HB 272-17
HC 2431-17
XREF HC 1933-17

CARRY MINE COMPLEX (PVT) LTD
**versus**
EASY CASH SYNDICATE
and
PROVINCIAL MINING DIRECTOR MATEBELELAND SOUTH N.O
and
THE CO-ORDINATOR ZIMBABWE REPUBLIC POLICE MINERALS AND BORDER CONTROL N.O
and
MINISTER OF MINE AND MINING DEVELOPMENT N.O
and
BULAWAYO ASSISTANT SHERIFF N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 18 SEPTEMBER 2017 AND 21 SEPTEMBER 2017

**Urgent Chamber Application**

*G Nyoni* for the applicant
*Ms V Chikomo* for the 1st respondent
*L Dube* with *Ms N Ndlovu* for the 2nd, 3rd & 4th respondents

**MATHONSI J:** This is the third time in exactly 5 months I am being called upon to preside over the mining dispute between the applicant and the first respondent, a mining dispute that just does not appear to be going away anytime soon because either one of the parties or both deliberately wants to mystify what is otherwise a simple and straight forward matter in the forlon hope that the court will not see through it and unwittingly allow the party to unduly benefit from the maze of confusion. Otherwise there is no reason why this matter is still trending.

What makes the present application unpalatable is the failure of the applicant to observe the time-tested principle required in urgent applications, that the utmost good faith must be observed by those that approach the court on an urgent basis requiring the court to drop everything and attend to them or *ex parte*. There has been a deliberate failure to disclose material facts as would assist the court in making an informed decision on the propriety of the application in what appears to be an attempt at misleading the court.

On 21 April 2017 the same parties appeared before me in HC 1039/17 fighting over the same issue, the ownership of mining claims located somewhere around Matopos National Park in Matabeleland South. The applicant owns Shamrock mining claims which are adjacent to those of the first respondent held by a special grant number 5968. Mindful of the provisions of s 345 (1) of the Mines and Minerals Act [Chapter 21:05] which allow parties to a mining dispute to agree that the dispute be investigated and decided by the mining commissioner, now called the mining director by virtue of reforms being introduced by the Ministry of Mines, the parties consented to the grant of an order referring their dispute for determination by the provincial mining director.

Pursuant to the agreement of the parties, I issued a provisional order by consent on 21 April 2017 the operative part of which reads:

> "Pending the confirmation of the Provisional Order, the applicant be and is hereby granted the following relief:
>
> 1. All mining activities on area 1090 which was under special grant 5968 issued in favour of the applicant whether by the applicant or the first respondent are hereby interdicted pending the resolution of the dispute by the mining commissioner."

Although by determination dated 22 June 2017 the mining commissioner (I use the terms interchangeably because in terms of the Act they are still so called instead of the term "mining director" which is now used by the ministry), determined that of the 7 mining shafts mined by the first respondent only shaft 6 slightly encroached onto the applicant's Shamrock mining claim, somehow the bickering between the two mining concerns did not end. The determination directed that the first respondent should adjust its boundaries to exclude shaft 6 falling within the applicant's mining claim.

It is significant that the determination of the mining commissioner has not been contested by any of the parties and should have, for all intents and purposes, put the matter to rest had the parties been acting in good faith. In HC 1933/17 the first respondent returned to court with a complaint that despite the decision of the mining commissioner and the order issued by this court on 2 June 2017, per MAKONESE J. that it is indeed the registered owner of Area 1090 and that the present applicant had no lawful right to disturb its operations, the latter was disturbing its operations by unlawfully mining at its shafts numbers 2 and 3. It would be recalled that

according to the findings of the mining commissioner all the first respondents mining shafts, except for shaft 6, were located on that part of land covered by its special grant.

Therefore if the present applicant was mining shafts 2 and 3 it had strayed onto the present first respondent's mining claim, never mind what one calls the mine, whether Shamrock or Area 1090. At the end of arguments, I delivered judgment on 27 July 2017, HB 237-17, giving effect to the determination of the mining commissioner dated 22 June 2017, a determination which I have said was consented to by the parties and has not been contested to this day either by way of appeal or review to this court. The operative part of the order that I granted on 27 July 2017 reads:

> "Pending determination of the matter, the applicant is granted the following relief—
>
> 1. The first respondent and all persons occupying the Area 1090 under special grant 5968 and in particular the applicant's mining shafts numbers 1, 2, 3, 4, 5, and 7 as determined by the 2nd respondent in his report dated 22 June 2017 and the survey report thereto attached at the instance of the first respondent and all their property be and are hereby evicted from that mining area.
> 2. The sheriff of the High Court, with the assistance of the Zimbabwe Republic Police is hereby directed to evict the first respondent and those claiming through it in terms of paragraph 1 above.
> 3. The 1st respondent and all those claiming through it are hereby prohibited from moving any ore extracted from shafts 1, 2, 3, 4, 5, and 7 under special grant 5968 issued to the applicant upon their eviction therefrom."

It would seem that the applicant has equivocated in the extreme in respect of that judgment. As shall be demonstrated shortly, it initially complied with it before noting an appeal to the Supreme Court on 10 August 2017 challenging the judgment in question on five grounds the import of which is not relevant for our present purposes. Having appealed on 10 August 2017 the applicant waited more than a month until 12 September 2017 to bring this application on a certificate of urgency calling into question the urgency of the matter. In the application the applicant seeks the following relief:

> "<u>TERMS OF FINAL ORDER SOUGHT</u>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:

a. 1st respondent or anybody claiming through (it) be and are hereby ordered not to interfere with the applicant's activities at Shamrock Mine pending finalization of the appeal under SC 581/17.
b. 1st and 2nd respondents pay costs of suit.

TERMS OF INTERIM RELIEF GRANTED
Pending finalization of this matter *(sic)*

a. 1st respondent or anybody claiming through them be and are hereby interdicted from interfering with the applicant's activities at the Shamrock Mine.
b. 1st respondent to pay costs of suit."

In his founding affidavit, Bekezela Moyo the applicants Operations Manager, stated that the applicant seeks the foregoing relief because it has noted an appeal against the judgment of this court which appeal has had the effect of suspending the judgment appealed against. He stated that by virtue of that the applicant sought to resume occupation of the mine in order to embark on mining activities but found the area guarded and secured by the employees of the first respondent who refused the applicant's employees entry. The applicant has been effectively barred from occupying and conducting mining activities at the disputed area. If the first respondent wants the applicant to be stopped from working it should make an application, presumably for leave to execute pending appeal.

As it is now the applicant is being incapacitated by the conduct of the first respondent because it is unable to meet its financial obligations towards its more than twenty employees employed at the mine. Stoppage of mining operations will also prejudice the government which is unable to collect revenue from the applicant. The application is opposed by the first respondent while Mr *Dube* for the second, third and fourth respondents submitted that they will abide the decision of the court although they would want their costs to be covered.

In its opposing affidavit, sworn to by its co-director Wellington Nyoni the first respondent reveals that the judgment appealed against was executed on 28 July 2017 with the service upon the applicant of the notice of ejectment. According to the Sheriff's return of service of that date the notice of ejectment was served on Crispen Dlodlo, the foreman. The sheriff further remarked:

> "Ejectment date 02/08/17. Notice of ejectment served. Request for Riot Police made. Find annexed a copy of the notice."

The attached notice of ejectment states that Crispen Dlodlo accepted service on behalf of the first respondent. Earlier on I said that the applicant has given conflicting signals. This is because upon being served with the notice of ejectment the applicant voluntarily vacated the premises in compliance with the court order. When the sheriff returned on 3 August 2017 to execute, the applicant had packed and left. In his return of service for that date, the sheriff remarked:

> "All the defendants *(sic*) and their occupants had left the premises along with their equipment. This was confirmed by the applicant's employee Mr Misheck Nkomo 35-035269 N 35 who was at the premises."

The first respondent went on to say that the appeal which is relied upon by the applicant was noted fourteen days after the judgment appealed against was enforced, meaning that what is sought to be interdicted had long come to pass at the time the appeal was noted and indeed at the time this application was filed. The first respondent also complains that the applicant is misleading the court by suggesting that it was evicted from Shamrock Mine when in fact the area taken over and occupied by it falls under its Area 1090 covered by the first respondent's special grant. Therefore the applicant is asking this court to allow it back on the site belonging to the first respondent which it was mining illegally. This , the applicant seeks, against the background of a court order granted on 2 June 2017 declaring the first respondent as lawful owner of the mining area in question. The court order in question has not been appealed against and remains in force.

This court has repeatedly stated that the utmost good faith must be observed by all those who approach it either *ex parte* or on an urgent basis. An applicant in a matter like this is enjoined to disclose to the court all the facts that are relevant to the resolution of the dispute. Urgent applications punctuated by material non-disclosures or falsehood must be discouraged at all costs. Where such non-disclosures are detected the court will penalize an applicant who does that with admonitory costs as a seal of its disapproval. See *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd and Another* 2001 (2) ZLR 551 (H) at 555 A-D; *Moyo and Another* v *Hassbro Properties (Pvt) Ltd and Another* 2010 (2) ZLR 194 (H); *Sweet* v *Nkanyezi and Others* 2016 (1) ZLR 612 (H) 614 G-H.

In this matter, the applicant did not disclose that it was not evicted from its Shamrock 4 and 8 which it holds by certificates of registration 36493 and 36497 respectively, the certificates that it attached to the founding affidavit, but was in fact moved from the first respondent's shafts 2 and 3 located on a piece of land falling under special grant number 5968 held by the first respondent. In fact the applicant has tried to create the false impression that it has been evicted from its own mining claim by virtue of the court order that it has appealed against.

More importantly, the application studiously fails to disclose that the judgment appealed against was carried into execution on 28 July 2017 and the applicant did voluntarily vacate the mining site before 3 August 2017 several days before the applicant launched the appeal that it now seeks to rely upon to reverse the process. Indeed the applicant has tried to create the impression that the first respondent sought to enforce a judgment that had been suspended by the noting of the appeal. That way the applicant hoped to hoodwink this court into granting an order restoring it to a site which it voluntarily vacated and from which it would have been lawfully evicted, the judgment which was being executed having been effectual at the time of its execution. Clearly therefore the applicant is guilty of serious lack of probity.

In our law it is trite that only an evictee who has lost occupation of the premises by virtue of a judgment which was a nullity is entitled to reinstatement because such an evictee may be regarded as being still in possession given that the process was a nullity. See *Maisel* v *Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (C). The point is also made in *Mangena* v *Edgars Stores Ltd and Another* HB 108/16 (unreported) that the execution of an order suspended by the noting of an appeal would be a nullity and that the evictee under those circumstances would be regarded as being still in possession and therefore entitled to restoration.

The applicant's situation is however different mainly because at the time of execution, the judgment had not been suspended and was therefore valid, operational and effectual. Its execution was therefore lawful and can certainly not be impugned merely because at a subsequent date the executed judgment was suspended by the belated noting of an appeal. The position of the appellant is the same as that which obtained in the case of *Delco (Pvt) Ltd* v *Old Mutual Properties and Another* 1998 (2) ZLR 130 (S) 134 B-C, which, though relating to a

statutory lessee evicted by a court order subsequently held to be wrong, was held not entitled to reinstatement. GUBBAY CJ stated:

> "Both majority judgments (By BARRY JP and DE VILLIERS J in *Makhebedu and Another* v *Ebrahim* 1947 (3) SA 155 (T)) approved the proposition enunciated by CLAYDEN J that a statutory lessee who had been evicted by process of law is not entitled to be given possession of the premises against the lessor who has re-occupied if it is subsequently shown that the process of law was based on wrong judgment (see respectively at pp 160 and 169)."

By parity of reason, an evictee who has lost possession of the premises by execution of a valid court order which is subsequently suspended by an appeal is not entitled to restoration merely on the ground that a subsequent appeal has suspended the executed judgment. Such an evictee would have to establish an entitlement premised on other grounds than just the noting of an appeal. This is so in order to maintain the dignity of the court and the credibility of its process. It was up to the applicant if it needed to benefit from the noting of an appeal to act diligently and appeal before the execution of the judgment. Having been tardy in that regard and in fact complied with the judgment by accepting eviction, the applicant can no longer benefit from the noting of the appeal.

The application advances no other basis for restoration outside the appeal. Quite to the contrary, it is clear that the applicant is trying to use technicalities to continue mining a claim that has been shown by the mining director not to belong to him. Its lack of probity as reflected in the deliberate withholding of crucial information that I have alluded to means that the applicant must be visited with admonitory costs.

In the result, the application is hereby dismissed with costs on a legal practitioner and client scale.

*Mwonzora and Associates*, applicant's legal practitioners
*Dube-Tachiona & Tsvangirai*, 1st respondent's legal practitioners
*Civil Division, Attorney General's Office, 2nd, 3rd & 4th respondents'* legal practitioners