GEORGE MATSIKIDZE
versus
ZEPLIN RESOURCES (PVT) LTD
and
SECRETARY FOR MINES AND MINING DEVELOPMENT
and
DEPUTY SHERIFF OF THE HIGH COURT OF ZIMBABWE, GWERU N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 2 February & 16 October 2023

Opposed application

Mr *T Zishiri*, for the applicant
Mr B Ngwenya, for the 1st respondent
No appearance for the 2nd and 3rd respondents

CHINAMORA J:

After hearing argument by the respective parties, I dismissed the application with costs on an attorney and client scale. I now give my reasons. On 20 January 2020, the applicant filed an urgent chamber application and submitted that, in 2002, he obtained rights to extract minerals in Mvuma through special grants SG 2854 and SG 2858. Before the expiry of the special grants in 2011, he wrote to the second respondent through the office of the Mining Commissioner, seeking their renewal. Thereafter, on 20 April 2018, the second respondent acknowledged receipt of the applicant's letter, and indicated that applicant's file was at some point misplaced, hence the delay in renewing the special grants. The applicant avers that he made various follow ups with the second respondent requesting the renewal of the special grants. As a result, he learnt that the first respondent was also granted rights by the second respondent to operate in areas surrounding the location of the special grants. A dispute arose between the applicant and the first respondent over

boundaries of their mining locations. The applicant states that the first respondent allowed him to continue operations on his special grants pending their renewal.

In addition, the applicant alleges that due to disputes between him and the first respondent, he applied (under HC 5501/19) for an order compelling the second respondent to renew his special grants. That matter is pending before this court. On the other hand, the first respondent filed and obtained a provisional order on an urgent basis under HC 5714/19. That order directed the applicant to stop operations which fell within his special grants SG 6855 and 6856, pending the return date. On 27 November 2019, the provisional order was confirmed. The applicant contends that, sometime in 2022, he received communication from the second respondent stating that they were no longer in a position to renew his special grant. The applicant submits that this decision was based on the misconception that applicant's application under HC 5501/19 had been disposed of. Contrary to a seeming moratorium *vis-à-vis* execution, the first respondent obtained a warrant of execution under HC 5714/19 sometime in December 2022. Faced with the prospect of eviction, the applicant filed an urgent chamber application for stay of execution pending the demarcation of boundaries of SG 2854 and 2858 by the second respondent.

The same application also sought a stay of execution pending the determination of HC 5501/19. In this respect, the applicant argues that on the initial hearing of the urgent chamber, the second respondent was directed by the court to carry out the demarcation exercise. Pursuant to the exercise, the second respondent authored a report dated 10 January 2023 which was filed of record. In terms of the report, only SG 2854 was found to be encroaching on the first respondent's mine. Consequently, the application was dismissed for lack of merit. On 13 January 2023, the applicant was evicted from the whole area covered by SG 2854 and SG 2858. However, the applicant contends that this was outside the parameters of the court order, warrant of execution and the boundaries of SG 6856, which is now the only grant held by the first respondent. Further, he submits that, from a reading of the second respondent's report, only part of his special grant SG 2854 encroached on SG 6856. According to the applicant, that is where the third respondent ought to have evicted him, since the rest of SG 2854 and SG 2858 are not part of the court order or writ of eviction. It is on this basis that the applicant alleges that the matter is extremely urgent and ought to be treated as such. In addition, the applicant submits that he has been on the mining area for more than twenty years and, as such, he is an interested party who has real and substantial

interest in SG 2854 and SG 2858. The applicant also petitions this court to exercise its discretion to determine existing, future contingent rights. On the above facts the applicant prayed that:

1. The execution by the third respondent through a court order and warrant of execution obtained under HC 5714/17 be and is hereby declared unlawful and a nullity for want of revival of the court order upon the renewal of the special grant under SG 6856 in 2022.
2. The execution by the third respondent through a court order and warrant of execution obtained under HC 5714/19 be and is hereby declared a nullity to the extent that it affects the mining area under SG 2854 and SG 2858, which are not covered by the court order referred to herein and the report by the second respondent dated 10 January 2023.
3. Consequently, the eviction of the applicant by the third respondent from SG 2854 and SG 2858 be and is hereby declared a nullity to the extent that it interferes with the applicant's occupation or use of SG 2854 and SG 2858 not covered by the court order under HC 5714/19.
4. Consequently, the third respondent be and is hereby ordered to restore the applicant to SG 2854 and SG 2858, save for the area covered by the court order referred to above as shown on the report by the second respondent dated 10 January 2023.
5. Alternatively, the Special Grant in the names of the first respondent under SG 6856 issued on 26 April 2022 be and is hereby declared null and void to the extent that it interferes with SG 2854 and SG 2858.
6. Costs of the application to be borne by the respondent who opposes the application on an attorney and client scale.

The first and second respondents opposed the granting of the order sought by the applicant. Essentially, the first respondent raised a preliminary point to the effect that the draft order is defective for want of form. As a result, the first respondent prayed that the application be struck off the roll. Before going into the merit of the case, let me deal with this preliminary point. It is settled law that the Rules of this Court empower this court to amend, vary or alter a draft order. In this respect, Rule 60 (9) provides that:

> "Where in an application for a provisional order the judge is satisfied that the papers establish a prima facie case he or she shall grant a provisional order either in terms of the draft filed or as varied". **[My own emphasis]**

I must add that, this court had occasion to explain the true import of the rule when dealing with its predecessor, namely, Rule 240 of the old High Court Rules 1971. Thus, in *Chiswa* v *Maxess Marketing (Pvt) Ltd & Ors* HH 116-20, KWENDA J appositely said:

> "My understanding is that the final wording of any court order (whether final or provisional) is the prerogative of the court as long as the order resolves the dispute(s) before the court. The draft provisional order submitted by the applicant with the application remains a proposal".

Consequently, from the unequivocal language of r 60 (9) and the remarks of my brother judge, KWENDA J, I am of the view that the preliminary point lacks merit.

Turning to the merits of the case, the first respondent contents that applicant's mining grants expired and have not yet been renewed. Consequently, the applicant has no mining rights to enforce and the issue of encroaching and overlapping does not arise. It is argued on behalf of the first respondent that the area which is alleged to be outside its special grant belongs to Shapa Mining Syndicate and Chicha Mining Syndicate, respectively. Additionally, the first respondent argues that the applicant's application under HC 5501/19 is misplaced, since the applicant cannot seek to compel an administrative authority to make a decision in his favour. As correctly pointed out by the first respondent, the applicant can only compel the second respondent to make a decision and give reasons for such decision. In light of the above, the first respondent contends that the applicant suffers no prejudice. To the contrary, it is the first respondent who stands to suffer as he does not exercise his mining rights. In the premises, the first respondent prayed that the matter be dismissed with costs on a punitive scale. The second respondent's opposition echoes that of the first respondent. The second respondent contends that the special grants referred to by the applicant expired and have not been renewed. This entails that the applicant has no mining rights at the moment. Furthermore, the second respondent contends that the fact that applicant's special grants were included in the report does not mean that they are still in existence.

The factual narrative is that, it is not in dispute that the applicant's special grants expired and were never renewed by the second respondent. However, the applicant had remained in

possession of the mining area, rather in my view, unlawfully on the basis of a letter from the second respondent dated 20 April 2018. A further common ground is that the first respondent now has mining rights over the area in dispute in terms of the special grants given to it by the second respondent. Another common feature is that the applicant as submitted by the first respondent cannot compel the second respondent to make a decision in his favour. As a result, the pending applications as noted by the first respondent are inconsequential. In the premises, I am more tempted to repeat the words by Lord Denning in *Macfoy Ltd* v *United Bottlers*: [1961] 3 All ER 1169, to the effect that *'You cannot put something on nothing and expect it to stand'*. The further contention was that the applicant has no mining rights in the area concerned and cannot seek to enforce non-existent rights.

In conclusion, my observation is that any rights which the applicant had over the mining area in dispute, were terminated by operation of law when the special grants expired. This view is given credence by the applicant's confirmation that his application for renewal is still pending before the second respondent. What is evident is that the applicant's entitlement to the special grants is uncertain until they are renewed. That being the case, this court can only protect existing rights and not non-existent rights. In this context, it bears mentioning that in *Econet (Pvt) Ltd* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR (H), with reference to declaratory relief, the court said: "it confirms the right of applicants, it does not confer rights".

Taking into account the respective positions of the parties, I tend to agree with the submissions made by the first and second respondents that no rights has been established by the applicant. In my view, no evidential basis has been established for affording the relief sought, and I am inclined to dismiss the application. I now have to consider the issue of costs. As regards costs, it is trite that they are in the discretion of the court. However, costs generally follow the outcome and are awarded to the successful party. In *casu*, punitive costs at the scale of attorney and client. Since the applicant was aware that his rights to the mining area in question had ceased to exist, this application should not have been filed. He therefore knew that, without evidence of renewal of the special grants, his position was precarious. Yet, the applicant approached this court, nonetheless, seeking to enforce non-existent rights. The first respondent has been put out of pocket in being forced to defend this application. The conduct of the applicant deserves censure.

Accordingly, this application is hereby dismissed with costs on an attorney and client scale.

Kwande Legal Practitioners, applicant's legal practitioners
B Ngwenya Legal Practice, respondent's legal practitioners