

LAMECK MUBAIWA
and
PROGRESS MINING SYNDICATE
versus
THE MINING COMMISSIONER
and
THE MINISTER OF MINES AND MINING DEVELOPMENT
and
GARATIA NJANJI
and
ESTATE LATE KENNIAS NJANJI

THE HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 27 November 2013

Urgent Chamber Application

T. Chakabva, for the applicants
Ms K. Warinda, for the 1st and 2nd respondents
B. Chidenga, for the 3rd and 4th respondents

MATHONSI J: This litigation and indeed the dispute between the parties could have been avoided. It is the signal failure of the office of the Mining Commissioner to manage a simple mining issue which has brought about the simmering conflict between neighbours, a conflict which could have led to dire consequences, but for, the commendable self-restraint of the parties who have continued to submit themselves to due process only to be let down by the Mining Commissioner's Office.

Andy Stanley put it very well when he said:

“Character involves doing what's right because it's the right thing to do totally regardless of the cost. And it is those last few words that divide the men and women of character from those with good but negotiable intentions.”

The first respondent may mean well and may cherish a desire to resolve the impasse between the parties, but it is how he has gone about doing that which is wrong and has led the parties to this court. How else can one explain conflicting decisions emanating from one office, which have set these law abiding citizens on a collision course? There has been a clear lack of decisiveness.

The applicants have approached this court on an urgent basis seeking a provisional order, the interim relief of which is:

“INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is (sic) granted the following relief:

1. The third and fourth respondents, their family, agents or anybody acting for or on behalf of third and fourth respondents, be and are hereby ordered to return, forthwith, all gold ore removed from the applicant’s claim, Apollo 5, and desist from removing any gold ore extracted from the Apollo 5 by the applicants.
2. The third and fourth respondents, their family, agents or anybody acting for or on behalf of third respondent be and are hereby ordered not to enter the applicant’s claim, Apollo 5, for purposes of mining and removing mineral ore or any other purpose,”

The first applicant was allocated plot 129 of Simoona Farm in Bindura District of Mashonaland Central Province, measuring 4 hectares by the Ministry of Lands and Rural Resettlement and officially granted a right of occupation on 28 March 2006. He says he immediately took occupation only to discover mineral deposits on that piece of land. The same gold deposits were claimed by the late Kennias Njanji resulting in a mining dispute which was referred to the first respondent, the Mining Commissioner, whose duty it is to adjudicate over such disputes.

Following a visit to the site by the first respondent and his assistant a decision was taken by the former to allow the family of the late Kennias Njanji to operate on the claims which were located on the first applicant’s plot, a decision informed by a realisation that the deceased had registered the mining claims on 23 June 2006, almost three months after the first applicant had been granted a right of occupation. Not happy with that decision, the applicants appealed to the second respondent, the Minister of Mines.

The Minister must have overturned the decision of the first respondent and his decision was communicated through a letter written by the first respondent dated 1 March 2013, later corrected to read;

“Ref: Mining Dispute: K Njanji vs. L. Mubaiwa

The above issue refers.

Please be advised the Minister of Mines and Mining Development has upheld the appeal made by Mr Lameck Mubaiwa against the Mining Commissioner’s decision on his dispute with the Njanji family who were mining within his homestead.

The following should be enforced:

1. Mr Njanji should discontinue mining activities at the disputed location near Mr Mubaiwa' houses and confine his mining operations within Apollo 63 claim boundaries as determined by the registration co-ordinates.
2. Mr Mubaiwa should be allowed to register an appropriate gold block within his plot to ensure legal mining of the pit near his property (Mr Mubaiwa has since been issued with a certificate of registration of his claim registration number 43958 Apollo 5 registered under Progress Mining Syndicate).
3. In addition Mr Mubaiwa should observe Mining Safety Regulations when citing (sic) his new residence relative to the mining operations.

Could you please allow Progress Mining Syndicate to start mining operations within their designated area. Should you have any queries or clarification please do not hesitate to contact the Mining Commissioner. By copy of this letter both parties are hereby informed.

N. Chieza
ACTING MINING COMMISSIONER

c.c. Mr L. Mubaiwa

c.c. Njanji Family.”

It is not clear in terms of what law the matter was referred to the Minister on appeal because s 361 of the Mines and Minerals Act [*Cap 21:05*] provides;

“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.”

Domestically the matter should have ended with the decision of the Mining Commissioner and taken out to the High Court by an aggrieved party. However the Mining Commissioner notified the parties that his earlier decision had been overturned and mining claims registered in favour of the applicants. They commenced operations in pursuance thereof. If anyone was dissatisfied with the decision of the Minister, they should have taken the matter up with a court or tribunal of competent jurisdiction, challenging the propriety of that decision.

This did not happen. Instead the Acting Mining Commissioner wrote another letter dated 13 November 2013 to the Officer in Charge, Minerals Unit, Bindura in the following:

“DISPUTE: K. NJANJI VS PROGRESS MINING SYNDICATE – SHAMVA

The above refers.

Please be advised that the decision by the Minister of Mines and Mining Development on the appeal made by Progress Mining Syndicate is null and void due to procedural irregularities in resolving the issue. We revert back to the Mining Commissioner’s decision of 24th May 2012 (refer to the attached report) which was in favour of K. Njanji. Progress Mining Syndicate had been stopped from operating in accordance with the Mining Commissioner’s decision.

E. KAHONDE
ACTING MINING COMMISSIONER”

Therein lies the good but negotiable intentions which have now reduced the whole exercise to a circus. When regulating mining disputes the Mining Commissioner exercises quasi-judicial authority and is bound, not only by the basic tenets of adjudication, but also by the rules of natural justice. He is also subject to the *functus officio* concept. The Mining Commissioner has no power to declare a decision taken on appeal, null and void. That decision exists and can only be overturned by a court of competent jurisdiction.

In declaring the decision of the Minister “null and void” the Acting Mining Commissioner was engaging in mischief for he possessed no jurisdiction to do so, especially as it was communicated by him. The applicants have now taken that decision on review in this court in HC 9895/13 which matter is yet to be determined. But taking advantage of their new found glory, the Njanji family has moved in swiftly to divest the applicants of their gold ore and forcibly taken over the mining claim.

This has prompted the applicants to come to this court on an urgent basis aforesaid, seeking interim relief. In my view, there is merit in the application for review which had been filed and without pre-judging the matter, I can only say that they deserve to be heard. Until such time that that has happened, justice demands that the *status quo ante* be maintained. I am therefore satisfied that a good case has been made for the relief sought.

Mr *Chidenga*, for the third and fourth respondents partially conceded that there is need for an interdict to be issued to stop further mining activities by the parties, including the applicants, until the respective rights to the parties have been determined. The difficulty with that argument is, as stated by Mr *Chakabva*, that there is no counter application for such relief, the third and fourth respondents simply did not file anything even though they were served with the application, almost a week ago.

Accordingly, the provisional order is hereby granted in terms of the draft order as amended.

Kwenda and Associates, applicant's legal practitioners

Attorney General's Office, respondent's legal practitioners