

CHASE MINERAL (PVT) LTD

versus

EDMOTH NDLOVU MADZIKITA

IN THE HIGH COURT OF ZIMBABWE
SIBANDA J
BULAWAYO 2 FEBRUARY 2001 & 30 MAY 2002

J Tshuma for the applicant
Adv.T Cherry for the respondent

SIBANDA J: In this application the applicant seeks an order couched in the following terms:

Applicant be and is hereby granted leave to execute the judgment in case number HC 1225/2000 entitling it to evict respondent pending the hearing of the appeal noted by the respondent in case number HC 1225/2000 with costs at an attorney and client scale.

When the matter came up for the hearing I granted the order sought. The legal practitioner for the respondent has written seeking reasons for my order, he explains that he seeks those reasons in order to explain to his client, presumably why the respondent lost. My reasons are set out herein under.

The applicant is the registered title holder of the following mineral claims:-

- (a) Stella City A 10336BM
- (b) Stella City B 10337BM
- (c) Stella City C 10338BM
- (d) Stella City D 10339BM

On 29 May 2000, applicant instituted proceedings under case number HC 1225/2000 seeking an order for the eviction of the respondent from its registered claims *supra*, with costs. The application was heard jointly with other matters involving the same parties in case numbers HC 879/2000 and HC 1314/2000. Judgment was handed down by this court in which *inter alia*, the court granted an order of eviction against the respondent from applicant's registered claims *supra*.

Pursuant to the judgment, the applicant issued a writ of ejectment following respondent's refusal to voluntarily move out of the claims. The main reason advanced by the respondent for the said refusal is that the respondent has noted an appeal against the eviction order granted in case number HC 1225/2000 sought to be enforced. The eviction order should await the outcome of the appeal so goes the argument, as at common law an appeal has the effect of staying the execution of a judgment or order appealed against.

The disputes between the parties relate to the ownership and mining claims of minerals set out *supra*. It is not in dispute that the said mineral claims are all registered in the name of the applicant. That the respondent has in fact instituted proceedings seeking an order for specific performance in respect of the same claims against a 3rd party that is for the transfer of "Stella claims" to himself in case number HC 3209/99.

The rights of parties for the ownership of minerals are governed by the provisions of the mines and Minerals Act (Chapter 21:05). Section 172 of the Act provides;

"... every holder of a registered block of claim other than precious metal reef claims shall possess the following rights-

(a) the exclusive right of mining any ore or deposit of the mineral in respect of which the block is registered which occurs within the vertical limits of his block."

It will be seen, therefore, that the applicant, as the holder of the registered claims, has the exclusive rights of mining the claims under dispute. Such rights are protected by section 379 of the Act which provides;

“any person who breaks, severs or removes any mineral from any mining location, reef or deposits, or who takes, removes or conceals any minerals, slag, slimes, amalgam, residues, tailings or concentrates, the product of any mining location reef or deposit with intent to deprive the lawful owner or holder thereof, shall be guilty of theft and liable to be prosecuted and punished accordingly.”

It is thus in so far as it is submitted that the respondent has been, in fact, working on applicant's claims, he is therefore guilty of contravening section 379 of the Act. To suggest that the eviction order be suspended or stayed pending appeal in case number 1225/2000, so as to enable the respondent to continue mining amounts to authorising the contravention of section 379 of the Act. That would create an untenable situation in which this court would not only be condoning but authorising the criminal conduct of the respondent in breach of the provisions of the Act.

The provision at common law that notice of appeal has the effect of staying a writ of execution could not, in my respectful view, have been intended to operate or come into effect in circumstances where such stay of execution had the effect of perpetuating the commission of an offence or criminal conduct. It could only have been intended to come into effect where both parties had, in the dispute, rights lawfully pending final determination and resolution by the court of appeal. That situation does not obtain in the instant case. In this case if the eviction were to be stayed pending appeal, that would create a judicial anomaly where the court, becomes party to respondent's unlawfully conduct in breach of the provisions of the Act. Further such unlawful conduct and operations of the respondent would be highly prejudicial to the applicant because the minerals that would be extracted by the respondent could not be recovered and the applicant would sustain considerable and irreparable loss.

It follows therefore that it is highly improper for the respondent to seek the sanction of this court in respect of his criminal conduct. I would for these reasons grant the order.

Accordingly, the applicant be and is hereby granted leave to execute the judgment in case number 1225/2000 entitling it to evict respondent pending the hearing of the appeal noted by the respondent in the case above referred. That the respondent shall pay the costs of this application at an attorney and client scale.

Webb, Low & Barry applicant's legal practitioners
Hwalima & Associates respondent's legal practitioners