

CHARLES SIMBI

Versus

SABAWE MAZUWA

And

THE CHIEF MINING COMMISSIONER

And

**OFFICER-IN-CHARGE GWERU RURAL POLICE
STATION N.O.**

And

NKOSILATHI MOYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 23 MARCH 2011 & 1 MARCH 2012

Ms H. M. Moyo for the applicant
I. Murambasvina for 1st respondent

Opposed Application

NDOU J: The applicant seeks an order in the following terms:

“It is ordered that:

1. The memorandum dated 16 March 2012 written by the 3rd respondent to the Mining Commissioner Gweru be and is hereby set aside.
2. The respondents be and are hereby jointly and severally, interdicted from hindering the applicant from carrying out mining operations on Thunderbird 42 or in any way interfering with such operations or encroaching onto the applicant’s said claim.
3. The 1st and 4th respondents be and are hereby directed to return to the applicant within 48 hours of the date of this order, the following property or assets:
 - (a) 28 pan dishes of gold ore and rubble worth US\$4 480;
 - (b) 5 by 30 metres of rope worth US\$50;
 - (c) 2 by 8 pound hammers worth US\$ 20;

- (d) 5 chisels worth US\$30;
- (e) 2 cylindrical hand held driving wheel used to lower equipment into the mine shaft worth US\$40;
- (f) 4 pairs of shoes (tackies) worth US\$20;
- (g) 4 pairs of trousers worth US\$40;
- (h) 3 jackets worth US\$20;
- (i) 4 shirts worth US\$20;
- (j) 10 kg mealie meal worth US\$5;
- (k) 2 litres cooking oil worth US\$2

Failing which the Deputy Sheriff be and is hereby authorized to attach and sell in execution the said respondents' property to the total value of US\$187.

4. The 1st respondent pays costs of this application."

The facts leading to this application are the following.

The applicant is a small scale miner who is the registered owner of Thunderbird 42 mining claim. A boundary dispute has arisen between him and 1st respondent pertaining to a shaft which the 1st respondent claims is situated on his mining claim. The dispute was taken to the local Mining Commissioner who, after taking submissions from both parties and ordering a survey of the claims, ruled in favour of the applicant viz that the disputed shaft was situated on the applicant's claim. Dissatisfied with the Mining Commissioner's determination, the 1st respondent noted an appeal to the Secretary of Mines. The latter after receiving the appeal wrote a memorandum instructing the parties to stop mining operations pending the determination of the said appeal. In executing the said instructions, the 1st, 3rd and 4th respondents removed the items listed in paragraph 3 of the above-mentioned draft order which belong to the applicant from the mining site. They also chased away the applicant's workers. The applicant is currently not operating as a result. It is the applicant's contention that there is no valid appeal which is pending before the Secretary of Mines and further that even if there was such a valid appeal pending (which is denied by the applicant), the 2nd respondent does not have authority to stop mining operations pending the determination of the appeal. The dispute between the applicant and the 1st respondent was dealt with by the Gweru Mining Commissioner in accordance with the provisions of Part XXV of the Mines and Minerals Act [Chapter 21:05] ("the Act"). Section 346 of the Act gives the Mining Commissioner judicial powers in the resolution of disputes. Section 346 provides:

"Judicial Powers of Mining Commissioners

- (1) A Mining Commissioner may hold a court in any part of the mining district to which he is appointed or at his discretion in such place outside the said mining district as

- may be convenient to the parties interested, and may adjourn such court from time to time and from place to place as occasion may require.
- (2) A Mining Commissioner shall hear and determine in the simplest, speediest and cheapest manner possible, all actions, suits, claims, demands, disputes and questions arising within his jurisdiction as set forth in section three hundred and forty-five and make such orders as to costs as he may deem just.
- (3) For the purpose of such hearing a Mining Commissioner shall examine witnesses on oath, which oath he is hereby empowered to administer, take down the evidence in writing to be signed by the person giving the same, and do all things which he may deem necessary for a proper decision ...”

Further section 348 provides:-

“348. Summary hearing of complaints

Notwithstanding requirements of section three hundred and forty-five and three hundred and forty-six, the Mining Commissioner may, if the parties concerned consent thereto in writing and are both present at the hearing, hear and determine any such complaint as above mentioned, summarily, and without any formal proceedings taken before him.

A minute of the decision shall be made by him in a register of complaints in which shall be entered every complaint laid before him, together with particulars thereof.”

Section 352 is also relevant to the facts of this matter. Section 352 provides:

“352. Mining Commissioner may direct surveys for purposes of trial of case

If before or during the hearing of any complaint it appears to the Mining Commissioner that it will be necessary for a survey to be made of any land or mining location in dispute, such Mining Commissioner may order either party to cause such survey and a plan thereof to be made, and the costs thereof shall be in the discretion of the Mining Commissioner.”

After such survey, the Mining Commissioner’s powers, when encroachment is alleged, are prescribed in section 353.

In section 353 it is provided that magistrates court procedure and fees in civil cases should, so far as is practicable, be observed in the Mining Commissioner’s court.

Section 361 provides:

“361. Appeal from Mining Commissioner’s Court to High Court

Any party who is aggrieved by any decision of a Mining Commissioner’s Court under this Act may appeal against such decision to the High Court, and that court may make such order as it deems fit on such appeal.”

Having cited the provisions of the Act, I propose to determine the issue whether the 1st respondent has lawfully appealed the decision of the Gweru Mining Commissioner. As alluded to above, the 1st respondent has appealed to the permanent Secretary of Mines (“the Secretary”). It is contended by the 1st respondent that such appeal to the Secretary is proper because of the provisions of section 341 of the Act. Section 341 provides:

“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 act 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 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 the Act vested in the Minister as may be delegated to him by the Minister. “

It seems to me that section 341 confers on the Secretary both administrative and judicial powers. The judicial powers given to the Secretary are limited to those enjoyed by the Mining Commissioner. This is so because of the phrase – “at his discretion assume all or any of the powers, duties and functions by this Act vested in a Mining Commissioner ...” The Mining Commissioner’s Court is a court of first instance with more or less similar powers to those of a magistrates’ court in civil cases. The Secretary may assume these powers of a court of first instance. Appellate powers are conferred on the High Court as enshrined in section 361, supra. The Secretary is not empowered to hear appeals from a Mining Commissioner’s Court. There is

no provision for an appeal to the Secretary. These wide powers of appeal are given to the High Court. The 1st respondent, in his wisdom, chose not to appeal to the High Court pursuant to the provisions of section 361. He instead, complained to the Secretary and such an administrative complaint is not an appeal. The issue was raised early in these proceedings and one would have expected 1st respondent to have endeavoured to regularize his appeal. He has been represented by a legal practitioner all along and I do not understand why he sought to equate a complaint to the Secretary to a proper and formal appeal to the High Court in terms of section 361. There is no appeal to the High Court so question of stay of execution of the decision of the Gweru Mining Commissioner (pending appeal) does not arise at all. In any event the Act does not give the Secretary the authority to suspend the operation of a judgment of the Mining Commissioner pending the determination of an appeal. It is trite that the accepted common law rule of practice whereby the execution of a judgment is automatically suspended by the noting of an appeal does not apply to any court, tribunal or authority other than a superior court of inherent jurisdiction. This rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. Where the enactment does not provide for suspension pending appeal, an aggrieved person is not left without remedy he may approach the High Court to move an appropriate stay or interdict – *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H).

The directive to suspend the mining operations pending appeal has no legal basis as there is not valid appeal noted against the judgment of the Gweru Mining Commissioner's court. As far as the property taken is concerned there is a dispute of fact as to property taken. The dispute cannot be resolved on the papers even if I adopt a robust approach. The 1st respondent admits taking the rope and the pipe only. I am prepared to make an order in respect of these items only.

Accordingly, it is ordered that:

1. The memorandum dated 16 March 2010 written by the 3rd respondent to the Gweru Mining Commissioner be and is hereby set aside.
2. There is no appeal pending against the decision of the Gweru Mining Commissioner arising from the facts of this case.
3. The respondents be and are hereby jointly and severally interdicted from carrying out mining operations on Thunderbird 42 or in any way interfering with such operation except authorized to do so by the law.
4. The respondents be and are hereby ordered to return the rope and pipe to the applicant within 48 hours of the date of this order.

5. 1st respondent pays costs of this application on the ordinary scale.

Jumo, Mashoko & Partners, applicant's legal practitioners

I. Murambasvina c/o Coghlan & Welsh 1st respondents' legal practitioners