FALCON GOLD ZIMBABWE LIMITED
and
INYAMAZANE GOLD (PVT) LIMITED
versus
FISANI MOYO
and
IRVINE NGWENYA
and
SAMSON NGWENYA
and
ANDILE DHLAMINI
and
SHINGAI MOYO
and
TAKUNDA HATINA
and
ELVIS MOYO
and
DECEND MOYO
and
LONDILE MOYO
and
PHILASI NCUBE
and
JOHN MOYO
and
THE PROVINCIAL MINING DIRECTOR,
MATEBELELAND MINING DIRECTOR N.O
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 24 October & 6 November 2023

Urgent Chamber Application

B Mataruka, with him *M P Mahlangu*, for the applicants
D Dube, with him *P Ngwenya*, for the 1st to 10th respondents

ZHOU J: This is an urgent chamber application for an order interdicting the first to tenth respondents, their employees, assignees, invitees and all other persons claiming occupation through these respondents from mining ore at the disputed mining claims located in Maphisa, Kezi and from removing any mined ore, dump or sands from the said claims. The relief is being sought pending determination of the action instituted under Case Number HC 6672/23 for the ejectment of these respondents from the claims.

The application is opposed by the first to tenth respondents. The twelfth and thirteenth respondents did not contest the matter. At the hearing the applicants withdrew their claim against the eleventh respondent following questions regarding the service of the application upon that respondent.

The application comes in the backdrop of a Supreme Court judgment given in Case No. SC 398/22. In terms of that judgment the decision of the thirteenth respondent cancelling the first applicant's claims with the following numbers Antelope 9 – Reg No. 36034, Antelope 2, 3, 4, 5 and 6 – Reg. Nos. 33199, 33128, 33129 and 33130, Antelope East 2 – Reg. No. 32200, Antelope East Extension and Antelope Extension 2 – Reg. No's 34385 and 34386, Antelope East Reg. No. – 32106, Antelope 11 – Reg. No. 36036, was set aside. The judgment was granted following an appeal by the applicants herein against a judgment of this court in terms of which the cancellations had been upheld. The Supreme Court judgment was delivered on 29 September 2023.

Applicants' case is that on 8 October 2023 they discovered that mining operations were taking place at the mining claims to which the Supreme Court order relates. The applicants had themselves been interdicted from carrying on mining operations on those claims by order of this Court granted in Case No. HC 4038/23 on 30 June 2023. The order in HC 4038/23 was granted at the instance of the thirteenth respondent pending determination of the said Supreme Court appeal.

At the commencement of the hearing the applicants made an application for my recusal from dealing with the instant application. I dismissed the application and gave reasons for the dismissal. After that the parties proceeded to argue the matter.

The respondents have raised the following objections *in limine*: (a) that the matter is not urgent, (b) that the relief sought is final and therefore defective, (c) that there was material non-disclosure of certain facts by the applicants which material non-disclosure justified dismissal of the application, (d) that there are material disputes of fact which cannot be resolved on the papers, and (e) that there was material non-joinder of a company known as Luck Heather (Private) Limited to which the first to tenth respondents belong as employees.

A matter is urgent if it cannot wait to be resolved through a court application, see *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Joppa Engineering Company (Pvt) Ltd* HH 116 – 98, at p. 1; *Pickering* v *Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71(H) at 93E. In the case of *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188(H) at 193F-G, CHATIKOBO J said:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

This court has stated several times that a party who seeks to have a matter heard on an urgent basis is in essence seeking preferential treatment ahead of those other matters filed before his, and must therefore show that he or she has acted expeditiously having regard to when the need to act arose. *In casu* the applicants were interdicted by this court from carrying on mining work at the claims in question on 30 June 2023, which shows that they were in occupation of the claims then. Applicants could not have sought the relief then. Applicants state that after the Supreme Court had delivered its judgment in their favour they then went to the mine but found that mining operations were taking place on the same claims that were the subject of the Supreme Court order. This means that the need to act arose in October 2023 when the applicants' representatives visited the claims and not earlier. For this reason, the matter is urgent.

The objection that the relief that is being sought is final is not sustainable, because the provisional order is being sought pending determination of the summons matter instituted by the applicants seeking the ejectment of the respondents from the claims. It is therefore interlocutory to the main matter. The real dispute between the parties will be resolved through the summons case, with the instant matter seeking to simply preserve the *status quo* pending the definitive

resolution of the dispute as to whether the applicants are entitled to evict the first to tenth respondents. For these reasons the objection fails.

The third objection pertains to alleged non-disclosure of material facts, particularly the other cases that have been previously dealt with involving the same parties. Those other matters have no bearing on the present matter which arose simply because of the judgment of the Supreme Court referred to above and the attempts by the applicants to access the claims. In any case, I am satisfied that the papers make sufficient reference to the previous contests by the parties over the claims concerned to justify the conclusion that there if no fraudulent non-disclosure of facts. Accordingly, the objection must fail.

The fourth objection relates to the non-joinder of Lucky Heather (Private) Limited, the company that employs the first to tenth respondents. This objection is answered by the provisions of r 32(11) of the High Court Rules, 2021, which provide that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party. That provision allows the court to determine the issues or questions in dispute insofar as they affect the rights and interests of the parties before it. In other words, the objection taken does not dispose of the matter or any portion thereof. It is therefore dismissed.

The final objection pertains to the alleged material disputes that are said to be incapable of resolution on the papers. In this regard, I am prepared to accept for the purposes of the instant application that the company that employs the respondents has title to the mining claims referred to as Stella A and Stella B. The Supreme Court order does not pertain to those claims. If there is any boundary dispute then that is a matter for the twelfth and thirteenth respondents to resolve. I am concerned here only with those claims that are specified in the draft order which are the claims to which the Supreme Court order relates. Thus, the dispute, if it exists, is not material to the determination of the instant matter. I can resolve this application without resolving the boundary dispute, which issue I defer to the twelfth and thirteenth respondents to resolve. For the purposes of this application I proceed on the basis that the interdict sought relates not to Stella A and Stella B, but to those claims to which the Supreme Court order applies.

The applicant also objected to the respondents' opposing papers on the ground that the notice of opposition is not in Form No. 24 of the High Court Rules. There is no requirement for a respondent to file a notice of opposition in response to the service of a chamber application.

The entitlement to file a notice of opposition is provided for in r 59 (7) and the consequences of a failure to file it are stated in subrule (9) of the same rule. Rule 59 applies to court applications. There is no similar provision under r 60 which applies to chamber applications. This means that there is no prescribed form for opposing a chamber application. Indeed, the respondent may rely on submissions from the bar unless he or she raises factual issues that would then require to be presented under oath. The requirement that a chamber application that is meant to be served upon interested parties must be in Form 23 does not extend to requiring that any opposition to such an application must necessarily follow Form 24. The rules would have made such a provision if that was the intention of the law makers. For these reasons, the objection to the opposing papers filed is dismissed for want of merit.

On the merits, what is being sought is an interim interdict *pendente lite*. The requirements for the granting of such an interdict are settled in this jurisdiction. They are:

(1) that the right which is sought to be protected is clear; or
(2) that (a) if it is not clear, it is *prima facie* established, though open to some doubt; and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his or her right;
(3) that the balance of convenience favours the granting of the interim relief; and
(4) the absence of any other satisfactory remedy.

See *Econet (Pvt) Ltd* v *Minister of Information* 1997 (1) ZLR 342(H) at 344G-345B; *Watson* v *Gilson Enterprises (Pvt) Ltd & Ors* 1997 (2) ZLR 318(H) at 331D-E; *Nyika Investments (Pvt) Ltd* v *ZIMASCO Holdings (Pvt) Ltd & Ors* 2001 (1) ZLR 212(H) at 213-214B; *Nyambi & Ors* v *Minister of Local Government & Anor* 2012 (1) ZLR 559(H) at 572C-E.

Whether there is in existence a right is a matter of substantive law, whether that right is clearly or only *prima facie* established is a question of evidence. Thus, the use of the words 'clear' and '*prima facie*' does not in any way qualify the nature of the right but relates to proof of the existence of such a right whatever its nature might be.

In the present case the effect of the Supreme Court judgment is to reinstate the applicants' right to the disputed claims mentioned in the judgment. The right is therefore clearly established. Once the right is clearly established the applicants do not need to prove a well-grounded apprehension of irreparable harm. However, to the extent that the alleged existence of

a boundary dispute may be said to cast doubt on the right, I would still conclude that the right has been prove though only *prima facie*, because of the effect of the Supreme Court order. The apprehension of irreparable harm exists from the alleged mining on those claims that by the Supreme Court order now belong to the applicants. This court has held that mining resources are finite, by which is meant that they can be depleted by use or appropriation. Thus if interim relief is not granted and the applicant ultimately succeeds in the main matter then the loss suffered would be irremediable because those minerals will not be available anymore.

In weighing what the balance of convenience favours the court must juxtapose the prejudice to the applicant if the interim relief is not granted and the applicant ultimately succeeds in the summons matter against the prejudice to the respondents if the interim relief is granted and they ultimately succeed in having the action for their ejectment dismissed. As noted earlier on, if the applicants succeed in the action yet this application has been dismissed their loss will be irreversible because the minerals once extracted, milled and sold will not be recoverable. On the other hand, if the instant relief is granted but the respondents succeed in having the application for their ejectment dismissed, their loss is not irreparable even though they of necessity experience the inconvenience occasioned by the delayed extraction of the minerals from the disputed claims. It seems, therefore, that the balance of convenience favours the granting of the interim relief sought.

I have not been referred to any alternative remedy that would achieve the same result as the interim relief that is being sought herein. The result that is being sought is the preservation of the *status quo* pending determination of the action that has been instituted by the applicants. Accordingly, I find that there is no alternative satisfactory remedy that is available to the applicants.

For clarity, I note that this provisional order relates to the mining claims that are stated in the Supreme Court judgment in Case number SC 398/22. The provisional order does not apply to Stella A and Stella B.

In the result, the provisional order is granted in the following terms:

TERMS OF FINAL ORDER SOUGHT

That you show cause, if any, to this Honourable Court why a final order should not be made in the following terms: -

1. The provisional order be and is hereby confirmed.
2. The first to tenth respondents' mining activities within the first applicant's Antelope claims being Antelope Mine Registration Number 3064, Antelope 2, 3, 4, 5 and 6 Registration Numbers 32199, 33127, 33128, 33129 and 33130, Antelope East Registration Number 32200, Antelope East Extension Registration Number 34385, Antelope East Extension 2 Registration Number 34386, Antelope East Registration Number 32106, Antelope 8 Registration Number 36031, Antelope 9 Registration Number 36034, Antelope 10 Registration Number 36035, Antelope 11 Registration Number 36036 be and are hereby declared to be unlawful.
3. The first to tenth respondents shall pay the applicants' costs on the legal practitioner and client scale, jointly and severally the one paying the others to be absolved.

INTERIM RELIEF GRANTED

Pending the determination of the action in HCH 6672/23, the first and second applicants be and are hereby granted the following relief: -

1. The first to tenth respondents, their employees, assignees, invitees and all those claiming occupation through them, be and are hereby interdicted from:
   1.1 Mining any ore within the boundaries of the first applicant's mining claims situate in Maphisa Kezi being Antelope Mine Registration Number 3064, Antelope 2, 3, 4, 5 and 6 Registration Numbers 32199, 33127, 33128, 33129 and 33130, Antelope East Registration Number 32200, Antelope East Extension Registration Number 34385, Antelope East Extension 2 Registration Number 34386, Antelope East Registration Number 32106, Antelope 8 Registration Number 36031, Antelope 9 Registration Number 36034, Antelope 10 Registration Number 36035, Antelope 11 Registration Number 36036 ("the Antelope claims").
   1.2 Removing any mined ore, dump or sands within the boundaries of the Antelope Claims.
2. For the avoidance of doubt, this provisional order shall not apply to the claims known as Stella A and Stella B.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served on the respondents by the Sheriff or his lawful deputy.

Gill Godlonton & Gerrans, applicants' legal practitioners
Dube Legal Practice, first to tenth respondents' legal practitioners