KUBAKAIDZE MINING SYNDICATE
versus
MINISTER OF MINES AND MINING DEVELOPMENT
and
THE MINING COMMISSIONER
and
OPHIR TRUST
and
PIWA MINING SYNDICATE

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 22 November & 21 December 2022

Civil Appeal

R Mabwe, for the appellant
R Madenyika, for the 1st & 2nd respondents
*E Mubaiwa,*for the 3rd & 4th respondents

MAXWELL J: This is an appeal against the decision by first respondent to cancel Appellant's Mining Certificate and to suspend its mining activities as well as the second respondent's recommendation to cancel the same certificate.

Appellant outlines the background of the matter in its heads of argument as follows. Fourth respondent is the current tributor of Chigwell, Chigwell 8-11 claims and all its claims were transferred to third respondent on 3 August 2004. The homesteads of two A2 farms are located within 450 metres of Chigwell claims 8 and 9 allocated to third and fourth respondents. The two A2 farmers, Fungai Zvinanzva (Fungai) and Patrick Peter Kudyarawanza (Patrick), separately consented to the registration of mining claims within 450 metres of their homesteads. As a result two disputes arose, one, a boundary dispute between the two A2 farmers and another

on encroaching onto another's claims, between Fungai, third and fourth respondents and Appellant.

On the dispute between Fungai and the Appellant, the Mining Commissioner issued a determination on 15 January 2015. Appellant was not happy with the determination and wrote a complaint to the Permanent Secretary in terms of section 341(2) of the Mines and Minerals Act [*Chapter 21: 05]* requesting the Secretary for Mines and Mining Development (the Secretary) to correct an error which had been made by the Mining Commissioner. Appellant submitted that the Minister hijacked the process and decided to deal with the complaint as if it was an appeal, in the process including third and fourth respondents. The Minister cancelled the Appellant's certificates of registration and allowed Fungai and respondent to resume mining operations.

On the dispute between third & fourth respondents, Fungai and Appellant, the Minister made a determination on 13 October 2015 cancelling the certificates of registration for Appellant and Fungai and allowed third and fourth Respondents to mine. Appellant noted the present appeal on eleven grounds on 29 October 2015. The record of proceedings was filed on 20 June 2022 following an order of this court on 24 May 2022 for the reconstruction of the record of proceedings by all the parties. On 23 August 2022 Appellant obtained leave to amend its ground of appeal. The amended grounds of appeal were filed on 5 September 2022. Five grounds are in the notice of the amended grounds of appeal.

Third and fourth Respondents submitted that the appeal is fatally defective and should be struck off the roll with punitive costs. A record twelve preliminary issues were raised. These are

1. The appeal is against the decision of an appellate tribunal and that of the first instance on the same dispute. This is incompetent.
2. There can only be an appeal to this court in terms of section 361 of the Act if the Mining Commissioner has held proceedings commenced by summons as required by section 347 of the Act. No such proceedings were held *in casu.*
3. There is no indication of the provision under which the appeal is brought before this court.
4. There is no appeal against the decision of the Minister in terms of the Act.
5. The appeal irregularly cites the decision makers as parties to the appeal.
6. The appeal raises issues that should be dealt with through review proceedings.

7. The appeal is out of time.
8. The appeal is defective as it does not state the date of the decision appealed against.
9. The relief sought is incompetent as Appellant is seeking a declaration of invalidity of the order made *a quo* which cannot be granted on appeal.
10. The appeal is unclear and unfocused as after Appellant amended it, new grounds were added with the result that the appeal now has a record 16 grounds.
11. There is no prayer for the substitution of the decisions made *a quo* with a decision that Appellant feels is correct.
12. The effect of the prayer as couched leaves the dispute unresolved.

Third and fourth respondents urged the appellant to consider the preliminary issues and the case authorities cited in the heads of argument and withdraw the appeal and tender wasted costs. In the event that that course is not taken and the appeal is persisted with despite the defects, they indicated that they will seek costs of an admonitory nature.

On the merits, third and fourth Respondents submitted that there are no valid issues that call for argument. They point out that most of the grounds of appeal are not addressed in the Appellant's heads of argument. They also point out that Appellant contradicts itself concerning the nature of proceedings conducted before the first and second respondents. The main appeal says that the determination was made in terms of section 50. The amendment complains against non-compliance with section 345 (1) of the Act. They further point out that section 50 of the Act does not deal with a judicial decision capable of being appealed against but deals with an exercise of administrative authority which should be challenged on review. They argued that the Minister dealt with the matter as an appeal and section 345 (1) of the Act does not arise when the matter is before the Minister on appeal. According to them, Appellant is a late comer, having obtained its rights after they had obtained their mining rights. Later rights cannot undermine preceding rights and no provision in the Act allows for that, they argued. Third and fourth respondents further argued that first respondent is an administrative organ who makes decisions that are binding until they are set aside by an order of court. They pointed out that first respondent's decision is extant and must be given effect. They prayed for the dismissal of the appeal with punitive costs.

POINTS *IN LIMINE*

1. **The notice of appeal and the notice of amendment do not state the provision relied on in noting the appeal.**

Mr Mubaiwa submitted that the omission is fatal as the right of appeal is at all times statutory. He further submitted that the appellate jurisdiction is not inherent and no court has an automatic right to exercise appellate jurisdiction over another. He referred to heads of argument in which the case of *Bushu* v *GMB* HH 326/17 is cited. In that case it is stated; -

> "Firstly the application does not indicate the provisions of the law under which it is made. I will accept that form 29 of the High Court rules does not specifically provide that the applicant relying on a provision of the law should cite the rule under which the application is made. However, in practice, any astute legal practitioner making an application in terms of a statutory provision including a rule of court is expected to indicate the rule or provision concerned. The need to cite the relevant provision of the law under which the application is made, where applicable of course, cannot be overemphasized. The citation of the correct and relevant provision attunes the court to its jurisdiction and the judge or court as the case may be immediately opens up to the provision and if need be researches on the provision if it is not one that immediately comes to mind.
>
> Notwithstanding that form 29 does not provide for the rule or statutory provision citation, it should be accepted as a basic rule and pre-requisite in any application grounded on a statutory provision or rule of court that the provision or rule be cited. If not cited in the heading "court application….." then the founding affidavit should at least contain a statement by the applicant that he or she is making an application in terms of the specific provision or rule. It should not be left to the judge to have to go through all the papers filed in the application in order to determine the nature of the application."

The case was also cited in *Minister of Mines and Mining Development & Anor* v *Fidelity Printers & Refiners P/L & Anor* CCZ 9/22.

In response Mrs Mabwe submitted that there is no law that stipulates that a party must specify the law they bring the appeal under. She further submitted that s 30 (1) of the High Court Act [*Chapter 7:06*] grants appellate jurisdiction in any matter and that subsection (2) grants appellate jurisdiction even where statute does not provide.

Section 30 of the High Court Act provides; -

> "30 Jurisdiction in appeals in civil cases
> (1) The High Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which in terms of any other enactment an appeal lies to the High Court.
> (2) Unless provision to the contrary is made in any other enactment, the High Court shall hear and determine and shall exercise powers in respect of an appeal referred to in subsection (1) in accordance with this Act."(underlining for emphasis)

It follows that the High Court has jurisdiction to hear and determine appeals in civil cases where it is specifically provided for in any enactment. It is not correct that the appellate jurisdiction is inherent. It is statutory and as such an appellant must indicate under which statute the appeal is brought. The first point *in limine* has merit and therefore succeeds.

2. **Assuming the appeal is in terms of s 361 of the Act, it is invalid as it is not arising from proceedings following s 346, 347 and 348.**

Mr Mubaiwa submitted that the procedure that ought to have been followed was that summons were supposed to be issued, documents produced in a hearing, witnesses called and examined and a transcript of the record prepared for the appeal. As that procedure was not followed, he submitted that the appeal is invalid. Mrs Mabwe did not respond to this point until directed by the Court to do so. Her submission was an admission that procedures were not followed. In her view the failure to follow procedures shut the door on Appellant to appeal in terms of the statute and left it with no remedy other than to appeal to this court.

Section 346 of the Act provides for the judicial powers of the Mining Commissioner "to hear and determine, in the simplest, speediest and cheapest manner possible, all actions, suits, claims, demands, disputes and questions arising within his jurisdiction." Section 347 provides for the commencement of proceedings before the Mining Commissioner by way of summons. Section 348 provides for the summary hearing of complaints with the consent of the parties which consent must be in writing.

An attempt was made to bring the appeal to comply with the statutory provisions. The attempt is revealed in paragraphs B (v) and (vi) of the Appellant's heads of argument. Appellant submitted that first and second respondents failed to file a record of proceedings. Prior to this submission there was no reference to any proceedings being held which could have resulted in the record that the first and second respondents allegedly failed to file. Appellant proceeded to obtain an order for the "reconstruction" of the record. That is an interesting development in the absence of an allegation that a record was lost or destroyed. The averments that led to the granting of that order are not part of the record. What first and second respondent filed as a record of proceedings are letters, a record of the proceedings in the Magistrates Court, diagrams, maps, subdivision layout, coordinates and certificates of registration. Clearly the attempt was not successful as it did not address the issue of the formal hearing before the Mining Commissioner.

There was no indication that Appellant sought compliance with the statutory provisions from the first and second respondent. The submission that there was no remedy cannot be correct. The second point *in limine* also succeeds.

3. **The appeal irregulary cites decision makers as parties to the appeal.**

Mr Mubaiwa pointed out that the appeal is between the parties and should attack the decision, not the decision makers. In response Ms Mabwe submitted that there was nothing irregular as this was required by the former rules. It is trite that an adjudicator should not defend their decision for to do so would put their impartiality into question. It is therefore irregular to cite a decision maker as a respondent in an appeal. The point *in limine* has merit. However, it is not an irregularity that is fatal to the proceedings.

4. The appeal is invalid as under section 361 of the Act, an appeal is against the decision of the Mining Commissioner, yet, *in casu*, the appeal is against both the Mining Commissioner and the Minister.

Mr Mubaiwa pointed out that there is no provision for the right of appeal against the decision of the Minister in the Act. The original notice of appeal stated that the appeal is also against the recommendation by the second respondent. In third and fourth respondent's heads of argument, it is stated that one cannot appeal against a recommendation but a judicial determination. Ms Mabwe did not address this issue.

A recommendation is not a final decision. It can be accepted or rejected. The appeal therefore should only be noted after a decision has been made on the recommendation. There is merit in this point *in limine* and it therefore succeeds.

5. **The appeal raises issues that should be dealt with on review.**

Mr Mubaiwa submitted that the complaint by Appellant that the Minister had no part in the dispute he imposed himself in is a jurisdictional issue that should be attacked on review. He further submitted that in an appeal, one accepts that the decision maker had the jurisdiction but made a wrong decision. In response, Ms Mabwe submitted the issue of jurisdiction is a substantive issue that can be raised on appeal.

It is trite that where a litigant is aggrieved by the manner in which a hearing was conducted, and not by the fact that the court or tribunal came to a wrong conclusion on the facts

or the law, the appropriate remedy is to bring the case on review. See *Herbstein & Van Winsen, The Civil Practice of the Superior Courts in South Africa,* second ed, p668.

There is merit in this point and it succeeds.

6. The appeal was filed out of time.

It was submitted for third and fourth respondents that the appeal was filed out of time. Mr Mubaiwa pointed out that the High Court (Miscellaneous Appeals and Reveiws) Rules 1975, (RGN 450/1975), were applicable at the time the appeal was filed. Rule 5 thereof stipulates that an appeal ought to be filed within 15 days of the decision appealed against. He submitted further that the decision of the Mining Commissioner was made on 15 January 2015 and the appeal was filed out of time on 30 October 2015.

Ms Mabwe submitted that the appeal was filed within the prescribed time as it is against the decision on p 1 made on 13 October 2015. She further submitted that the decision of 15 January 2015 does not cancel mining rights therefore the appeal is not against that decision.

From the notice of appeal, the appeal is against the decision of the Minister and the recommendation of the Mining Commissioner. The Minister's decision was made on 13 October 2015 and the recommendation of the Mining Commissioner was on 15 January 2015. If there was a right of appeal against the Minister's decision, and if there was a valid decision by the Mining Commissioner, the appeal would have been valid in part. It is clearly out of time as far as the "decision" of the Mining Commissioner is concerned, but within time in relation to the Minister's decision. However, this is not helpful to Appellant as there is no right of appeal against the Minister's decision.

7. The appeal is defective as it does not state the date on which the decision appealed against was made.

Mr Mubaiwa submitted that r7(1) of RGN 450/1975 requires the notice of appeal to state the date on which the decision appealed against was made. In *casu* that information is not provided. There was no response from Ms Mabwe on this issue.

Rule 7 (1) (b) of RGN 450/1975 was couched in peremptory terms. It provides

" A notice instituting an appeal shall state-

a) …..

b) The date on which the decision was given; and

c) ….."

The headnote in *Chiroswa Minerals (Pvt) Ltd & Anor* ***v*** *Minister of Mines & Ors* 2011 (2) ZLR 403 (H) states that the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected. In **Ex parte Mandelstam** 1949 (3) SA 1210 (O) at 1211), HORWITZ J stated; -

> **"** And, in my apprehension, there is no justification under the Act for the exercise of any so-called right to condone a material defect which assumes the form of a non-compliance with an imperative provision of the statute, except, perhaps, on the principle of *de minimis non curat lex* principle which cannot be invoked in the present case.**"**

The non-compliance with a peremptory requirement in this case cannot be termed trivial. The indication of the date on which a decision was given is material in determining whether the appeal is on time or not. The non-compliance is therefore fatal. The point *in limine* has merit.

8. The grounds of appeal are unfocused and prolix

Mr Mubaiwa submitted that the amendment to the grounds of appeal resulted in 16 grounds of appeal yet the determinations appealed against are on a total of 4 pages. He referred to the case of *Chikura N.0. & Anor* v *Al Shams Global BVI Limited* SC 17/17 in which it was stated that

> "[8] It is not for the Court to sift through numerous grounds of appeal in search of a possible valid ground; or to page through several pages of 'grounds of appeal' in order to determine the real issues for determination by the Court. The real issues for determination should be immediately ascertainable on perusal of the grounds of appeal. That is not so in the instant matter. The grounds of appeal are multiple, attack every line of reasoning of the learned judge and do not clearly and concisely define the issues which are to be determined by this Court."

Ms Mabwe referred to the consolidated index and indicated that there are only five grounds of appeal. The amended grounds of appeal are five. However, the consolidated index shows that the notice of appeal is on p 1-10. The amended grounds are on 3 pages whilst the original notice of appeal contains 6 pages. It follows that the notice of appeal is a combination of the two documents. This is confirmed by the fact that in amending the grounds of appeal, Appellant did not indicate that any of the original grounds are withdrawn or abandoned. Ms Mabwe referred to the case of *Johanne Marange Apostolic Church* v *Common Vision Housing Consortium & Ors* SC 8/20 and submitted that where a party does not address grounds in the notice they are considered as abandoned. Whilst that is the correct position, it is not applicable to the preliminary issue. A preliminary issue enables one to win the battle before it begins. It is

argued and decided before the merits of the case are argued. Whether or not all grounds of appeal are addressed is considered when the merits of the matter are dealt with.

There is merit in this point as well.

The next four preliminary points are considered together.

9. There is no prayer for the success of the appeal.
10. The relief sought is incompetent as Appellant is seeking a declarator which cannot be granted on appeal.
11. There is no prayer for the substitution of the decisions made a quo with a decision Appellant feels is correct
12. The effect of the prayer as couched leaves the dispute before the Mining Commissioner unresolved.

Mr Mubaiwa submitted that Appellant did not pray for the success of the appeal and that the omission is fatal to the appeal. He referred to ***Sambaza* v *Al Shams BVI Limited*** SC 3/18 in which it was stated that the relief sought must be of the type relevant to the dispute between the parties, and the case of *Madyavanhu* v *Sambaza* SC 75/17 in which it was stated that failure to pray for the success of the appeal before the judgment *a quo* could be set aside and substituted, constitutes a serious defect in the notice of appeal. He also submitted that the relief sought is incompetent as Appellant is seeking a declarator which cannot be granted on appeal. Further, that there is no prayer for the substitution of the decisions made *a quo* with a decision Appellant feels is correct. He also submitted that the effect of the prayer as couched leaves the dispute before the Mining Commissioner unresolved

Ms Mabwe submitted that these points have no merit as the amended grounds of appeal have an appropriate prayer on p 13. The prayer in the original notice of appeal has all the defects complained of. As stated above, that notice of appeal was not withdrawn. However, the defects were rectified in the amended grounds of appeal. There is merit in these points *in limine* in relation to the notice of appeal filed on 29 October 2015 but no merit in relation to the amended grounds of appeal.

The preliminary issues that succeeded are dispositive of the matter. What remains is a decision on the issue of costs.

COSTS

In their heads of argument filed on 4 October 2022, third and fourth Respondents pointed out the irregularities in the appeal and indicated that if Appellant persisted with the appeal costs of an admonitory nature will be sought. In *Matanhire* v *BP & Shell Marketing Services (Pvt) Ltd* 2004(2) ZLR 147(S) MALABA JA(as he then was) stated

> "The existence of the defect was drawn to his attention through the respondent's heads of argument and the appropriate remedy for rectifying the situation pointed out to him about two months before the hearing. It became apparent during the argument he presented to the Court that Mr *Muskwe* had not bothered to read the cases cited for his benefit on the law relating to defective notices of appeal in the respondent's heads of argument. In *Omarshah* v *Karasa* 1996 (1) ZLR 584 (H) at 591F Gillespie J stated that:
> "Costs *de bonis propriis* will be awarded against a lawyer as an exceptional measure and in order to penalise him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself."

In *Tamanikwa & Ors* v *Zimbabwe Manpower Development Fund & Anor* SC 73/17 It is stated that; -

> "Those who deliberately defy wise counsel and go on to negligentl cause others patrimonial loss must not cry foul when they are made to make good the loss."

This is one such case where the prayer for admonitory costs is justified. The defects were pointed out well before the hearing date but no action was taken.

DISPOSITION

The appeal be and is hereby struck off the roll with costs on a legal practitioner and client scale.

TSANGA J:…….AGREES

Bherebhende Law Chambers, appellant's legal practitioners
The Civil Division of the Attorney General's Office, first & second respondents' legal practitioners.
Matizanadzo and Warhurst, third and 4th respondents' legal practitioners.