

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

In the matter of an application by
NEVILLE RUTHERFORD for a Writ
of Mandamus

Mr. N. Boston for Applicant

Mr. F. Peters for Respondent

Mr. V. Persaud for the added Respondents

DECISION

The Applicant filed a Notice of Motion on the 24th January 2008 claiming an Order or Rule Nisi of Mandamus directed to the Commissioner of The Guyana Geology and Mines Commission (the Respondent) to show cause why a Writ of Mandamus should not issue compelling him to issue a cease work order pursuant to Regulation 98 of the Mining Regulations made under the Mining Act, Chapter 65:01, against Kumar Singh and Deleep Singh (the added Respondents) and their servants, agents and/or workers from mining on any area of land in mining block described in Mining Permit R-11/MP 006.

An Order or Rule Nisi of Mandamus was granted by the Honorable Mr. Justice Jainarayan Singh on the 25th January 2008.

The Applicant claims that he is the holder of a Mining Permit, issued by the Guyana Geology and Mines Commission, in respect of State Land in a certain area described as ‘a tract of State Land located in Mining District No. 5 North West as shown on Topographic Sheet 11SW Waini. He claims that the said permit gives him the exclusive right of occupation and mining of the said area save and except all lands lawfully held or occupied by others. He said the

permit was issued to him on 22nd August 2005 for a period of five years from the 2nd August 2005.

The said permit imposed certain obligations one of which is to protect and preserve the natural environmental conditions of the land and not to unlawfully pollute fresh water supply.

The applicant claims that on the 26th March 2007, he discovered that certain persons namely, Deleep Singh, Robin Singh, and Dilip Narvan and their workers and also the workers of one Kumar Singh were on his land working dredges and extracting gold and diamond therefrom. He also found 4 camps on the land constructed by the said persons aforementioned.

The applicant further claims that no permission was given to these persons by him to enter the land nor construct camps and extract gold therefrom, and that these persons have been working and extracting gold and diamond from the land in an environmental unfriendly manner and inconsistent with the environment management agreement entered into between the applicant and the Commission. He claims that they dug several holes on the land leaving several large ponds of water, and have discharged the tailings from their dredging operations into the adjacent river and other areas on the land.

The Applicant also claims that on the 11th April 2007, Justice Claudette La Bennett granted an injunction restraining Deeleep Singh, Kumar Singh and Dilip Narvan whether by themselves, their servants, agents and workers, whosoever and howsoever from entering upon or remaining on the land and also from interfering with the plaintiff's exploitation and mining on the land. That notwithstanding the said Orders the respondents have entered upon the land and continued to mine same unlawfully and that the respondents have threatened the applicant with serious bodily harm and have used guns to do so.

On the 30th July 2007 the applicant wrote to the Commissioner informing him of the unlawful activities of the respondents and their threat to use violence against him and that they were damaging the environment and that the Commissioner has to the date of hearing not done anything to issue a cease work order against the respondents.

He said that the Commissioner told him that he should prevent the respondents from working on the land.

The Respondent's affidavit in answer sworn to by the Land Management Officer stated only denials and admissions but no response to the applicant's claims and the only answer stated therein was to state that gold is a wasting asset and that the applicant is obliged to construct settling ponds for the discharge of tailings which should not be discharged directly into the river, creek or other water sources.

I find that the Affidavit in answer does not address the applicant's claims at all and are evasive and non committal at best.

Counsel for the Respondent has submitted that the Applicant must have made a distinct demand for the performance of a duty by the Commissioner of the Guyana Geology and Mines Commission and that there must be a refusal of the Commissioner to perform that duty.

He cited the case of **Re Marahaj and the Constitution of Trinidad and Tobago** (1966), 10 WIR 149, which held that "it is not merely because a duty arises which it becomes the obligation of an officer to discharge and that duty is a public duty that mandamus may issue to command him to perform it: there must in addition be evidence of a distinct demand for the performance of the duty and a refusal to perform it".

Counsel for the Applicant responded that the situation given in Re Maharaj is an outdated rule and cited **Channell J, in the King –v- The Revising Barrister for the Borough of Hanley,** 1912 Kings Bench Division 518, where Channel J said at page 581 “the requirement that before the Court will issue a Mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable in all possible cases”.

However, that case turned upon its own peculiar facts and in those circumstances, it is clear that to apply the rule strictly would have lead to highly undesirable results. That was not a case where the person against whom the mandamus was sought had failed to carry out his duty, but was a case where because of some inadvertence the register of names was incorrect.

However, I found useful, the approach taken by Wade, Administrative Law, 9th edition, on prerogative remedies where he said at p. 626: “It has been said to be an ‘imperative rule’ that an applicant for mandamus must have first made an express demand to the defaulting authority, calling upon it to perform its duty, and that the authority must have refused (Tapping on Mandamus, 282). But these formalities are usually fulfilled by the conduct of the parties prior to the application, and that refusal to perform the duty is readily implied from conduct (the State (Modern Homes Ltd.) v Dublin Corporation (1953) IR 202). The substantial requirement is that the public authority should have been clearly informed as to what the applicant expected it to do, so that it might decide at its own option whether to act or not.”

I find this approach to be a much more useful approach, especially in cases where the public interest is at stake and as in this case, where environmental damage is likely to be caused and which the Respondent has the responsibility

and authority to prevent and to ensure that miners do not destroy the land or cause adverse effects to the environment.

In this case the Applicant did not make a formal and strict demand for the Respondent to perform a specific act, which is to issue a cease work order against the added Respondents.

The Added Respondents in this case had gone onto the Applicant's claims and were working the claims in breach of the Mining Permit granted to the Applicant. The Applicant had not given the added Respondents permission to work on his Claims.

The terms of the Applicant's permit prevented him from destroying the natural environment and from polluting fresh water, and he was liable to have his permit terminated for breach of its terms and conditions.

The Applicant claims that he informed the Commissioner of the added Respondent's acts upon the land. He said he wrote letters informing the Commissioner of the illegal acts of the added Respondents.

The Applicant did not make a specific demand of the Commissioner to perform a specific act and there was no specific refusal by the Commissioner to do some act to rectify the situation.

The Commissioner's powers under Regulation 98 of the Mining Regulations empowers the Commissioner or his servants or agents to order that all work shall cease on a claim, where it appears to him absolutely necessary to do so for the maintenance of the public peace or for the protection of the interest of the State or of private persons.

It seems therefore, that a duty lies upon the Commissioner to ensure that there is peace and good order on Mining Claims and that there is duty to ensure that the interests of the State are protected, hence the terms and conditions attached to the permit, therefore it would seem to me that the Commissioner ought to be ever vigilant in ensuring that persons who have been issued mining permits do not breach the conditions of the permit.

Where in this case, other third parties have gone onto the Applicant's claims without permission and to the detriment of the environment, and have threatened violence to the Applicant, then the Commissioner having been informed of this state of affairs ought to have exercised his powers to ensure the return of peace and also to ensure that the interests of the State are protected.

It is not good enough for the Commissioner to say that the applicant must take matters into his own hands when the applicant has made it clear that the added Respondents are mining the claims in breach of the mining rules and regulations as to the prevention of harm to the environment, which the Commissioner is empowered to protect.

Therefore, on these facts, does the lack of a strict demand being made by the Applicant means that the Commissioner is relieved of his duty under Regulation 98 of the Mining Regulations?

I think, in these circumstances, that the Commissioner ought to have carried out his duty to restore peace and order and prevent the acts committed by the added Respondents who had no permission to mine the claims.

The Affidavit in Answer by the Respondent shows an unwillingness to get involved, but, this is not a private dispute on private land. This is a dispute on State Land which is governed by certain rules and regulations which the

Commissioner has a duty to ensure are followed and applied and any act by anyone without permission and in breach of those rules should be sanctioned and dealt with by the Commissioner.

Counsel for the Respondent cited the learning of Clyde Lewis on Judicial Remedies in Public Law, 2004, where it is stated at page 236, paragraph 6-065:

“The public body is likely to be aware of the need to act from the conduct of the parties and the circumstances of the case, rather than a formal demand and refusal. In the case of an individual seeking to compel performance of a duty owed specifically to him, it is extremely unlikely that the individual would not have made an application first. In the case of duties owed to the public generally, the courts are unlikely to be deterred from granting mandatory orders because of the absence of a formal demand, provided that it is clear from the evidence that the authority is unwilling to perform the duty in question.”

I find that in this case, a formal demand and refusal would do an injustice in a situation that calls for the intervention and action of the Commissioner, who is the only person with the authority to rectify the wrongful acts of the added Respondents.

The preliminary point is therefore overruled.

Having read the submissions by Counsel for the Respondent and having heard the oral arguments of Counsel for the Applicant, in response thereto, there is evidence from the fly leaf of the records that the added Respondents were given an opportunity to intervene, but never filed an answer and subsequently withdrew their appearance.

I am of the view having read the relevant sections of the Mining Act that in a situation where damage is being done to the environment, irrespective of the opposing claims, then the Commissioner ought to intervene without the applicant having to resort to Regulation 82 of the Mining Act.

Regulation 98 states that: “The Commissioner, officer appointed by him or the mines officer may, where it appears to him absolutely necessary to do so for the maintenance of the public peace or for the protection of the interests of the State or of private persons, order that all work shall cease on a claim, either generally or by any particular person or persons and thereupon work shall be discontinued accordingly.”

Part XI of the Mining Regulations Cap. 65:01, is entitled ‘Determination of disputes’. Regulation 82 states “the person desiring to have any dispute other than by way of opposition settled shall file a complaint in writing in duplicate setting forth the names of the parties to the dispute, a short statement of the cause of complaint, and the remedy or redress which he asks for, and shall, within seven days thereafter, serve on the opposite party, either personally or by leaving the same at his registered address, or in such other manner as the Commissioner, or an officer appointed by him or the mines officer may direct, a copy of the complaint.”

The situation goes beyond the settlement of a personal dispute as to who is the lawful owner of the claims. This is not a mere allegation of trespass being made by the Applicant. The Applicant is also saying that the alleged Respondents are damaging the environment and causing waste to the land in breach of the Mining Regulations, and the terms and conditions attached to the Mining Permit.

It seems to me that it would be nonsensical to interpret Regulation 98 to mean that the Commissioner’s powers only become operational after a complaint is

made under Regulation 82. It makes more sense to interpret Regulation 98 to mean that the Commissioner has the power to order a cease work order on becoming aware of any acts done by anyone to the detriment of the environment which he protects, and not only upon a complaint being filed.

In other words, should the Commissioner receive information from any source that the conditions of the mining permit issued to any person are being violated, should he just sit back and do nothing, because he has not received a complaint under Regulation 82? Clearly, the Commissioner himself ought to enforce Regulation 98 on receiving any information involving a breach of the mining regulations.

The Commissioner has a duty to order a cease work order in the circumstances, and then follow up with an investigation, otherwise the effect of the Regulation would be useless. The cease work order is therefore not a determination of the rights of the Applicant in such a case and the Commissioner is bound to follow up with an investigation under the Regulation.

In the circumstances, the Order Nisi made on the 25th January 2008 is hereby made absolute the Respondents having not shown sufficient cause why the Order Nisi should be discharged.

Costs awarded in the sum of \$20,000.

Stay of execution of 6 weeks granted.

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Diana F. Insanally

Puisne Judge

4th February 2010