HB 260-17
HC 1993/17

RONALD DAVISON MUGANGAVARI
versus
PROVINCIAL MINING DIRECTOR (GWERU)
and
K & G MINING SYNDICATE

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 1ST AUGUST 2017 AND 31 AUGUST 2017

Urgent Chamber Application

K Ngwenya for the applicant
No appearance for the 1st respondent
T Zishiri for the 2nd respondent

TAKUVA J: This matter arises from a long and protracted mining dispute going as far back as 2014. The parties have been suing each other right left and centre, obtaining court orders some of which have been totally ignored.

As I pointed, out this application is the latest series of the boring drama. The facts as established by the first respondent are that there is one mine with two names. More specifically, Clifton 15 Mine and Midway 21 Mine share the same position on the Master Plan. On the ground, both blocks share the same beacon positions and coordinates. They have the same hectarage of 6.79Ha. For clarity purposes, Midway 21 is a registered mine owned by the second respondent while Clifton 15 is registered and owned by the applicant. It was first registered on 20 February 2012. Midway 21 was first registered on 19 October 2006.

The first respondent sitting as the mining commissioner's court made a determination that aggrieved the applicant who in turn appealed to the Minister of Mines and Mining development. The Minister found merit in the appeal and set aside the first respondent's decision. The second respondent then file an application for review under case number HC 2031/15. I granted the application for review in HB 131/17 on 1 June 2017. Dissatisfied, the applicant appealed to the Supreme Court under case number SC 380/17. This prompted the second respondent to file an application for leave to execute pending appeal under case number HC 1740/17. The application is pending.

On 6 July 2017, the first respondent notified the applicant of his decision to suspend with immediate effect all mining operations at Midway 21 and Clifton 15 Mine pending the finalization of the matter. Applicant was aggrieved and filed this application seeking the following order:

> "INTERIM RELIEF SOUGHT
> Pending the finalization of the appeal filed under SC 380/17 and/or the application for Execution pending appeal filed under HC 1740/17;
>
> 1. The 1st and 2nd respondents or anybody claiming through them be and are hereby ordered not to interfere with the applicant's activities at Clifton 15 Zvishavane,
> 2. The letter by the 1st respondent dated 6th July 2017 shall not be given effect to.
> 3. 1st and 2nd respondents pay costs of suit.
> 4. The applicant's legal practitioners are hereby authorized to serve this order on the respondents."

Applicant contended that he has a *prima facie* right by virtue of his appeal to the Supreme Court and that the matter is urgent because of the financial hardships that he is likely to suffer if the mining operations are temporarily stopped. Further, he argued that he has no other remedy available to him except for the interdict.

The second respondent opposed the application on the following grounds:

(a) The application lacks urgency

(b) The requirements of an interdict have not been met

The Law

The requisites of a temporary interdict are:

(a) A *prima facie* right

(b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) A balance of convenience in favour of the granting of the interim relief; and

(d) The absence of any other satisfactory remedy;

See *Steel and Engineering Industries Federations and Others* v *National Union of Metal Workers of South Africa* (2) 1993 (4) SA 196 (T) at 199G-205J; *Airfield Investments (Pvt) Ltd* v *Minister of Lands and Others* 2004 (1) ZLR 511 (S) at 517 F-H.

The remedy of a temporary interdict is the protection of an alleged existing right. It is not a remedy for the past invasion of rights. Its effect therefore is to maintain a certain *status quo* by freezing the position until the court decides where the right lies.

Applying the law to the facts in *casu*, it is common cause that applicant failed to comply with rule 34 (5) of the Supreme Court Rules by failing to pay costs for the preparation of the appeal record. In terms of that rule, if one fails to pay costs then the appeal lapses and will not be reinstated without leave of a judge. At the time that the applicant filed this application, he was aware of his failure to comply with r34 (5) *supra.* Surprisingly he decided not only to conceal that fact but to positively misrepresent facts and mislead the court by submitting that he had a *prima facie* right by virtue of his pending appeal in the Supreme Court. The least the applicant should have done was to point out and explain any remedial action he took to cure the defect in his appeal. As it stands there is no right that flows from the appeal until it is reinstated. Consequently, the right to mine is now with the second respondent in line with this court's judgment in HB 131/17 by operation of the law. Quite clearly applicant has no *prima facie* right in the mine in the absence of an appeal and an interdict should not be granted – See *Murowa Diamonds (Pvt) Ltd* v *ZRA and Another* 2007 (2) 375(H). Applicant strenuously argued that he will suffer irreparable harm if the interim relief is not granted. He described this harm as "financial hardships" emanating from non-payment of wages for his fourteen employees and obligations to pay ZIMRA and NSSA.

While urgency of a commercial nature may found an urgent application, in *casu*, the applicant has not set out sufficient facts in the founding affidavit to establish how these so called obligations will arise. See *African Tribune Newspapaers (Pvt) Ltd and Others* v *MIC and Another* 2004 (2) & (H).

Applicant has not attached proof from these entities to show that they are debts owing or that debts will accrue due to the closure of the mine. In any event these entities would not demand payment from a miner who has genuinely shut down operations unless there are arrears. From

these circumstances and the nature of the order complained against, the applicant can never suffer irreparable harm.

As regards the balance of convenience, the applicant has not alluded to this at all in his papers. It is common cause that the second respondent has heavily invested on the mine since 2014, way before applicant came into the picture. In my view, the injunction is actually called for in order to protect both parties from all kinds of prejudice. If it is removed, there will certainly be chaos and anarchy on the mine. I come to this conclusion because the applicant has not refuted the fact that he was ordered to stop his mining operations by MOYO J under case number HC 2205/15. He contemptuously disobeyed this order and has forcefully remained on site operating.

Further, the applicant has not said anything about the allegations that he and his security guard are on remand facing attempted murder charges arising from the shooting of two of second respondent's members in July this year. From the documents filed of record, it is surprising that the applicant claims that he will be prejudiced by second respondent's unlawful conduct. On the contrary, it is the applicant who has abrogated to himself the unchecked free play that includes disobeying court orders and shooting perceived rivals.

The court must weigh the prejudice that the applicant will suffer if the interdict is not granted against the prejudiced to the second respondent if it is. On the evidence, it is clear that the balance of convenience favours the upholding of the *status quo* pending finalization, of the court case as both parties will be at par until a final and definitive judgment is issued. The first respondent as the administrator of the Act and general overseer of mining operations in the province, has deemed it fit to stop operations pending the outcome of all court cases. Applicant must direct his energy at a speedy prosecution of his appeal to the Supreme Court if at all there is such an appeal in the first place.

Finally, the applicant has another satisfactory remedy, namely the application for review of the first respondent's decision which is basically a *quasi* judicial determination.

As regards costs, I am of the view that the application is an abuse of the process of the court. Also, applicant is guilty of mendacious conduct in that he did not disclose the existence of a grave defect in his application, which defect he was aware of. Such dishonest conduct justifies an award of attorney and client costs.

For these reasons I find that the applicant has failed to establish the requirements of an interdict.

In the circumstances, it is ordered that;

(1) The application be and is hereby dismissed.
(2) The applicant be and is hereby ordered to pay second respondent's costs at attorney and client scale.

Mwonzora & Associates, applicant's legal practitioners
Garikayi and Company, 2nd respondent's legal practitioners