INGWE MINING SYNDICATE

Versus

MINING COMMISSIONER, GWERU MINING DISTRICT

And

KIN'S MINERALS (PVT) LTD

And

HOMESTAKE MINING AND TECHNICAL SERVICES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 30 MAY & 7 JUNE 2012

P. Chitsa for the applicant
1st respondent in person
T.C. Masawi for 2nd respondent

Judgment

NDOU J: The applicant seeks a provisional order in the following terms:

"Terms of the final order sought

The respondents show cause, if any, to this honourable court why a final order should not be made in the following terms:

1. The decision by the 1st respondent of the 3rd May 2012 be and is hereby nullified and set aside.
2. A declaration be and is hereby made to the effect that the Tribute Agreement between the applicant and the 3rd respondent remains a valid and enforceable agreement at law, until or unless set aside or terminated through due process of law, by a court of competent jurisdiction.
3. The 1st respondent pays costs of this application.

Interim relief granted

Pending finalization of this matter, the applicant is granted the following interim relief:

1. That the 1st and 2nd respondents should not interfere with Tribute Agreement entered into by the applicant and the 3rd respondent on the 23rd April 2012 and the terms and conditions therein."

The salient facts of the matter are the following. The applicant is a mining syndicate. The applicant entered into a tribute agreement with the 3rd respondent on 23 April 2012. The agreement was approved by the 1st respondent. The applicant commenced mining operations. On 3rd May 2012 the 1st respondent wrote a letter to the applicant in the following terms:

> "Ref: Trib V/R 39/12 Homestake Mining and Technical Services i.f.o. Ingwe Mining Syndicate – 9274BM Neptune:
>
> Be advised that the tribute agreement signed under duress and therefore is null and void.
>
> All mining operations cease forthwith.
>
> Yours faithfully
>
> (Signed)
> W M Dube
> Mining Commissioner
>
> c.c. Homestake Mining
> c.c. O.I.C. C.I.D. Minerals Kwekwe"

The applicant avers that it received this letter on 8 May 2012. This application was filed under a certificate of urgency on 23 May 2012. The cause of the dilatoriness was not explained in the certificate of urgency and the founding affidavit at all. From the wording of the draft order above, the applicant seeks a review of the decision by the Mining Commissioner.

The application for review should have been in terms of Order 33 of the High Court Rules, 1977. In terms of Rule 256 it should have been by way of court application. The application was filed as a chamber application. I will revert to this issue later, if need be. The first issue raised is whether the application is urgent. It took the applicant around two weeks to act. There is no explanation proffered for the non-timeous action. In the absence of an acceptable explanation for the dilatoriness the matter cannot be treated as urgent whatever prospects of success may be – *Kuvarega* v *Registrar-General* 1998 (1) ZLR 188 (H) and *Mutizhe* v *Ganda & Ors* SC-17-09. Further, the applicant is required to satisfy the court that irreparable harm may be suffered by the applicant if the matter is not dealt with urgently and the applicant

should have treated the matter urgently – *Triangle Ltd* v *ZIMRA* HB-12-11 and *CABS* vs *Ndlovu* HH-3-06. There is no averment of irreparable harm to be suffered by the applicant if it is not granted the interdict. The applicant has just made a naked statement that it will suffer commercial prejudice. In this regard the applicant relied heavily on the case *Silver Trucks and Anor* v *Director of Customs* 1999(1) ZLR 490 (H). The same judgment requires that the applicant provides the court with some material to work with to satisfy itself that there will be irreparable harm. *In casu*, as alluded to above, the applicant just made a naked statement in the certificate of urgency (and not in the founding affidavit). In the circumstances the court cannot begin to exercise discretion without the benefit of that crucial information. The applicant in the *Silver's* case, *supra* gave detailed information on the possible irreparable commercial harm to be suffered if the application is not granted. *In casu* the applicant has been very casual and streetwise on the question of urgency and irreparable harm to be suffered. It is trite that there is a direct link between urgency and irreparable harm.

From the foregoing it is clear that the applicant has failed to satisfy that it will suffer irreparable harm if the matter is not dealt with under a certificate of urgency. This court cannot exercise its discretion to hear the matter on urgent basis when there is no such foundation.

Accordingly, on this point alone, without going into merits, the application is dismissed with costs.

Mkushi, Foroma & Maupa, applicant's legal practitioners
Masawi & Partners, 2nd respondent's legal practitioners