ZIMASCO (PVT) LTD
**versus**
F MUDZENGI T/A MUDZENGI GOLD MINES
and
PROVINCIAL MINING DIRECTOR FOR
THE MIDLANDS PROVINCE
and
THE OFFICER IN CHARGE ZRP
SHURUGWI POLICE STATION
and
THE OFFICER IN CHARGE CID MINERAL AND
BORDER CONTROL UNIT

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 9 MAY 2018 AND 31 MAY 2018

*P Mukono* for the applicant
*L Nkomo* for the 1st respondent
*L Msika* for the 2nd & 3rd respondents

**Urgent Chamber Application**

**MOYO J:** This is an urgent application wherein the applicant seeks the following interim relief:

1) That the first respondent and her agents be and are hereby interdicted from carrying on any mining activities or removing gold ore.
2) That pending the return date the applicant's security guards are to guard East Peak 13 Mine and the first respondent and her agents are interdicted from harassing, or interfering with any of the applicant's security guards on the site or any of applicant's employees or agents who may visit the site or in any way interfering applicant's mining activities at East Peak13 mine.
3) That the third and 4th respondents ensure that the first respondent or her agents do not carry out mining operations at East Peak 13 Mine.

The first respondent opposed the application, the rest of the respondents consent to the application being granted.

First respondent raised two points *in limine*, firstly that there are material disputes of fact that cannot be resolved in this application and that the High Court in Harare has already found so. I was however not favoured with a copy of the Harare High Court judgment. Yet applicant's counsel argues that that is in fact not the position as the first respondent's application was dismissed on other grounds including that she had no *locus standi*. When I requested for a copy of the judgment neither party could avail same as they said it has not yet been typed.

This being an urgent application I cannot withhold my determination until when that judgment is out. I will thus proceed to analyse and assess the issues as I understand them. The first respondent argues that there are material disputes because it is not clear what is happening on site, as the parties are yet to demarcate their appropriate boundaries by obtaining the GPS coordinates from the department of mining. This is espoused in a letter by the mining commissioner where he made a ruling that first respondent had her pegged Ansh139 mine into applicant's East Peak 13 mine.

> The letter from the mines ministry annexed on page 22 of the application reads, on page 2
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> "The survey was done on the 29th of December 2017 in which both parties were represented on the ground. The survey found out that Ansh 139 mine on the ground overpegs East Peak 13 mine. The disputed shaft is also in East Peak 13 Mine."

The mining commissioner further directed in the same letter that the first respondent should stop all mining operations in East Peak 13 Mine and revert to the position in Ansh 139 mine. The letter further states that this is to avoid future disputes. The second respondent who issued the directive after doing the appropriate investigation and findings which are in themselves its prerogative, has supported applicant's cause and also says that indeed it is an established fact that first respondent encroached on applicant's claim. Second respondent is better placed to deal with the issues of encroachment and boundaries whereas this court does not have the know-how or the technical expertise to dismantle such an issue. In my view this court cannot go against the findings of the second respondent on this platform except of cause in an application for the review of that decision.

I cannot therefore uphold the point *in limine* on the ground that there are material dispute of facts as clearly second respondent has found substance in applicant's claims.

The second point *in limine* raised is that of urgency, that applicant discovered the issues relating to this application in December 2017 and only approached the court in April 2017. I hold the view that according to applicant's narrative that they did seek an alternative remedy from the second respondent which they had to wait for and which indeed later came out on 4 April 2018, resulting in them filing this urgent application since first respondent would not honour second respondent's directive, is indeed a valid and reasonable explanation for not approaching this court. The delay by the applicant to approach this court was not premised on mere inaction but the applicant was pursuing an alternative remedy through complaining to the second respondent.

In any event had applicant approached this court without exhausting all alternative remedies first, that would have been a ground to challenge this application. I thus find that the requirements for urgency are met by the explanation given by the applicant as to what transpired in the four months preceding to this urgent applicant. I would thus not uphold the second point *in limine* as well.

On the merits

The facts of this matter are that the parties share a common boundary in relation to their respective mining claims. Applicant owns East Peak 13 mine and first respondent's late husband owns Ansh 139 mine. These mines share a common boundary which is the subject matter of this dispute. Sometime in December 2017, applicant alleges that it discovered that first respondent and her agents were mining on applicant's claim, having encroached thereon. A report was made to second respondent, the authority that oversees the mining portfolio, second respondent made investigations on the ground and discovered that indeed first respondent had encroached on to applicant's claim and that she should stop immediately. Applicant alleges that it is the failure to honour the second respondent's directive that caused them to approach this court. In approaching this court to seek a provisional order, applicant has to satisfy the four requirements of an interdict.

1) A *prima facie* right.

I hold the view that a *prima facie* right has been established by the applicant in the directive by the mining commissioner, which has established that first respondent is infringing on applicant's claims.

2) Reasonable apprehension of harm.

I hold the view that the findings of the mining commissioner that first respondent has overpegged and is mining on applicant's claim substantiates the fear that applicant has. I find that the contention by the first respondent that applicant mines chrome and they mine gold and therefore there is no irreparable harm to be suffered as being irrelevant for, a finding has been made that first respondent is intruding into applicant's land, and is extracting gold and by virtue of being entitled to that claim applicant is justified in seeking to block any intrusion on its claim.

3) That there is no alternative remedy.

I hold the view that applicant has indeed exhausted the only remedy that was available to it namely approaching second respondent for a resolution of the dispute and therefore its recourse now solely lies with this court.

4) The balance of convenience

It is my view that certainly the balance of convenience leans heavily in favour of the applicant because a finding has already been made in its favour by the relevant authorities and until that finding is set aside on review it remains operative and hence tilts the scales heavily in applicant's favour.

The requirements for a temporary interdict were succinctly put in the case of *Zesa Staff Pension Fund* vs *Mushambadzi* SC 57/02. I have already listed them above. The first respondent raised the aspect of section 58 of the Mines and Minerals Act whose import is that even if first respondent has over pegged into applicant's mine the law stipulates that where the pegs have been so for over two years, then the second respondent is estopped from interfering with the pegs anymore. I believe this part is for review where the decision of the second respondent on the over pegging will be assessed as being correct or otherwise, that is where the first respondent can throw in this argument in my view and the court on the review platform will probe into it and making the appropriate findings. In this application all applicant has to show is a *prima facie* right which I believe it has done as I have shown herein. First respondent also

submitted that there is no interference with applicant's East Peak 13 Mine as evidenced by the letter from the police dated 16 April 2018 wherein they say that from their investigations on 14 April they did not establish any evidence of the alleged illegal mining activities.

*Mr Msika* counsel for the respondent sought to down play that letter saying it is not known whether the police did a thorough job in investigating the issue at hand. He sought to submit that the position of the respondents was that the provisional order should be granted. However, one is persuaded to believe that if the applicant had complained to third respondent and they did carry out investigations, their findings cannot just be ignored by this court. They went to the site complained of and they did not witness any illegal mining activities by the first respondent. It is therefore not clear if first respondent is indeed acting in the manner alleged by applicant.

The other problem that applicant has in my view is to do with the provisional order itself. The way it is drafted. First respondent's counsel raised this pertinent point again. He submitted that the provisional order as sought is fatally flawed in that the relief sought in the interim is the same as the final relief in that all applicant wants is that the respondent be interdicted from carrying a mining activities at East Peak 13 Mine and removing gold ore therefrom. The manner the relief is couched is such that once the applicant gets the provisional order, which is final in nature, they will have no reason to set this matter down for confirmation or to proceed with same to confirmation stage. Such a scenario is undesirable as in essence, it means that the applicant will obtain final relief *via* an urgent application. That is not allowed procedurally and there is ample case law to that effect.

In the case of *Chief Gampu Sithole and Another* vs *Kennedy C. Ndlovu and Another* HB 63/13, the late Honourable Mutema J had this to say on a similar issue:

> "Regarding the issue concerning similarities in the interim and final orders sought in the draft provisional order, ---. The net effect of granting the relief sought in paragraph 1 of the interim order is that the applicants would have obtained final relief on proof merely of a *prima facie* case. This is undesirable as there would be nothing to anticipate on the return day. The applicants, at the end of the day would have nothing to confirm or discharge. This is tantamount to getting final relief through the back door. This was also frowned upon in the *Kuvarega* case."

At least the best applicant's counsel could have done in the circumstances would have been to orally apply for an indulgence and to seek an amended draft order at the end of the day. Applicant's counsel forewent that opportunity and this court's hands are tied. It cannot grant an indulgence which amounts to condonation when none was sought, neither can this court proceed to amend the draft provisional order as firstly, it is unknown what final relief the applicant would then seek and secondly, this court as an impartial arbiter should not be seen to bend too much in favour of one litigant as that creates a perception of a bias especially where the litigant themselves have done absolutely no attempt to save the situation. In any event the letter from the police makes it questionable whether the relief sought is justified in the circumstances.

It is for these reasons that this court will not exercise its discretion in favour of the applicant. The application is accordingly dismissed with costs.

*Danziger and Partners*, applicant's legal practitioners
*Musunga and Associates*, 1st respondent's legal practitioners
*Civil Division, Attorney General's Office*, 2nd and 3rd respondents' legal practitioners