing it, alleged that she objected to the hearing because the only formal complaint raised was against the second respondent. The minutes of the meeting, which the appellant sought to confine to claims 26606BM and 26608BM, however, made no record of this. Instead, they show that the Acting Provincial Mining Director, who chaired the meeting, advised the appellant and the second respondent that a determination would be made after a ground visit.

On 29 September 2022, a field visit to the disputed area was undertaken by the Mashonaland East Mining Provincial Team. The purpose of the visit was to verify the facts on the ground and it yielded findings that were incorporated in the determination of the first respondent.

The first respondent’s determination of the dispute is contained in a letter dated 4 October 2022. He found that the area description of the appellant’s block of claims named Chidje 5 did not match the area shown on the ground. In respect of Chidje 4, a finding was made that there was a discrepancy between the area of registration and the area on the ground. The ground area of Chidje 4 and 5 was said to be forty hectares in extent and yet the area on the registration cards was twenty hectares. Similarly, the second respondent’s block of claims named Chipfunde was found to be over-pegging the appellant’s claims named Chidje 4.

Citing s 177(3) of the Act, the first respondent determined that the second respondent's mining rights in the Chipfunde block of claims were subordinate to the appellant's Chidje 4 block of claims. This was so because the second respondent was a subsequent pegger. Following this finding, the first respondent was of the view that the second respondent's Chipfunde block of claims had to be canceled in terms of s 50 of the Act. This was because they had been pegged on ground that was not open to prospecting in contravention of s 31(1) (b) of the Act. The additional terms of the first respondent's determination were that:

- “1.1 Stonezim Granite P/L should adjust its block of claims named Chidje 4 (Registration Number 23174BM) so as to maintain the 20 hectares which were granted at registration.
- 1.2. Stonezim Granite P/L's block of claims named Chidje 5 (Registration Number 23175BM) should maintain its ground position as at registration. No justification was realised to allow for relocation of the mining title.
- 1.3. Yang Sheng's block of claims named Chipfunde (Registration Number ME1507BM) should maintain its map and ground position.”

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Notably, the determination was undersigned “For Secretary for Mines and Mining Development”. I note here, in passing, that although s 5 of the Act provides that Secretary means “the Secretary of the Ministry for which the Minister is responsible,” references to Secretary shall generally be regarded as references to the Secretary of the Ministry of Mines and Mining Development since the Act is assigned to the Minister of Mines and Mining Development.

PROCEEDINGS BEFORE THE COURT A QUO

The appellant was irked by the first respondent's determination. As already stated, the appellant brought an application for review in the court *a quo* in terms of r 62 of the High Court Rules. Raising three grounds of review, the appellant protested that it was

aggrieved “with the findings and determination of the first respondent” made on 4 October 2022.

The grounds of review were that the first respondent had no jurisdiction over the matter. It was contended that the first respondent passed injunction orders, which could only be competently given by a mining commissioner. The other grounds were that there were gross irregularities in the proceedings and that the first respondent’s decision was grossly unreasonable in its defiance of logic. With that the appellant sought the setting aside of the first respondent’s determination.

The first respondent opposed the application. The thrust of his opposition was that he had jurisdiction since he was appointed by the Permanent Secretary, who assumed the duties of the mining commissioner in terms of s 341 of the Act. He added that he had to determine the issue of the over-peg that was uncovered in the course of the ground visit triggered by the complaint made by the appellant.

Likewise, the second respondent opposed the application. It contended that the Provincial Mining Director for Mashonaland East had jurisdiction to make the decision he or she made in terms of the mining laws. In its view, there was an actual hearing before the first respondent to resolve a dispute between the appellant and the second respondent. The second respondent also denied that there were gross irregularities in the proceedings. The first respondent’s decision was defended as sound and supported by a fact-finding process which was undertaken by the Ministry of Mines and Mining Development.

On 9 June 2023, the court *a quo* rendered its judgment on the matter. It firstly considered whether the determination could not be said to be unreasonable in the *Wednesbury* sense. It found that the first respondent did not determine the issue of the over-pegging of the blocks of his own volition but that the issue necessarily arose from the last sentence in the appellant's letter of 13 July 2022.

On the question of whether or not the first respondent had the jurisdiction to deal with the dispute and to make the determination he did, the court *a quo* reasoned that the matter had to be dealt with holistically. In its view, the mere fact that there is no mention of a Provincial Mining Director in the Act did not necessarily imply that the Act must first include a Provincial Mining Director in its provisions before the acts carried out by the person so described in name can be valid at law. This proposition of the law sprung from the court *a quo*'s own observation that the post of a mining commissioner, as was accepted by the parties before it, no longer existed in the relevant Ministry. Perforce, the court *a quo* held that the functions of the now defunct office of mining commissioner were reposed in the Secretary of Mines in terms of s 341 of the Act, which functions could be delegated. In its own words:

“I am not inclined nor persuaded and with all due respect to what may have been decided in other cases in this court, to hold that the mere fact of the absence of mention of a Provincial Mining Director in the Mines and Minerals Act nullifies anything that the person so described by name of post does; The Provincial Mining Directors are clearly carrying out Mining commissioner duties and where as in this case it is alleged that they are authorized by the Secretary to so perform the duties, then to the extent that their existence is accepted their jurisdiction cannot be defeated by what I may call a mere enquiry to say, ‘why are you not called mining commissioner – if you are not so called, you have no jurisdiction to perform duties and obligations which under the Act are assigned to a Mining Commissioner’ ...”

In making a specific finding that the Secretary's power was delegated the court *a quo* reasoned thus:

“*In casu*, my finding is that the jurisdiction issue is not founded upon the mere want of mention of the first respondent’s work title but is founded upon delegation by the Secretary. The applicant’s answer to the assertion by the first respondent that he is appointed to perform the functions which in the Act are supposed to be performed by a mining commissioner was to aver that the first respondent did not prove the delegation, a point already dealt with. I hold that the first respondent in the circumstances of this case acted lawfully under delegated power given by the Secretary...”

Regarding the allegation that there was a procedural irregularity, the court *a quo* concluded that the cancellation of the second respondent’s claims in Chidje 4 was procedural. This was so because the first respondent did not have to wait for the filing of a complaint first and, undoubtedly, had a duty to ensure the regularity of mining operations and to ensure that the situation of claims complied with the provisions of the Act.

It added that the absence of minutes in the record of proceedings did not vitiate the proceedings as the minutes could be prepared and included as part of the record. Finally, the court *a quo* held that against the background of the ground verification of the claims of the appellant and the second respondent in the presence of their representatives, the object of a notice and a summons to the parties was realised.

The appellant’s review application was thus dismissed with costs for lack of merit.

PROCEEDINGS BEFORE THIS COURT

The appellant was riled by the decision of the court *a quo*. It, thus, launched this appeal on the following grounds:

1. The court *a quo* erred in determining that the first respondent had jurisdiction to adjudicate on the matter before him in the absence of either specific statutory powers

for him to so act arising out of the Mines and Minerals Act [*Chapter 21:05*] or evidence of delegated power in terms of the same Act.

2. The court *a quo* erred in adjudging that it was procedurally regular for the first respondent to:
 - a. Deal with a dispute that had not been referred to him and to so deal with it outside the provisions of the Mines and Minerals Act [*Chapter 21:05*].
 - b. Even entertain that dispute and resolving it without following the rules of natural justice which include affording the appellant an opportunity to be heard
3. The court *a quo* erred in determining that the decision of the first respondent was not in any way grossly unreasonable so as to defy logic notwithstanding;
 - a. That the disputation that he resolved was not a matter that had been referred to him.
 - b. He resolved such a controversy without affording the applicant an opportunity to fully present its story.

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From the grounds of appeal reproduced above, it is clear that the appellant's gripe is with the court *a quo*'s finding that the first respondent had the requisite lawful authority to deal with the mining dispute that was placed before him. Hence, the preeminent issue arising for determination is whether or not the court *a quo* erred by concluding that the first respondent had jurisdiction to deal with the mining dispute in question. The determination of the issues related to in the other grounds of appeal depends on the conclusion made on this issue.

At the hearing of the appeal, Ms *Mabwe*, for the appellant, submitted that the appeal raised three critical issues on which it could be resolved. The first was the absence of

jurisdiction on the part of the first respondent. The second relates to the alleged gross irregularities in the proceedings. The third concerns the alleged gross unreasonableness of the first respondent's decision, which was said to be in defiance of logic.

On the question of jurisdiction, she submitted that there is no authority or official recognised in the Act who is called a Provincial Mining Director. In her view, the party allowed to conduct court and resolve mining disputes is the mining commissioner. For this proposition, she referred the court to s 345 of the Act contending that the first respondent could not exercise power that is not given to him by the Act and as such his decision ought to be set aside.

In respect of the contention that the first respondent enjoyed power delegated to him by the Secretary of Mines, Ms *Mabwe* was of the view that it could not have been the case as the common law position is that parties cannot agree to bestow jurisdiction where there is none. While Ms *Mabwe* submitted that a Mining Commissioner has the authority to subdelegate his power, she took the view that a different position obtains in respect of the power of the Secretary. In her view, the Secretary has no such power of delegation because, so counsel argued, the Secretary assumes delegated authority which cannot be subdelegated.

On the aspect of the alleged gross irregularity, Ms *Mabwe* submitted that the procedure followed by the first respondent was grossly irregular, especially considering that the parties did not refer the matters determined by the first respondent to a hearing. Mr *Mubaiwa* complimented Ms *Mabwe*'s effort by contending that the formal procedure prescribed by the Act could not be departed from other than by a written instrument in terms of s 348 thereof.

Finally, on the issue of the gross unreasonableness of the first respondent's decision, the nub of Ms *Mabwe's* submission was that the determination by the first respondent went beyond the scope of the request that had been referred to him. In her view, the first respondent ought to have declined jurisdiction on the matter.

Per contra, Ms *Mpande*, for the first respondent premised her submissions on the two letters directed to the first respondent by the appellant which, in her view, were an acknowledgement that his office existed. Placing reliance on s 341 of the Act, she submitted that the Secretary is authorised to assume the duties of a Mining Commissioner and to delegate them.

Ms *Mpande* refuted the contention that the Secretary's power is delegated, preferring instead, the view that the Secretary's power exists as of right. To her, the first respondent exercised power that had been properly delegated to him. He exercised that power by conducting a hearing in which the parties were represented and carrying out ground verification in the presence of the parties. It was further contended that, while attending to the ground verification, it was discovered that Chidje 4 was overstretching to 40 hectares instead of 20 hectares. There could, therefore, not have been an irregularity in the first respondent's conduct. Belatedly, it was argued that it would have been unreasonable for the first respondent to brush aside the issue of the overstretching hectarage instead of taking responsibility and rectifying the anomaly. On these grounds, she entreated the court to dismiss the appeal.

Mr *Zhuwarara* for the second respondent, considered the issue for determination as being whether the first respondent exists and can make a decision such as the one in

dispute. Like Ms *Mpande*, he placed weight on the fact that the first respondent's decision was, in the main, in favour of the appellant. To him, the appellant's grievance arose from the fact that the first respondent did not alter the coordinates of Chidje 5.

Mr *Zhuwarara* was of the firm view that the office of the first respondent is aptly recognised in three instances in the Act. The first is s 341(2) of the Act in terms of which the Secretary has the discretion to act as a Mining Commissioner. There was, in counsel's view, no need to resort to the common law as the Act provides for that power. The second is s 343 of the Act in terms of which there is recognition of the fact that there are other officers who were not mining commissioners. Accordingly, Mr *Zhuwarara* rounded up by submitting that this demonstrates the Legislature's intention that in the absence of a Mining Commissioner, the duties could still be performed. He pertinently noted that the determination in question was signed for the Secretary.

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On the procedural aspect of the challenge, it was contended that the *audi alteram partem* rule was satisfied. Attention was drawn to the fact that the letter (report) of 10 October 2022 was clear that a decision was taken following a site visit. Finally, on the reasonableness or otherwise of the decision of the first respondent, it was Mr *Zhuwarara's* position that the mere fact of reliance on the Surveyor's report means that the report was reasonable. Mr *Zhuwarara* concluded by submitting that the first respondent made a recommendation and not a determination.

THE LAW

This appeal pointedly draws attention to the provisions of the Act providing for the resolution of mining disputes. In saying so, I note that there is convergence among the

parties herein that the appeal demands an investigation of the question whether the first respondent's actions following the complaint submitted by the appellant and the subsequent determination were authorised by the Act.

The starting point has to be an examination of the provisions of the Act relied upon by the first respondent to assert authority over the matter. The first respondent stated that he derived his power from the Secretary of Mines, whose power is bestowed by s 341 of the Act. The section reads:

“341 Administration of Ministry

- (1) The Secretary shall be and is hereby vested with authority generally to supervise and regulate the proper and effectual carrying out of this Act by mining commissioners or other officers of the Public Service duly appointed thereto, and to give all such orders, directions or instructions as may be necessary.
- (2) The Secretary may at his discretion assume all or any of the powers, duties and functions by this Act vested in any mining commissioner, and may lawfully perform all such acts and do all such things as a mining commissioner may perform or do, and is further empowered in his discretion to authorize the correction of any error in the administration or in the carrying out of the provisions of this Act, or to perform any other lawful act which may be necessary to give due effect to its provisions.
- (3) The Secretary may exercise such of the powers by this Act vested in the Minister as may be delegated to him by the Minister.”

Reference must also be made to the provisions of paragraphs (c) and (j) of s 343 of the Act, which reads:

“For the purposes of this Act, there shall be—

- (a) – (b) ...
- (c) whenever the exigencies of the mining industry so require, an acting mining commissioner, assistant mining commissioner or such other officer to perform the functions of a mining commissioner; and
- (d) – (i) ...
- (j) such inspectors of mines and other mining officers as may be necessary for the efficient administration of this Act;

who shall respectively perform the functions imposed upon them under this Act or any other enactment.” (*Underlining for emphasis*)

One commences the analysis of the above provisions from the rudimentary principle that words in a statute must be given their grammatical and ordinary meaning unless that would lead to an absurd result. See *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264D-E. By simply giving the words their grammatical and ordinary meaning, the true meaning of s 341(2) on the power of the Secretary in the administration of the Act becomes exceedingly apparent. The Secretary has the power to:

- Assume, at his discretion, all or any of the powers, duties and functions vested in any mining commissioner by the Act;
- Lawfully perform all such acts and do all such things as a mining commissioner may perform or do;
- Authorize, at his discretion, the correction of any error in the administration or in the carrying out of the provisions of the Act; and
- Perform any other lawful act which may be necessary to give due effect to the provisions of the Act.

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Relevant to this appeal is that the Secretary assumes the powers, duties and functions vested by the Act in any mining commissioner by dint of the authority given to him by the Legislature. He does not derive his authority from a mining commissioner. The position was made clear in *Simbi v Mazuwa and Others* 2012 (1) ZLR 280 (H) at 284D, where NDOU J concluded that “s 341 confers on the Secretary both administrative and judicial powers”. See also *Marasha v Secretary for Mines and Mining Development* HH-452-14 at p6.

It is, thus, lawful for the Secretary to perform all such acts and do all such things as a mining commissioner may perform or do. He has the additional power of performing any

other lawful act which may be necessary to give effect to the provisions of the Act. The words “any other” are as wide as they sound - signaling an innumerable number of acts that the Secretary is empowered to perform to administer the Act. I must caution though that the power is not so wide as to give the Secretary a blank cheque to act as he may please. There are always limitations to statutory power and as such “any other” act performed by the Secretary must be lawful and necessary to give effect to the provisions of the Act.

The fact that the Secretary may perform any other lawful act which may be necessary to give effect to the provisions of the Act is significant in this case. To appreciate its full import, the principles of interpretation laid down by the court in *S v Meredith* 1981 ZLR 123 (AD) at 127 are apposite. The court reiterated that “it is trite that words and phrases cannot be construed in *vacuo*; their meaning can be discerned only in the context in which they are used.” Here, the words of INNES CJ in *Director of Education, Transvaal v. McCagie and Others* 1918 AD 616 at 623, are also relevant:

Director of Education, Transvaal v. McCagie and Others 1918 AD 616 at 623, are also relevant:

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“The words ‘other evidence,’ are no doubt, wide, but their interpretation must be affected by what precedes them. General words following upon and connected with specific words are restricted in their operation than if they stood alone. *Noscuntur a sociis*; they are coloured by their context; and their meaning is cut down so as to comprehend only things of the same kind as those designated by the specific words— unless, of course, there is something to show that a wider sense was intended.”

In terms of s 341(2) of the Act, the Secretary has the power to perform any other lawful act which may be necessary to give due effect to its provisions. The *Meredith* case, *supra*, directs that the words “any other lawful act” be imbued with meaning by the context within which they appear. This context includes the same provision on the power of the Secretary to assume all or any of the powers, duties and functions vested in the mining commissioner by the Act. It extends to the power of the Secretary to authorise the correction of any error in the administration of or in the carrying out of the Act. To be able to fully

assume the powers vested in mining commissioners, the Secretary is given the power to perform all such acts and do all such things a mining commissioner may perform or do provided that they are lawful.

In this context, the words “any other lawful act” in s 341(2) of the Act must be read to be in addition to the express provision of the power of the Secretary to perform the statutory and judicial duties vested in mining commissioners. Thus, “any other lawful acts” that the Secretary may perform, as is the case with the duties of mining commissioners, must be performed in furtherance of the provisions of the Act. It, therefore, means that the power vested in the Secretary is in addition to all the powers given to mining commissioners in the Act and it is designed to extend to any act that is lawful and is carried out to give effect to the provisions of the Act. What is important is that the act performed by the Secretary, though not specifically articulated, must give effect to the Act in a similar way that the powers exercised by mining commissioners give effect to the Act.

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The critical question to be answered in this appeal is whether or not the words in s 341(2) of the Act empowering the Secretary to perform “any other lawful act” allow him to delegate the exercise of the powers of mining commissioners that he is entitled to assume. This question arises from the common law principle *delegatus delegare non potest*, which means “a delegated power cannot be delegated”. John Willis, in an article, “Delegatus Non Potest Delegare”, 1943 21-4 *Canadian Bar Review* 257 (1943) at 257 notes:

“The administrative law which has grown up around the Latin maxim *delegatus non potest delegare*, a delegate may not re-delegate, deals with the extent to which an authority may permit another to exercise a discretion entrusted by a statute to itself. The maxim is derived from and is most frequently applied in matters relating to principal and agent but it is not confined thereto; it is basic in administrative law, the law relating to discretions conferred by statute. The maxim does not state a rule of law; it is ‘at most a rule of construction’ and in applying it to statute ‘there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects’.”

The author continued thus:

“As a rule of construction for a section in the statute which confers a discretion on an authority named therein, the maxim applies: to an authority empowered to lay down general rules (legislative power); to an authority empowered to decide a particular issue affecting the rights of an individual, be it a magistrate, a municipal authority, a wartime controller or a minister of the Crown (judicial and *quasi* judicial power); to an authority empowered to determine whether legal proceedings shall or shall not be initiated against an individual; and even to an authority empowered to do an act involving the exercise of practically no discretion, such as a utility company operating under a charter, and a person serving a distress warrant, It applies, in short, to all persons who are empowered by statute to do anything. Its most important application, however, is to authorities which are by statute empowered to exercise discretions affecting the rights and interests of the public.”

Whether or not authority is delegable is usually a question of interpretation of the statute granting the authority. Willis *supra* at p. 259 answers this question:

“When is delegation permissible? The answer to this question depends entirely on the interpretation of the statute which confers the discretion. A discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but, this intention may be negatived by any contrary indications found in the language, scope or object of the statute; to put the matter in another way, the word ‘personally’ is to, be read into the statute after the name of the authority on which the discretion is conferred unless the language, scope or object of the statute shows that the words ‘or any person authorized by it’ are to be read thereinto in its, place. This *prima facie* rule of construction dealing with delegation is derived in part, from the ‘literal’ rule of construction, in part from the political theory known as ‘the rule of law,’ and in part from the presumption that the naming of a person to exercise some discretion indicates that he was deliberately selected because of some aptitude peculiar to himself.”

In this jurisdiction the maxim *delegatus delegare non potest* was accepted as a rule of construction in the case of *S v Gatsi; S v Rufaro Hotel (Pvt) Ltd T/A Rufaro Buses* 1994 (1) ZLR 7 (H) at 26(a judgment of three High Court Judges), in the dissenting judgment per SMITH J. Citing a passage appearing in the case of *Minister of Trade & Industry & Anor v Nieuwoudt & Ors* 1985 (2) SA 1 (C) acceptance is made of the fact that the maxim “may be negative by any contrary indications found in the language, scope or object of the statute”.

Correspondingly, this court, in *Whaley and Others (Law Society of Zimbabwe Intervening) v Cone Textiles (Pvt) Ltd* 1989 (1) ZLR 54 (S) at 69, observed that:

“The maxim *delegatus delegare non potest* is clear and the principles giving rise to it are well established. They have most recently been set out by MCCREATH J in *Aluchem (Pty) Ltd & Anor v Minister of Mineral and Energy Affairs & Ors* 1985 (3) SA 626 (T) at 631. BOTHA JA in *Attorney-General OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 said at 639D:

‘It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers.’...

No one can delegate to another a power greater than he himself has.

To decide whether or not a delegation of authority is appropriate a court must take into account several factors comprising the scope, language and purpose of a statute. In the case of *Aluchem (Pty) Ltd and Another v Minister of Mineral and Energy Affairs and Others* 1985 (3) SA 626 (T), in considering whether the statutory authority was delegable, the court took into account certain factors. At p. 631 of the judgment, it considered that the powers conferred on the public functionary were far-reaching and that the public functionary was already subject to another minister. Thus, the delegation of his powers to an official in a different department was contrary to the provisions of the Act in question.

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Professor Feltoe, in *Administrative Law and Local Government Guide* (2020), discusses the sub-delegation of decision-making power. At 110, he persuasively suggests that:

“Various criteria will be taken into account in deciding whether sub-delegation is permissible. For instance, sub-delegation would not have been envisaged where the Legislature had delegated the power to make a decision requiring special expertise to an administrative official who had that expertise. If the decision that needs to be made is complex and will have far-reaching consequences, it will probably be implied that no sub-delegation was envisaged. On the other hand, if the decision was purely mechanical or was of a petty nature and many such decisions need to be made, it may well have been envisaged that, if the delegate is a high-ranking official like a

Minister, he would be permitted to sub-delegate to civil servants in his Ministry the power to make such decisions.”

In light of the above principles, it remains to be determined whether the authority granted to the Secretary of Mines by s 341(2) of the Act may be delegated. The view of the court, for the reasons that follow, is that it may.

The Secretary for Mines is given the discretion to assume any or all of the functions of a mining commissioner. Section 341 of the Act does not state whether or not this power may be delegated. It would, however, appear that the authority to delegate is necessarily implied in subs (2) thereof. Subsection (2) gives the Secretary the power “*to perform any other lawful act necessary to give effect to the Act*”, which, *ex hypothesi*, includes a lawful act of delegation of the powers conferred upon him.

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I venture further to state that the answer as to whether the Secretary can delegate his functions in terms of s 341(2) of the Act to other officials in the Ministry calls for a purposive interpretation of the provision. It is trite that a purposive approach to interpretation requires the interpreter to identify and give effect to the object and purpose behind the legislation. See *Care International in Zimbabwe v Zimbabwe Revenue Authority and Others* S-76-17 at pp. 12-13; *Nhari v Mugabe and Others* S-151-20 at p. 11, para. 24.

The Act aims to consolidate the laws relating to mines and minerals. It regulates and provides for the prospecting and mining of minerals, the acquisition and registration of mining rights, and the functionaries responsible for administering the Act among other things. One of the functionaries that the Act provides for to ensure that it is properly administered, is the aforesaid Secretary of Mines and Mining Development. In terms of s 341(1) of the Act,

the Secretary is vested with authority generally to supervise and regulate the proper and effectual execution of the Act by mining commissioners and other officers of the Public Service duly appointed thereto.

One can say therefore with profound certainty, that the Act is cognisant of the reality that its operationalisation rests entirely on officeholders designated by it. To ensure its seamless administration, the Act vests supervisory and regulatory power in the Secretary. It seems unlikely that the Act would designate the Secretary to supervise the administration of the Act while at the same time denying him the right to delegate his authority. To hold otherwise would render nugatory to the Secretary's supervisory role.

It flows from the above position that, in addition to his or her supervisory and regulatory authority, the Secretary is also specifically given the power to assume any of the powers, duties and functions that are vested in any mining commissioner by the Act. By doing this, the lawmaker accepted that the Secretary of Mines and Mining Development cannot effectively exercise his or her supervisory and regulatory authority in the execution of the Act unless he is capable of assuming the powers, duties and functions held by other officials such as mining commissioners in the administration of the Act. In other words, the Secretary would be hamstrung if he were to be asked to supervise the carrying out of the Act when he cannot personally administer the Act on his own.

The Act, thus, sets up a system of administration under which the Secretary has the oversight role to ensure that all designated mining commissioners or officers of the Public Service properly and effectively give effect to the Act. This can only be the reason why the

Secretary has the authority to “give all such orders, directions or instructions as may be necessary”. See s 341(1) of the Act.

From the object and purpose of the Act, the entitlement of the Secretary to assume the power, duties and functions of mining commissioners, which is given to him in the administration of the Act, is delegable. The powers exercised by the Secretary in this capacity are not derived from those of mining commissioners. They are directly vested in him by legislative design. He exercises the powers by dint of the Legislature’s bestowal of that authority upon him in his own right. The authority is given to ensure that the Secretary is adequately capacitated to oversee the administration of the Act and give effect to its object and purpose.

In discussing the power of the Secretary to give effect to the Act, there must be an acceptance that the Act provides for and regulates a vast number of mining operations and activities. Efficient mining operations in this country depend on an ordered and integrated legislative and administrative framework. The proper regulation, supervision and coordination of the prospecting and mining of minerals as well as the acquisition and registration of mining rights is impossible without the right laws and the appropriate personnel to execute those laws.

Common sense and good judgment dictate that the Secretary of Mines and Mining Development is incapable of effectively executing and administering the Act alone. He is, thus, given the power to perform any other lawful act necessary for the effectual and proper administration of the Act and this includes delegating his authority to assume the powers, duties and functions of mining commissioners.

To hold that the Secretary is unable to delegate his authority to assume the powers, functions and duties of mining commissioners would be to impermissibly frustrate and erode the object and purpose of the Act. The lawgiver deliberately did not restrict the authority exercised by mining commissioners to mining commissioners. It went further to give that power to the Secretary. If anything, this is an indication that the functions and duties of mining commissioners are capable of being discharged by other functionaries such as the Secretary of Mines.

The language of s 341 of the Act also points to the conclusion that the Secretary may lawfully delegate his authority to assume and exercise the powers, duties and functions vested in mining commissioners by the Act. Firstly, in terms of s 341(2), the Secretary may lawfully perform all such acts and do all such things as a mining commissioner may perform or do. One thing that a mining commissioner may do is set out in s 344 of the Act. Section 344(1) provides that a mining commissioner, acting mining commissioner or assistant mining commissioner, may delegate to any other officer, with the Secretary's consent, any of the powers or duties vested in him by the Act.

Notably, a mining commissioner, acting mining commissioner or assistant mining commissioner does not necessarily delegate to another mining commissioner but to another officer, the powers or duties vested in him. The provisions of s 344(1) lead to the inescapable conclusion that if a mining commissioner, acting mining commissioner or assistant mining commissioner may delegate any of the powers or duties vested in him by the Act, then the Secretary may also do the same in terms of s 341(2). The only difference would be that the Secretary would not need to seek consent since the power to consent to delegation is already vested in him. Thus, put simply, if a mining commissioner can delegate his powers and

duties, so can the Secretary because they are vested with the same powers by the Act. Needless to say, the officer on whom the powers or duties vested by the Act in a mining commissioner may be delegated is not specific but generalised.

Secondly, the language of s 341(2), allows the Secretary to perform any other lawful act which may be necessary to give due effect to its provisions. I glossed over this provision in discussion above noting that the phrase “any other lawful act” is wide enough to encompass an act of delegation. To my mind, there seems to be no restriction in the wording of the Act limiting the application of the words “any other lawful act” to lawful acts of delegation.

Therefore, based on the above, I hold, without hesitation, that the maxim *delegatus delegare non potest* in respect of the power of the Secretary to delegate his authority in the context of this case is negated by the purpose and language of the Act. The only grounds upon which delegation of the authority given the Secretary in s 341(2) of the Act is improper is when the delegated authority is greater than that which is given to the Secretary by the Act.

EXAMINATION

What has to be determined first is whether or not there was scope for the delegation of the power of the Secretary for Mines and Mining Development in this case. In other words, the first port of call is to examine whether the first respondent had jurisdiction to adjudicate on the dispute that was before him. This is an inquiry which relates to the first ground of appeal.

Notably, the preceding discussion on the law provides a normative answer to this inquiry. I have already made a finding that properly interpreted, the Act envisages a situation in which the Secretary may delegate his or her functions to other officers. The first respondent, being an officer in the Ministry of Mines and Mining Development, could exercise the delegated powers. Against this conclusion, what, therefore, remains is to ascertain whether there is evidence of delegation in this matter.

At all material times, the appellant considered the Provincial Mining Director to be the officer responsible for handling the complaints it made within the province of Mashonaland East. It was probably correct in so doing. Conjunctively, the first respondent, in his letter of 4 October 2022, undersigned his determination for the Secretary of Mines and Mining Development.

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The only inference that can be drawn from that fact is that he was acting on behalf of the Secretary. In fact, in his opposing affidavit *a quo*, the first respondent declared that he was acting on the strength of his appointment by the Secretary who assumed the duties of a mining commissioner in terms of s 341 of the Act.

The appellant has demanded more conclusive proof to demonstrate that the first respondent was acting on behalf of the Secretary. It must, however, not be forgotten, that proof in civil proceedings is on a balance of probabilities. This is trite. On the one hand, the court *a quo* was confronted with conduct consistent with the claim that the first respondent was acting on delegated authority as shown in his determination of 4 October 2022.

On the other hand, there was a bare challenge by the appellant that the first respondent did not have proof of delegation. In light of the circumstances of the entire case, it seems more likely than not that the first respondent had delegated authority. There would not have been any reason for the indication that correspondence dated 4 October 2022 was for the Secretary of Mines and Mining Development.

For completeness, we note that in arriving at its conclusion on this issue, the court *a quo* thrust against an impressive line of prior decisions of the same court to the contrary. One such decision is *Gombe Resources (Pvt) Ltd v Provincial Mining Director, Mashonaland Central* HH-405-18.

In this case, the High Court had to determine whether a decision that had been given by a Provincial Mining Director instead of a mining commissioner was *ultra vires* the Act. While the High Court accepted, on the facts that were before it, that the Secretary may have assumed the powers of mining commissioners in his capacity and delegated the authority to a Provincial Mining Director, it discounted this argument on the basis that there was no evidence of this fact. To the High Court, a supporting affidavit from the Secretary may have demonstrated that he had delegated powers to a Provincial Mining Director. Accordingly, the High Court concluded that the Provincial Mining Director lacked jurisdiction to deal with an interdict.

This decision was subsequently followed by another decision of the High Court in *Pahasha Somalia Mining Syndicate v Earthrow Investments (Pvt) Ltd and Others* HH-450-21. A point was raised that the Acting Provincial Mining Director was non-existent at law. On the authority of the case of *Commissioner General – Zimbabwe Revenue Authority v Benchman Investments (Private) Limited* S-88-21, the High Court held that it was

inappropriate to cite a Provincial Mining Director when the Act provided for a mining commissioner.

The above decisions of the High Court were yet again emphatically followed in the recent decision of *Barrington Resources (Pvt) Ltd v Pulserate Investments (Pvt) Ltd and Others* HH-446-23. A preliminary point was raised that the applicant therein was non-suited because it had approached the High Court instead of the approach being made by a mining commissioner. In considering the preliminary point, the High Court canvassed the legal framework under which it may assume jurisdiction over mining disputes as well as the circumstances when a mining commissioner may assume jurisdiction. By excoriating remarks, the High Court held that a Provincial Mining Director cannot preside over a mining commissioner's court and, should he purport to do so, such a decision will be a nullity.

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See also *Masuku and Ndlovu N.O. and Others* HH-299-23 and the well-written judgment in *Sandawana Mines (Pvt) Ltd v Ndlovu N.O. and Anor* HH-537-23 in which the position reached in the *Barrington Resources (Pvt) Ltd* case was reiterated.

The foregoing decisions behoove this Court to determine whether the court *a quo* departed from its previous decisions. Should that be the case, an additional inquiry relates to whether or not the departure was appropriate.

I proceed from the point that there cannot be a real question of whether a Provincial Mining Director may preside over a mining commissioner's court. This is because a Provincial Mining Director, as his name suggests, is not a mining commissioner.

What, however, a Provincial Mining Director can do is exercise the delegated authority of the Secretary to assume the functions, duties and power of a mining commissioner. The critical point that a court must verify whenever it is faced by an officer from the Ministry of Mines and Mining Development who exercised authority vested in a mining commissioner in terms of the Act is whether or not there was a legal basis on which the power and functions were exercised.

The discussion herein above on the law concluded that the Secretary of Mines and Mining Development is lawfully entitled to assume the power and duties of a mining commissioner. When he does so he does not purport to be a mining commissioner but he exercises that power in his own right as the Secretary of Mines and Mining Development. Should he decide to exercise his discretion to delegate the power, functions and duties he assumes, his or her delegate does not exercise the power of a mining commissioner. Instead, the delegate exercises the power that is reposed in the Secretary to assume the duties of a mining commissioner in terms of the Act. The delegate must not be seen as a mining commissioner as he will be operating on the Secretary's delegated authority.

The decision reached by the court *a quo* on this issue appears, on its face, to be at variance with previous decisions of the same court. This impression necessarily flows from the principle of *stare decisis*. One of the rules of the doctrine of *stare decisis* is that a judge deciding on an issue in respect of which another judge of similar jurisdiction has already made a pronouncement must be slow to depart from the prior decision. The principle is reiterated in *Commissioner General – Zimbabwe Revenue Authority v Benchman Investments (Private) Limited* S-88–21 at pp. 11-12, thus:

“The doctrine of precedent is expressed in the maxim *stare decisis et non quieta movere* which, loosely translated, means to stand by the decision and not to disturb

what is settled. Where a Judge enjoying the same level of jurisdiction with one who has made a pronouncement on the law desires to depart from the previous decision, he or she must show that the earlier decision is wrong or that the law has since evolved.

In such a situation, it must be shown that it is unconscionable to abide by the previous decision. In my view it is not enough for the judge to merely declare that he or she does ‘not agree with the conclusion’ previously made. Neither is it sufficient to say that the decisions that have interpreted a statutory provision proceeded from ‘a flawed premise’ without demonstrating how, and indeed why, the interpretation is wrong. The court *a quo* clearly misdirected itself in rejecting the previous decisions of the High Court on the citation of the appellant without justification.”

In this case, the court *a quo* held that Provincial Mining Directors carry out their duties on the authority of the Secretary. In my view, the court *a quo* rightly accepted that there is no need for the office of Provincial Mining Director to be expressly set out in the Act. This is because the provisions of s 343 of the Act are wide enough to encompass unnamed officers such as Provincial Mining Directors.

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The court *a quo* appears to have based its decision on a point that was not actively engaged in some of the cited decisions of the High Court, namely that the Secretary can delegate his authority to any officer, and when he does so, such an officer lawfully exercises the delegated power on behalf of the Secretary. The court *a quo* was within its rights to approach the matter from a perspective different from that taken previously without offending the principles set out in *Commissioner General-Zimbabwe Revenue Authority, supra*.

As I draw to a close on this aspect, I hold that the first respondent had the jurisdiction to deal with the dispute in question as he was operating on delegated authority. The first ground of appeal must accordingly fail.

I pause here to make a critical observation arising from the fact that the Secretary may assume several duties and functions of mining commissioners. Although mining commissioners may deal with disputes principally in terms of the provisions of Part XXV of the Act, that Part is not an exhaustive body of law prescribing what the mining commissioner may or may not do. A reading of the Act shows that the functions of mining commissioners cut across judicial and administrative roles. It, thus, behoves any person approaching a mining commissioner or the Secretary for Mines and Mining Development or his delegate to specify which function vested in the mining commissioner he intends to invoke.

This is important because the second ground of appeal by the appellant attacks the procedural regularity of the proceedings conducted by the first respondent. The exact nature of those proceedings is, however, not identified. It is not for a court to make out the nature of proceedings that were placed before the first respondent and thereafter, to determine the propriety of those proceedings. Statutory remedies must ideally be pursued with clarity. Likewise, appeals or reviews against administrative or *quasi*-judicial conduct must also be pleaded with clarity.

Be that as it may, in this case, the appellant did not precisely state, in both of its letters, whether it wanted the Provincial Mining Director to exercise jurisdiction in terms of s 345 of the Act or in terms of other provisions of the Act. Frankly speaking, this has muddled the case. The appellant ought to have known from the onset the nature of jurisdiction that the officers in the Ministry of Mines and Mining Development would be called upon to exercise. The appellant cannot now be allowed, having triggered the functions of officers in the Ministry, to turn around and disown the consequences of the complaint it placed before the first respondent. Notwithstanding this, it is significant that whichever

remedy the appellant was pursuing when the first respondent was called upon to intervene, the first respondent was lawfully exercising delegated authority.

I turn now to the second ground of appeal. Before the court *a quo*, the mainstay of the appellant's grievance was that the relief that was granted by the first respondent could only be granted by a mining commissioner. The allegation that no formal complaint for the relief which was granted had been sought was, as a matter of fact, made in the alternative.

Going by the appellant's position that it merely placed a complaint before the first respondent, I am unable to conclude that the first respondent dealt with issues that had not been referred to him and outside the provisions of the Act. I agree with the court *a quo* that the determination made necessarily arose from the content of the two letters by the appellant. It would have been the height of turpitude for the first respondent, at the mere say-so of the appellant in a letter, to straight away alter records or to make a correction of the area description and/or resolve the dispute as to encroachment without ascertaining the exact locations of the mines and issuing the corrective orders he made. The first respondent is not an appendage of the appellant's office. Neither is he the secretary to the appellant's Director. He cannot be expected to rubber stamp the appellant's demands without investigating the matter and applying his mind to it.

Regarding the contention that the rules of natural justice were not observed based on the allegation that the appellant was not allowed to be heard, I am unable to agree. The appellant was represented at a hearing chaired by the first respondent. In addition, it was also represented during the site visit carried out in the mining locations. What is essentially important is that the position and circumstances of an interested person must be taken into

account before a decision is made against him or her and he must be accorded an opportunity to make representations. The rule cannot be deployed by one who has presented his or her case badly or one against whom a decision has been made on account of that only. Thus, in the case of *Taylor v Minister of Higher Education and Anor* 1996 (2) ZLR 772 (S) at 777, it was held that:

“Although the right to be heard is not expressly or by necessary implication removed by s 11(2), it is not to be assumed that in every instance the person concerned must be accorded a hearing before any decision is taken to transfer him to another post of the same grade. It would make it quite unworkable for a busy Ministry to have to circulate everyone who is under consideration for a transfer and if opposed, invite the furnishing of reasons why it should not take place. That kind of elaborate procedure would expose the system to substantial delay and strain, and impact upon the efficiency of its operation. Ministries would be inundated with hearings before transfer from all categories of persons, from the most humble to the most senior in rank. The position and circumstances of a person must, therefore, be considered by the head of Ministry before the decision is made to transfer him. In some cases, it will be necessary to hear the person in advance of the decision; in others not.”

In the circumstances of this case, I am satisfied that the steps which the first respondent took, comprising conducting a hearing and the site visit fulfilled the requirement of the right to be heard encompassed in the *audi alteram partem* rule.

Accordingly, the second ground of appeal has no merit and it ought to be dismissed.

Finally, in its third ground of appeal, the appellant contends that the decision of the first respondent was unreasonable because the dispute he resolved was not referred to him and that he resolved a controversy without allowing the applicant to fully present its story.

This ground of appeal may simply be resolved on the basis that its components all dovetail with the second ground of appeal. A conclusion has already been made that the

complaints referred to the first respondent required him, as of necessity, to pronounce on the ground positioning of the claims and to order the cancellation of the second respondent's block of claims named Chipfunde. In addition, a finding has also been made that the appellant was adequately afforded the right to be heard by the first respondent. Against the background of these related findings, the determination by the first respondent cannot be said to be grossly unreasonable.

At any rate, the appellant pleaded unreasonableness in the *Wednesbury* sense. The *Wednesbury* sense of unreasonableness was discussed in the case of *PF-ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (S) at 326, where it was held that:

“By ‘irrationality’ I mean what can by now be succinctly referred to as ‘*Wednesbury* unreasonableness’ (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

Both factors that the appellant has related to in the third ground of appeal do not hinge on the reasonableness or otherwise of the decision. They do not relate to the logic of the first respondent's decision which must have been proven to be so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. On the contrary, they relate to the procedural regularity of the proceedings. By necessary implication, the third ground of appeal is ill-conceived as, in essence, it is not an attack on the reasonableness of the decision.

Thus, the court *a quo* may not be castigated for its conclusion that the strict standard of gross unreasonableness was not met by the appellant. The third ground of appeal must accordingly be dismissed.

DISPOSITION

The appellant has not been able to demonstrate, in the slightest, that the court *a quo* erred in dismissing its application for review. The first respondent was imbued with the jurisdiction to assume the powers and functions he exercised in this case. On the other grounds of appeal, the appellant has not demonstrated that the first respondent failed to conduct himself procedurally or that his determination was grossly unreasonable. The appeal must accordingly fail.

As for the costs of this appeal, there is no reason why they should not follow the result. They are for the account of the appellant.

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In the result, the appeal is dismissed with costs.

BHUNU JA : I agree

MWAYERA JA : I agree

Mhishi Nkomo Legal Practice, appellant's legal practitioners

Civil Division of the Attorney General's Office, 1st respondent's legal practitioners

IEG Musimbe & Partners, 2nd respondent's legal practitioners

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