

MISTOPHER KHAN
versus
CHANAKIRA MASUKU
and
THE MINING COMMISSIONER-MIDLANDS (NO)
and
MINISTER OF MINES & MINING DEVELOPMENT (NO)
and
THE COMMISSIONER GENERAL OF
ZIMBABWE REPUBLIC POLICE (NO)
and
FIDELITY PRINTERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 19 January & 3 February 2023

Urgent Chamber Application

G R J Sithole with him *D Majaya*, for the applicant
V Masvaya with him *J Gwatipedza*, for the first respondent
Ms S Mpande, for the second to fourth respondents

ZHOU J: This is an urgent chamber application for an order interdicting the respondents from interfering with the applicant's mining rights and operations at Somerset 16 Mine registered under certificate of registration number 24107 Sherwood, Kwekwe and for the respondents to forthwith vacate the said mine and give vacant possession thereto to the applicant. The other relief sought is for the fifth respondent to be ordered not to purchase or pay for any gold mined from Somerset 792, Somerset 791, Somerset 16 and Good Morning Mine, that is delivered to it by the first respondent or any person acting on behalf of the first respondent. The foregoing relief is being sought on an interim basis pending the return date. The final order to be sought on the return date is a declaration that the first to fourth respondents' occupation of Somerset 16 Mine and deprivation of possession, control and enjoyment of and access to the said Mine is unlawful. An interdict barring the first to fourth respondents from prospecting pegging and carrying out mining activities within the boundaries of Somerset 16 Mine is also being sought.

The application is opposed by the first respondent. The fourth respondent had also filed an opposing affidavit. However, during the hearing, the applicant through his counsel advised that he was no longer pursuing any relief against the fourth respondent. In light of the attitude expressed by the applicant, the fourth respondent advised through counsel that he was not making any submissions. Clearly, the claim against the fourth respondent was not properly conceived in the first instance and the draft order shows that not much thought had been given to the reasons for dragging the fourth respondent to court. For instance, a reading of paragraph 2 of the terms of the final order sought gives the impression that fourth respondent or police officers were prospecting for minerals or pegging or carrying on mining activities at the disputed mine. Yet no such allegation appears in the founding affidavit. It must be emphasized to legal practitioners that a draft order must be given serious thought before being presented to court. A party cannot just put terms in a draft order which bear no relation to the averments in the founding affidavit.

In addition to contesting the application on the merits, the first respondent raised points *in limine*. These preliminary objections are that (a) the matter is not urgent; (b) the draft order is fatally defective; (c) the matter is pending before another competent court (*lis pendens*). I heard argument on both the objections *in limine* and the merits and advised the parties that my determination on the points *in limine* will inform whether or not I will proceed to consider the merits of the application.

On the question of urgency, the first respondent's case is that the need to act arose on 24 December 2022 when he took occupation of the area complained of following a judgment granted by CHINAMORA J. The instant application was filed on 16 January 2023, about twenty-three days after the date on which the respondent alleges that the need to act arose. The period of twenty-three days can hardly be characterized as a delay that would deprive the matter of its urgency. Even if the applicant had filed a court application on 24 December 2022 it would not have been heard by now. Thus the matter did not cease to be urgent owing to the passage of twenty-three days. For these reasons the objection to the urgent hearing of the matter is dismissed for want of merit.

The objection to the draft order is that it is final in its effect. This is not correct because the interdict to stop the interference with the operations of the applicant is being sought on a temporary basis pending the return date. In other words, until the question of the entitlement to occupy Somerset 16 is determined on the return date, the first respondent

should not be on that mine according to the draft provisional order. The objection that the order is final is accordingly dismissed.

On the issue of *res judicata*, the respondent contends that the order by DEME J determined the dispute to which the instant application relates. The first respondent makes inconsistent submissions in this regard. It asserts that Somerset 16 has no distinct existence from Somerset 791. Yet during the hearing, counsel for the first respondent admitted that Somerset 16 is separate from Somerset 791. The judgment by DEME J in HC 5937/22 does not give the first respondent the right to occupy Somerset 16 or to carry on mining operations at that mine. It is common cause that Somerset 16 is a mine with its own mining certificate in the name of the applicant. The title has not been revoked. The first respondent's papers do not relate to Somerset 16 and the order in HC 5937/22 does not in anyway apply to that mine. The objection that the matter is *res judicata* is therefore meritless and must fail.

The final preliminary objection is that this same dispute which forms the subject of the instant application is pending before the High Court in Bulawayo. The parties before HC 1068/22 are not the same parties who are in this matter. In any event, as was submitted on behalf of the applicant, *lis pendens* is not an absolute bar to the subsequent proceedings, as was held in the case of *Muzonda & Ors v Usayiwevhu* HH 107-2012. The present application was triggered by the alleged interference that started after 23 December 2022. The declaration that is being sought in the final order relates to that interference which arose after the Bulawayo matter had been filed and removed from the roll. Even though part of the relief that is being sought is in the form of an interdict, the facts from which the instant cause arose are different. This court can determine the instant dispute on the papers before it. Accordingly, the objection that the matter is *lis pendens* is dismissed.

On the merits, what is being sought is an interim interdict. The requirements for such an interdict are as follows:

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 rights;
3. that the balance of convenience favours the granting of 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 & Ors* 1997 (2) ZLR 318(H) at 331D-E; *Nyika Investments (Pvt) Ltd & Ors* 2001(1) ZLR 212(H) at 213G-214B.

Whether there is a right in existence is a question of substantive law; whether that right is clear or only *prima facie* established is a matter of evidence. *In casu*, the right pertains to title to Somerset 16 Mine. The applicant has a certificate in respect of that mine. That certificate is proof of the title to the mine. There is a submission by both counsel that Somerset 16 Mine falls inside the boundaries of Somerset 791 which the first respondent has title over. This does not make Somerset 16 Mine part of Somerset 791. The first respondent makes no claim and has no certificate in respect of Somerset 16 Mine. If, as appears to be suggested by the first respondent, there is a dispute on boundaries, that dispute does not affect the applicant's title. The least that can be said is that there is *prima facie* proof of the right even in the face of a boundary dispute.

The irreparable harm is already taking place, as the first respondent is insisting on mining at Somerset 16. The interference with the applicant's operations is continuing. The allegation which has not been challenged is that the first respondent is causing gold ore to be shipped from Somerset 16 Mine even as the dispute is ongoing. That gold taken from Somerset 16 Mine will not be restored once it has been disposed of. The apprehension of irreparable harm is therefore well-founded.

In considering the balance of convenience, the court weighs the prejudice to the applicant if the interim relief is not granted against the prejudice to the respondent if the relief is granted. Other than stating that Somerset 16 Mine is located within the boundaries of Somerset 791, the first respondent lays no claim to Somerset 16. That mine has a separate certificate. It belongs to the applicant. The first respondent was always aware of the existence of Somerset 16 because in August 2022 he entered into an agreement with the applicant in respect of that mine. Thus, even when he had Somerset 791 pegged he knew that inside the boundaries of Somerset 791 there was Somerset 16. He therefore suffers no prejudice by the granting of the interim relief. The order being sought *in casu*, does not pertain to his mine but to the applicant's mine. On the other hand, as noted above, the

applicant's prejudice would be irreparable if he is not given control of his mine and the first respondent is allowed to mine and dispose of ore from that mine.

There is no alternative remedy to the interdict being sought herein that would stop the first respondent from interfering with the applicant's mining operations. There is also no alternative remedy that would stop the mining and removal of ore from Somerset 16 mine by the first respondent.

In the interim relief portion of the draft provisional order para. 4 will be deleted. The application pertains to Somerset 16 Mine. There is no justification to interdict the purchase of gold from Somerset 791 and Good Morning Mine. Paragraphs 1 and 2 of the draft order sufficiently address the concern about the taking of gold from Somerset 16 Mine. As regards para. 3, the legal representative of the third respondent advised that they had no problem with the order being granted except for the period of 48 hours which was submitted to be too short in the circumstances. It seems to me that a period of 15 working days from the date of service of the order would give the third respondent adequate time to attend to the requirements of para. 3 of the order granted in HC 5937/22.

In the result, the provisional order is granted in terms of the draft order thereof as amended.

Mawadze & Mujaya, applicant's legal practitioners
Chitsa & Masvaya Law Chambers, first respondent's legal practitioners
Civil Division of the Attorney-General's Office, first to fourth respondent's legal practitioners