WHATSMAC MINING SYNDICATE
versus
BIZOKA SANYAMAHWE
and
SECRETARY FOR MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 March, 2021 & 21 July, 2021

Opposed application

Adv. E. Donzvambeva, for the applicant
T. Tabana, for the respondent
D. Machingauta, for the 2nd respondent

MANGOTA J: I heard this matter on 19 March 2021. I delivered an *ex tempore* judgment in which I dismissed the same with costs.

On 15 April 2021 the High Court Registrar wrote to me. He advised that my decision had been appealed. He requested reasons for the same. My reasons are these:

the applicant, a mining syndicate, had a mine dispute with the first respondent who is a miner. The dispute centred on who, between the two of them, was/is the lawful owner of claims M5083 BM and M5084 BM both of which fall under Makoni Rural District Council which is in the Province of Manicaland.

The applicant's assertion was that the two claims are registered in its name. The first respondent's contention was to the contrary. He claimed ownership of the two mining locations.

The dispute of the parties compelled the applicant to approach and request the police who are at Inyati Police Camp to assist in the resolution of the same. When these failed, it approached and requested the Provincial Mining Director for Manicaland Province to intervene.

The Provincial Mining Director ("The director") heard the parties' case and resolved the dispute on 6 June 2019. He ruled in favour of the first respondent. His decision did not go down well with the applicant.

The decision of the director forms the basis of the application which the applicant placed before me. The application is one for review of the decision of the director.

The issue which exercised my mind when I decided as I did was who, between the Secretary for Mines and Mining development ("the Secretary"), on the one hand, and the director, on the other, should have been cited as a party to the review proceedings.

The issue became live when the first respondent raised the *in limine* matter, among others, which was to the effect that the director, and not the secretary, should have been cited as the respondent to the application for review. He alleged that the person who made the decision which is being reviewed should have been cited. He insisted that the non-citation of the director was fatal to the application. He moved that the application be dismissed with punitive costs.

The applicant's statement was to the contrary. It asserted that the secretary whom it cited in the application was the correct respondent. It alleged that the secretary made the decision which it was reviewing. It moved me to dismiss the first respondent's preliminary matter, the one upon which my decision is premised included.

Because the branch of the law under which I had to consider the application was clearly spelt out from the parties' pleadings, I had no difficulty in reverting to the applicable law. I observed that the application fell under Order 33 of the High Court Rules, 1971. I read that order and observed, further, that r 256 offers a proper guide as to the party/parties whom the applicant in an application for review should cite.

The rule reads:

> "... any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board, or officer performing judicial, quasi-judicial or administrative functions, shall be way of a court application directed and delivered by the party seeking to review such decision or proceedings to the *magistrate, presiding officer* or *chairman of the court,* tribunal or board or to the officer, as the case may be, and to all other parties affected." (emphasis added)

The contents of the rule direct that the person who conducted the proceedings which relate to the dispute of the parties and who made the decision which one of the parties is reviewing should be cited as the respondent in an application for review. That the stated matter constitutes the fact of the case is evident from a reading of r 260 of the rules of court. The rule enjoins the clerk of the inferior court whose proceedings are being brought on review to lodge with the registrar of this court the original record and two typed copies which are certified as true and correct copies of the original within twelve days of the date of service of the application for review on the person who conducted the proceedings and made a decision upon the same.

The fact that it is only the proceedings and/or the decision which is/are reviewable says it all. Decisions, or proceedings, it is evident, are made or conducted by a natural person or a group of persons who are constituted as such for the purpose of hearing and determining the dispute. It is the manner that he does it, or they do it, and the decision which he, or they, reach after having heard the parties that is reviewable.

The record which is before me shows that the director, and not the secretary, heard the parties. It shows, further, that the director, and not the secretary, made the decision which the applicant is reviewing. Reference is made in the mentioned regard to annexure G.

The annexure is the letter which the applicant wrote to the director on 2 April, 2019. It appears at p 34 of the record. It draws the attention of the director to what the applicant describes as:

(a) unlawful mining activities at its registered mining locations - and

(b) unlawful removal of beacons from its mining locations.

It sought from the Ministry, through the director, written permission to put in place all its permanent beacons which it alleged had been removed.

It is at the direction of the director that officials of the Ministry of Mines and Mining Development accompanied the applicant and the first respondent to the mining locations for what may be described as an inspection –*in-loco*. The visit took place on 22 May, 2019 as a result of which the applicant wrote its second letter, Annexure H, to the director.

The annexure appears at p 35 of the record. It is dated 3 June, 2019. It raises concern as to the conduct of the first respondent who, according to the same, continued mining at the disputed claims and was putting permanent structures on the same. The last two paragraphs of the letter are pertinent. They show, in clear terms, that the director was the decision-maker in the resolution of the dispute of the applicant and the first respondent.

Paragraph 2 of the letter reads in part as follows:

> "….our main worry is if there is no verdict that has been passed to date, why the other party is confident in putting up such permanent structures?"

Paragraph 5 reads:

> "We also would like to appeal to your humble office that you give us this clarification and also a follow up on the previous letter attached that we wrote and we did not get any response from your office." (emphasis added)

The applicant cannot pretend that the secretary was seized with its matter when it never dealt with him. It wrote two letters, Annexures G and H, to the director. Both annexures bear the date-stamp of the director and not that of the secretary. The contents of the annexures sought the director's resolution of its dispute with the first respondent.

Annexure I is the director's decision which it is now reviewing. How it continues to attribute the decision of the director to the secretary remains a matter for pure conjecture. A *fortiori* when it advances no reason at all for alleging, as it is doing, that the decision of the director is that of the secretary.

There is always a reason why r 256 of the High Court rules, 1971 insists that the decision-maker should be cited as a respondent in an application for review. Apart from advising him that his decision is, or the proceedings which he conducted are, being taken on review, the decision-maker may want to make a comment or two, without necessarily defending the position which he has taken in respect of the pending review. He is, therefore, the proper and correct respondent to cite. Where he is left out of the equation, as occurred in *casu*, the application for review cannot be said to be properly before the court. It is fatally defective for the non-citation of the decision-maker who is a *sine qua* own aspect of any review proceedings. The secretary who did not hear the parties cannot, it is logical, make any meaningful comment on issues which he did not deal with.

The applicant cited the wrong party in its application for review. The secretary whom it cited as the second respondent did not make any decision in the resolution of its dispute with the first respondent. The director conducted the proceedings which brought about the decision which it is reviewing. The decision is that of the director and not the secretary.

The application which does not cite the decision-maker who heard and determined the parties' dispute is fatally defective. It is, therefore, struck off the roll with costs.

Wintertons, applicant's legal practitioners
Rubaya & Chatambudza, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners