(1) SABAWE MAZUVA **HC 1310/10**

Versus

CHARLES SIMBI

And

MINING COMMISSIONER – GWERU N.O.

And

OFFICER COMMANDING POLICE – MIDLANDS PROVINCE N.O.

And

MINISTER OF MINES AND MINING DEVELOPMENT N.O.

(2) CHARLES SIMBI **HC 1349/10**

Versus

SABAWE MAZUVA

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 12 & 20 OCTOBER 2011

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

Opposed Applications

MATHONSI J: These two applications are inter related. HC 1349/10 is an application for rescission of judgment made by Charles Simbi (herein after referred to as "the first respondent") who is the first respondent in HC 1310/10, an application made by Sabawe Mazuwa (hereinafter referred to as "the applicant"), who is the respondent in the former case.

On 1 July 2010 the applicant obtained a default judgment in HC 905/10 which is to the following effect:

"It is ordered that:

1. The 1st respondent be and is hereby ordered to cease the operations at Thunderbird 42 and 21 mine forthwith, pending the hearing of applicant's appeal.
2. The 2nd respondent be and is hereby barred from dealing with the dispute whatsoever other than for purposes of complying with the orders of this honourable court or his superiors.
3. The 1st respondent only be and is hereby ordered to pay the costs of suit."

In order to obtain that order the applicant had made a court application in which he argued that there was a boundary dispute between himself and the first respondent which had been referred to the second respondent for adjudication. He had gone on to argue that after the second respondent had ruled in favour of the first respondent on the ownership of the disputed mine shaft, he had lodged an appeal to the Secretary of Mines against the decision of the second respondent made on 4 March 2010.

As that appeal was still pending before the Secretary of Mines, he sought an order stopping mining operations at the disputed mining claim and barring the Mining Commissioner for Gweru from dealing with the dispute. As the application was unopposed, I granted the order on 1 July 2010 aforesaid. It is that order which the first respondent wishes to have rescinded in HC 1349/10.

With the consent of the applicant and the first respondent on 28 September 2011 I ordered the consolidation of the two matters and directed that they be heard at the same time on 11 October 2011. This judgment is in respect of the two applications.

In seeking rescission of judgment the first respondent stated that when the application in HC 905/10 was served upon his wife he had been out at his mining claim where he spends his time during the week. Upon his return home his wife gave him the papers part of which had been torn by his child. He had a "cursory" look at them and assumed they were the same documents he had received earlier in respect of another application that had been filed in this court because they had a striking resemblance of the earlier court papers especially as there was no case number.

The first respondent stated that he had ignored the application and it was not until he received the court order I have referred to above, that he realized his error and rushed to his lawyers with instructions to file an application for rescission of judgment.

The first respondent went on to say that the purported appeal against the Mining Commissioner's decision of 4 March 2010 was invalid given that it was noted in the wrong forum, the Secretary of Mines and Mining Development, instead of being noted in this court as

provided for in section 361 of the Mines and Minerals Act [Chapter 21:05]. If it could be taken as a valid appeal it would still not automatically suspend the decision of the Mining Commissioner.

Mrs *Moyo* for the first respondent argued that the default judgment of 1 July 2010 cannot stand because there is, in essence, no appeal pending and that the filing of HC 1310/10 by the applicant was a clear indication that the purported appeal had been abandoned. Indeed in his heads of argument, Mr *Murambasvina* for the applicant abandoned the appeal completely saying in paragraph 6:

> "this application will not address anymore the propriety or otherwise of applicant's appeal to the Permanent Secretary of 4th respondent and the desirability that mining operations should stop pending the resolution of the dispute."

In his address to the court Mr *Murambasvina* submitted that the determination of HC 1310/10 should resolve the rights of the parties and that the order of 1 July 2010 in HC 905/10 would be overtaken by events.

In deciding whether an applicant for rescission of judgment has discharged the onus of proving "good and sufficient" cause as provided for in Rule 63(2) of the High Court of Zimbabwe Rules 1971, the court has regard to the reasonableness of the applicant's explanation for the default; the *bona fides* of the application to rescind the judgment; and the *bona fides* of the defence on the merits of the case which carries some prospects of success. *Barclays Bank of Zimbabwe Ltd* v *C C International (Pvt) Ltd* S-16-86*; Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (5) at 211C-F.

As stated in *Stockill* v *Griffiths* 1992 (1) ZLR 172 (S) at 173F;

> "These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

In my view the concession made by *Mr Murambasvina* on the fate of the purported appeal to the Secretary of Mines was well made. Section 361 of the Act 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."

In casu, no appeal was made to this court. To the extent that the appeal was purportedly made to the Secretary of Mines, then it is a monumental nullity. There is no appeal at all. The order sought to be rescinded was made pending a non-existent appeal.

While the explanation for the first respondent's failure to respond to the application in HC 905/10 is what MAKARAU JP (as she then was) referred to in *Mwanyisa* v *Jumbo & Ors* HH-3-10 as "a dog's breakfast", if the factors to be taken into account in deciding a rescission of judgment application as set out in *Stockil*l v *Griffiths (supra*) are taken in conjunction with one another, the applicant has discharged the onus of proving "good and sufficient cause" for the rescission of the judgment entered on 1 July 2010. It simply cannot stand.

In HC 1310/10 the applicant made a climb down on the order that he sought in this court by amending the draft order remaining only with a prayer for a declaratory order that he is the registered owner of a mining claim known as Thunderbird 21 in which the disputed mining shaft falls and that his claim has priority over the claims of the first respondent which were subsequently registered after his.

This is the same dispute that was placed before the second respondent. In order to adjudicate on the dispute, the second respondent commissioned a survey by the Regional Mining Engineer one C. C. Goremusandu. In pursuance thereof the erstwhile Regional Mining Engineer compiled a report dated 15 February 2010 which reads in part as follows:

> "RE: PEGGING DISPUTE BETWEEN S. MAZUWA VS C. SIMBI
>
> INTRODUCTION
>
> The survey of this dispute was requested by the Mining Commissioner see dated letter 09 February 2010 (i.e. pegging dispute 15/2010)
>
> The actual surveying using the G.P.S was done by the Regional Mine Surveyor Mr Goremusandu in the presence of the two miners Mr C Simbi for Thunderbird 42, Mr Mazuwa and Gambe for Thunderbird 45 and 21. The CID Minerals, Shurugwi were unable to be present because of other work. The results were plotted by the (RMS) Mr Goremusandu. The plan so produced is divided into three sections as figure 1 in the survey report sheet, figure 2 as the claims report sheet and 3a and 3b are the registration sketches.
>
> SURVEY REPORT SHEET (Fig 1)
>
> The plan was prepared using the GPS co-ordinates taken by the RMS on the 15 February 2010. The plan was drawn to 1:1000, the plotted two mines are shown as Thunderbird 21 and 45 (Mr S. Mazuwa) in bold lines and Thunderbird 42 (Mr C. Simbi) in broken lines.

CLAIMS REPORT SHEET (Fig 2)

This is a redirection of a survey report sheet (fig 2). It is drawn to a scale of 1:2 5000m. The purpose of this plan is to be able to compare these plottings with the registration sketch (fig 3a and 3b). From this we determined the position and distance from the reference point as described on the registration certificate. In this case the reference point in homestead P2340 on Ballock Farm hence Thunderbird 45 is approximately 1,7km south west, Thunderbird 42 is 1km south west and Thunderbird 21 is 0,95km south west of homestead.

COMMENT

1. For Thunderbird 21 and 45 (S. Mazuwa) the positions on ground are approximately the same on the registration notice to the GPS coordinates taken by the RMS. Also in Thunderbird 21 the reef have been mined towards Thunderbird 42 also note that the disputed shaft is on the common boundary.
2. The calculated area on the registration sketch equals to 21 hectares and the area calculated by the RMS equals 21,35 hectares. The difference in area is equal to the common unpegged area that is, the area between Thunderbird 21 and Thunderbird 42 see fig 3b.
3. For Thunderbird 42 C. Simbi the position differs from Approved Prospector Mr Gambe registration sketch (Mining Commissioner's plan) and Mr Gambe GPS co-ordinates submitted. Thus it is likely S. Mazuwa shifted Thunderbird 21 boundaries to include the unpegged area.
4. On figure 1 the position marked X is the disputed shaft which is in Thunderbird 42 (Mr Simbi).

C C Goremusandu
For: REGIONAL MINING ENGINEER"
(The underlining is mine)

That the second respondent acted on the strength of this survey report in arriving at a decision can be found in his letter dated 15 March 2010 addressed to the Secretary for Mines and Mining Development which reads in part as follows:

> "The writer would like to point out that the survey was carried out by the Regional Mine Surveyor – Gweru, who produced a report and a map plan of the disputed area for this office to make a determination of dispute. <u>The decision was made by this office based on that report and survey."</u>

The second respondent determined that "the disputed shaft falls within Thunderbird 42" thereby liberating the first respondent to continue mining operations at the shaft. In doing so it is not clear whether he considered the argument made by the applicant that the first respondent's Thunderbird 42 was registered much later than his Thunderbird 21 in 2005 when his was registered in 2001. The applicant's argument is that the first respondent's claim over-pegged extant claims belonging to himself.

Whichever way, these are the issues that have to be determined. Unfortunately, the second respondent relied upon a survey report which was later disowned by its author. In an affidavit deposed to much later on 12 May 2010 Christopher Goremusandu, the Regional Mining Surveyor for Gweru Mining District, recanted the survey report relied upon by the second respondent. He said:

> "I submit that indeed I made an error particularly on page 3 of my report paragraph 3. The correct position and what comment number 3 should is as (*sic*)
>
> > 'For Thunderbird 42 C Simbi the position differs from the Approved Prospector Mr Gambe – registration sketch (Mining Commissioner's plan) and Mr Gambe GPS coordinates submitted. <u>Thus it is likely Mr C Simbi shifted Thunderbird 42 boundaries to include the unpegged area.'</u>

The Regional Mining Surveyor therefore contradicts himself sharply and yet the decision of the second respondent was premised upon his findings. Mrs *Moyo* for the first respondent submitted that the affidavit was elicited after the second respondent had made a decision and therefore it must be ignored.

Regrettably I am unable to do that. The affidavit has come to my attention and it shows that the Surveyor is one person that cannot be relied upon. The second respondent determined the matter on the basis of a survey report which is demonstrably unreliable. It is a principle of our law that an interested party should be allowed to approach the court at any time to seek a declaratory order that an act done on the strength unreliable advice is a nullity. The courts should be very slow to turn away a party seeking a declaration of its rights or status.

In *BMG Mining (Pvt) Ltd* v *Mining Commissioner, Byo Mining District & Ors* HB-5-11 at p4 I cited with approval the pronouncement made by ROBINSON J in *Musara* v *Zinatha* 1992(1) ZLR 9 (H) at 13F where the learned judge said:

> "I consider that the same approach should be adopted by the court in a civil case where, on the papers before it – the more so where those papers seek a declaratory order – an act of glaring invalidity is, as in this matter, starring the court straight in the face. For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void *ab initio* on some technical ground would, I agree, be to ignore the court's fundamental duty to see that justice is done which, after all is the duty which the layman expects the courts to discharge."

That there is a boundary dispute between the parties in respect of their adjoining mining claims is beyond doubt. That the said dispute has not been addressed satisfactorily is pretty obvious from the prevarications of the Surveyor whose findings were relied upon by the second respondent. I cannot ignore such a glaring injustice.

There is a need to remit the matter for a proper survey to be carried out by an untainted person to enable the second respondent to resolve the dispute between the parties.

Regarding costs, this is one of those rare instances where the success of the parties concerned is evenly balanced. The applicant has not been significantly successful as to attract an award of costs in his favour. The same goes for the first respondent. For that reason the loss should lie where it falls.

In the result I make the following order that:

1. The default judgment entered on 1 July 2010 be and is hereby set aside.
2. The first respondent should file his opposing papers in HC 905/10 within 10 days of the date of this order.
3. The decision of the second respondent contained in his letter of 4 March 2010 to the effect that the disputed mining shaft falls within Thunderbird 42 is hereby set aside.
4. The dispute over ownership of the mining shaft is remitted to the second respondent for adjudication and the second respondent should assign another Mining Surveyor, other than Christopher Goremusandu, to conduct a fresh survey and compile the requisite report to enable a fair determination of the matter.
5. Each party should bear its own costs.

Messrs I. Murambasvina, applicant's legal practitioners
Jumo Mashoko & Partners c/o Mabhikwa, Hikwa & Nyathi 1st & 2nd respondents' legal practitioners