

BEKI SIBANDA

Versus

VANSBURG DRUMGOLD ENTERPRISES

And

PROVINCIAL MINING DIRECTOR – MIDLANDS PROVINCE

And

SECRETARY FOR MINES & MINING DEVELOPMENT

And

MINISTER OF MINES & MINING DEVELOPMENT

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 27 SEPTEMBER & 6 OCTOBER 2016

Urgent Chamber Application – Joinder

J. Magodora for applicant
Masamvu for 1st respondent
L. Dube for 2nd, 3rd & 4th respondents

MAKONESE J: On 20th September 2016 the applicant filed an urgent chamber application for an order to be joined in the proceedings pending in this court under case number HC 2208/16. I directed that the application be served on the respondents. 1st respondent opposes the application. The application is not opposed by 2nd, 3rd and 4th respondents. 1st respondent dwelt to a large extent on the preliminary issues, namely that the matter was not urgent and that the draft order ought to have a provisional order. Counsel for the 1st respondent abandoned his arguments on the points in limine, when it was brought to his attention that an application for joinder, by its very nature may be brought at any stage of the proceedings. It is observed that on the merits the application is resisted on the grounds set out in paragraph 29 of the founding affidavit in the following terms:

“As indicated earlier on, the application is fatally defective and if at all the applicant is eager for co-joinder proper applications should be filed. The applicant should not at all be joined in these proceedings, particularly by way of an urgent chamber application which does not even have a provisional order. One of the applicant’s remedies is to file a procedurally proper application for co-joinder. Issues of environmental degradation can always be addressed by the Environmental Management Agency (EMA) if at all there are such fears. The applicant should never be allowed to succeed in an urgent chamber application couched in this fashion.”

The question for determination before this court is whether the requirements of Order 87(2) (b) of the High Court, Rules have been met. Rule 87 (2) (b) provides as follows:

“At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –

- (a) order any person who has been improperly or unnecessarily made a party or who has any reason ceased to be a proper or necessary party, to cease to be a party;
- (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matter in dispute in the cause or matter may be effectively and completely determined and adjudicated upon, to be added as a party; but no person may be added as a plaintiff without his consent signified in writing or in such other manner a may be authorized.
- (3) A court application by any person for an order under sub-rule (2) adding him as a defendant, shall except with the leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter.”

It is the clear position of or law that the purpose of rule 87 (2) (b) is to ensure that all matters in the cause may be effectively and completely determined and adjudicated upon. It is to prevent unnecessary multiplicity of litigation by adding anyone and everyone with a real and substantial interest as a party to the proceedings in order that justice may be done.

A clear reading of rule 87 (3) leaves no room for any doubt that an application for joinder should be made by way of a court application. Such an application shall be supported by affidavit except with the leave of the court. The applicant in these proceedings has, despite the clear provision of the rules opted to proceed by way of an urgent chamber application.

Factual Background

The 1st respondent was issued with Certificate of Registration for mining claims for Dundrum North and Dundrum North 1 mines registration numbers 3037 and 30372 respectively on 12th July 2016. Following allegations that the said certificate had been issued fraudulently, the 2nd, 3rd and 4th respondents caused the licences to be suspended pending an assessment of the validity of these licences. On the 16th and 28th of July 2016 the applicant instituted legal proceedings for an interdict under case numbers HC 1716/16 and HC 1892/16. On the 19th July 2016 the court granted a provisional order interdicting the 1st respondent from conducting any mining operations at Dundrum North and Dundrum North 1 mines. The provisional order is still extant and has not been discharged. The order is interlocutory and as such before any appeal is noted against such order leave must be sought and obtained. The 1st respondent purported to appeal against the provisional order by filing a notice of appeal with the Supreme Court. No leave to appeal against the interlocutory order was sought or granted. The appeal was noted to hoodwink the 2nd, 3rd and 4th respondents into granting 1st respondent access to the disputed mining claims. It is however, the province of the Supreme Court to determine the validity of such notice of appeal. On 5th September 2016, the 1st respondent filed a court application under case number HC 2208/16 seeking the following relief:

“It is declared that:

1. Registration certificates numbers 30371 and 30372 in respect of Dundrum North and Dundrum North respectively be and are hereby declared to have been duly issued to the applicant.
2. The 1st respondent’s letter dated 18th July 2016 suspending mining operations on Dundrum North and Dundrum North 1 be and is hereby set aside and the application to exercise its rights in terms of the Certificate of Registration numbers 30371 and 30372.
3. That respondents pay the costs on attorney and client scale.”

It is noted that the 1st respondent, the Provincial Mining Director has filed an opposing affidavit under case number HC 2208/16. This court cannot ignore the factual details contained

in that opposing affidavit as it has a direct bearing on the application before this court. In paragraph 3 of the opposing affidavit the 1st respondent states as follows:

“... applicant knows very well that the area it registered is subject matter of legal wrangles which saw a number of interested parties approaching the High Court. Applicant is quick to forget that Beki Sibanda, a farmer upon the land which applicant registered its mining locations challenged the legality of the said certificates and obtained a provisional order on 18th of July 2016 which interdicted the applicant from carrying out mining operations at Dundrum North (registration number 30371) and Dundrum North 1 (registration number 30372) respectively ...”

It has been pointed out to the 1st respondent that the claims registered by the applicant are the subject of a dispute. The Ministry has still not produced its findings on the dispute. It is common cause that while attempting to note an appeal against a provisional order of the court, the 1st respondent is well aware that this order has not been discharged. To put it in simple terms, the 1st respondent may not seek to commence operations before the mining dispute is resolved. The attempt by 1st respondent to compel the court under case number HC 2208/16 to grant it an order to resume operations on the disputed claims before the dispute has been resolved is clearly disingenuous at the very least. Now, turning back to the issue of the application for joinder, there can be no doubt that the applicant has a substantial interest in the outcome of the matter. The Ministry of Mines and Mining Development has indeed confirmed that the applicant has obtained an interdict against 1st respondent in this court in view of the mining dispute that has arisen. I have no doubt in my mind that the applicant’s interest in the matter is common cause.

As regards the appropriateness of the Form that has been used by applicant to bring this application, I have already observed that the provision under Rule 87 (3) envisages the filing of a court application. However, in terms of Rule 4C of the Rules the court may order a departure from the rules as it deems fit. The Rule provides as follows:

“4C The court or a judge may, in relation to any particular case before him, as the case may be –

- (a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice ...”

See the cases of *Sumbereru v Chirunda* 1992 (1) ZLR 240 (H) and *Village Construction (Pvt) Ltd v Alpha Brick (Pvt) Ltd* HH-52-92.

The purpose of Rule 87 (2) (b) is to prevent unnecessary multiplicity of litigation and to facilitate the speedy and wholesale resolution of disputes by ensuring that everyone whose legal interests are likely to be affected by the outcome of the proceedings is joined as a party to the proceedings.

See the case of *Eunice Shumbairerwa vs Priscilla Chiraramo and Ors* HH-731-15. In this matter, the learned Judge referred to the cases of *Macey’s Supermarket & Bottlestore (Greencroft) (Pvt) Ltd v Edwards* 1964 RLR 13 (SR) and *Marais & Another v Pangola Sugar Milling Company & Ors* 1961 (2) SA 698 (N), where it was stated that in order to qualify to be joined as a party to any proceedings;

- (a) A party must have a direct and substantial interest in the issues raised in the proceedings before the court and that;
- (b) His rights may be affected by the judgment of the court.

This court has a discretion to determine whether the interest in the issues raised is “sufficient”. This discretion must be exercised judiciously upon a consideration of all the facts and circumstances of the case. Joinder will usually be refused where it will embarrass or prejudice the other party.

It is my view, that the balance of convenience favours a granting of the application. This court will, in terms of Rule 4C of the High Court Rules permit a departure of the rules which obliges the applicant to have proceeded by way of a court application for the following reasons:

- (a) The 1st respondent was served with the application for joinder
- (b) The 1st respondent was given an opportunity to respond to the application
- (c) The 1st respondent has not denied that the applicant has a substantial interest in the matter
- (d) The 1st respondent suffers no prejudice by the granting of the application for joinder

For the reasons, and in the interests of justice, I consider it appropriate that applicant be co-joined to the proceedings. The nature of the relief sought by the 1st respondent under case number HC 2208/16 directly affects the land owner upon which the mining claims are located. The law on the subject of joinder is well established in our jurisdiction. In my view there should have been no opposition to this application at all. I would have ordered the 1st respondent to pay the costs of suit, but in view of the fact that this court has granted indulgence to the applicant, who ought to have proceeded by way of a court application this court will make the following order:

1. The applicant be and is hereby co-joined to the proceedings under case number HC 2208/16 as the 5th respondent.
2. The applicant be and is hereby ordered to file its opposing papers within 7 days of the grant of this order.
3. There shall be no order as to costs.

Magodora & Partners, applicant's legal practitioners
Mkushi & Maupa c/o Dube-Tachiona & Tsvangirai, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd, 3rd & 4th respondents' legal practitioners