ACEBALL INVESTMENTS (PRIVATE) LIMITED
versus
STEPHEN MURAMBASVINA In his capacity as Executor of Estate Late Jobe Ncube
and
FELIX NCUBE
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 20 & 25 July, 1 & 31 August 2016

Urgent Chamber Application

K. Maeresera for the applicant
T. Mudambanuki for the first and second respondents

ZHOU J: This is an urgent application for an interdict preventing the first and second respondents or any persons representing them or related to them from visiting certain mining claims described in the papers as Bulldog 8, 9 and 10 situate at Hillington Farm, Golden Valley, Patchway, Kadoma pending the determination of the matter. The applicant also seeks further interim relief that it be allowed to open an entrance and exit point through a fence which was erected by the first and second respondents in order for it to be able to access its mining blocks. The final relief sought is for the same respondents and the other persons referred to above to be interdicted from harassing, assaulting and interfering with the applicant's mining activities at the same claims described above. The further relief sought is for the first and second respondents to be ordered to remove a fence and some poles which they erected at the same Bulldog 8, 9 and 10 situate at the place described above. The applicant also seeks costs of suit against the first and second respondents.

The following facts upon which the application is founded are alleged by the applicant. The applicant has been carrying on mining operations on certain mining claims which are described above. The mining blocks are situated on a farm known as Hillington Farm, Golden

Valley, Patchway, Kadoma. The farm belongs to the first respondent. From around June 2016 there were incidents of misunderstanding between the applicant's employees and second respondent and his family members. It is alleged that at some point the second respondent went to the mine accompanied by eight men and assaulted the applicant's employees. They took keys to an excavator from the driver thereof, one Enock Sonamizi. Enock Sonamizi deposed to an affidavit explaining the events of 11 June 2016 during which he was assaulted by the second respondent and other members of his family who took the keys to the excavator from him. The police were involved in the disputes. In fact, a report was made at Kadoma Rural Police Station concerning the incident in which the applicant's employees were assaulted. Those disputes are not particularly relevant to this matter albeit they provide a background to what then happened later. The applicant alleges that on 13 July 2016 the second respondent and members of his family erected a fence around the applicant's mining blocks thereby rendering them in accessible. It is alleged that the second respondents also closed the road linking the mining blocks to the milling plant. At the time that the founding affidavit was deposed to the applicant's excavator had been fenced inside the fenced area and the applicant's employees were prevented from accessing it.

The first and second respondents are opposing the application on the grounds set out in the opposing affidavit. On 1 August 2016 the first and second respondents filed heads of argument together with a "supporting affidavit" deposed to by one Knowledge Kabesa. They did not seek the leave of the court in terms of the rules to file the further affidavit. Accordingly, no regard is had to the contents of that affidavit. In addition to contesting the merits of the application the two respondents object *in limine* to the matter being heard on the merits and seek its dismissal on three grounds. The first ground of objection is that the application is invalid because the grounds of the application are not stated on the face of the Form 29B as is required by the rules of this court. The applicant readily conceded the omission to state the grounds on the face of the chamber application and moved that the omission be condoned in terms of r 4C. This is a matter in which the grounds of the application are sufficiently set out in the founding affidavit. There is no prejudice to the respondents which is occasioned by the failure to state the grounds on the face of the chamber application. I do not believe that the omission is such a fatal irregularity which invalidates the application to the extent that it cannot be condoned. While

there is need for litigants to comply with the rules of court the power vested in the court by r 4C and the Constitution, and the inherent power of the court to control its processes allow the court to condone such an omission. In the present case it is in the interests of justice that the non-compliance with the rules be condoned. There is no prejudice to the respondent caused by the non-compliance with the rules, especially as the grounds upon which the application is founded are sufficiently set out in the founding affidavit.

The second ground of objection is that the deponent to the founding affidavit, Sandy Chikosi, is not authorized to institute the proceedings on behalf of the applicant as she did not attach a resolution authorizing such proceedings to the founding affidavit. That concern was addressed by the attachment to the answering affidavit. Although the extract of the resolution attached is not elegantly drafted in the sense that it is very general and does not specifically refer to the current dispute, the court is satisfied having regard to it and the other factors that the applicant has authorized the proceedings. The resolution is signed by two directors of the applicant. The proceedings are in the name of the applicant. The deponent to the founding affidavit is a director of the applicant. The documents attached in support of the application are those of the applicant. The respondents have not pointed to any evidence to suggest that the applicant has not authorized the proceedings. It is not in every matter that the proceedings must be accompanied by a resolution to show that they have been authorized by an applicant company. The court looks at the totality of the circumstances and the basis upon which the authority to institute the proceedings is being challenged in order to determine whether an objection that proceedings have not been authorized by a company are properly founded. The objection based upon the alleged lack of authority to institute the proceedings is therefore rejected.

The respondents also objected to the application on the grounds that it is not urgent. It is suggested that the assault upon the applicant's employees took place prior to 20 June 2016 yet the application was filed on 15 July 2016. It is clear upon a reading of the draft order and the founding affidavit that what triggered the making of the urgent application was the fencing by the respondents of the mining claims. That took place on 13 July 2013, according to the founding affidavit. There was therefore no delay in relation to the cause of the complaint. The objection that the matter is not urgent is therefore not properly founded.

The other matters raised haphazardly as points *in limine* are matters which relate to the merits of the dispute. It has now become common practice for practitioners to just raise all sorts of defences under the title "points *in limine*". At the end of the day it is not even clear what defence is really being advanced by the first and second respondents. The absence of the environmental impact assessment report is not really the concern of this court in an application for an interdict as it is not one of the requirements for the granting of that relief. The respondents have also referred to the absence of an inspection report. That, too, has no relevance in the determination of whether a right exists in relation to the claims in dispute which are alleged to have been fenced by the respondents. The respondents' tactic has been to make bare denials of the material facts alleged without substantiating their denials.

What is being sought in the interim relief is a temporary interdict. The requirements for 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 right;
(3) That the balance of convenience favours the granting of interim relief; and
(4) The absence of any other satisfactory remedy.
See *Nyika Investments (Pvt) Ltd* v *ZIMASCO Holdings (Pvt) Ltd & Ors* 2001 (1) ZLR 212(H) at 213G-214B; *Watson* v *Gilson Enterprises & Ors* 1997 (2) ZLR 318 (H) at 331D-E; *Econet (Pvt) Ltd* v *Minister of Information* 1997 (1) ZLR 342 (H) at 344G-345B.

The existence of a right is a matter of substantive law; whether that right is clearly or only *prima facie* proved is a matter of evidence. See *Nyambi & Ors* v *Minister of Local Government & Anor* 2012 (1) ZLR 559 (H) at 574C-E. The certificates of registration attached to the applicant's founding affidavit show that Bulldog 8, 9 and 10 are in the name of the applicant which is stated as the holder thereof. The respondents' claim that the claims are registered in the name of some other company are not based upon the certificates of registration but on the name which appears on the beacons. But the beacons are not proof of title. They merely mark the boundaries. The right to the mining claims is therefore established by the evidence of those certificates. The certificates are *prima facie* proof of the rights in those claims. The question of the validity of the certificates being challenged on grounds not appearing *ex facie* those certificates are matters that should be dealt with on the return date. If, as appears from

the opposing affidavit, the respondents doubted the authenticity of the certificates they should have asked for the original copies thereof or sought clarification from the relevant offices from which the certificates originated. It does not assist the respondents to just dispute the authenticity of everything as a matter of course without any form of evidence to support their contentions.

The interference with the claims has not been disputed. The claims were fenced by the respondents in a manner that interferes with the applicant's access to them. The fencing of the claims constitutes an interference with the applicant's rights to carry on mining operations on those claims.

The balance of convenience favours the granting of the interim relief. The respondents are not prejudiced by the granting of that relief as they lay no claim to the mining claims. On the other hand the applicant which has hired equipment at a cost incurs costs yet it is being prevented from carrying on work at the mine. There is no alternative remedy by which the applicant can obtain the remedy being sought in the instant case.

In all the circumstances, I am satisfied that the applicant has established the requirements for the relief which is being sought.

Accordingly, the relief is hereby granted in terms of the draft provisional order filed of record.

Mangwiro Law Chambers, applicant's legal practitioners
Jarvis Palframan, first and second respondents' legal practitioners