

STONEZIM GRANITE (PRIVATE) LIMITED
versus
YANG SHENG MINING (PRIVATE) LIMITED
and
THE PROVINCIAL MINING DIRECTOR, MASHONALAND EAST

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 10 & 12 January 2023

Urgent Chamber Application

Ms R Mabwe with Mr C Mavhondo, for the applicant
Mr I E G Musimbe with Mr G Ranganai, for the 1st respondent
Ms K Manyowa, for the 2nd respondent

MUSITHU J: The applicant and the first respondent are mining entities registered in terms of the laws of Zimbabwe. A mining dispute arose between the two entities and it was adjudicated upon by the second respondent. The second respondent's decision was taken up on review by the applicant and it is pending before this court. Further disturbances occurred on the disputed mining site prompting the applicant to approach this court on an urgent basis. The relief sought is set out in the draft provisional order as follows:

“TERMS OF THE FINAL RELIEF

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. That the provisional order be is hereby confirmed.
2. The 1st Respondent is interdicted from carrying out any mining activities on the granite mining claim called Chidje 5 registered number 23175 BM (Murewa) or Chipfunde 1 registered number 1507BM (Murehwa) pending the determination of the application for review under case number HC 7504/22;
3. The 1st Respondent is hereby ordered to remove all its employees and chattels including all its mining equipment from Chidje 5 registered number 23175 BM (Murehwa) now known as Chipfunde 1 registered number 1507BM (Murehwa), within 48 hours of service of this order, failing which the Sheriff of the High Court is authorized to enforce this order.
4. That the 1st Respondent pays costs of suit on a legal practitioner and client scale.

INTERIM RELIEF SOUGHT

Pending the return date, the Applicant is granted the following relief:

1. The 1st Respondent be and is hereby interdicted from carrying out any mining activities on the granite mining claims called Chidje 5 registered number 23175 BM (Murehwa) or Chipfunde 1 registered number 1507BM (Murehwa).
2. The 1st Respondent shall not move out or dispose of any granite blocks extracted from Chidje 5 registered number 23175BM (Murehwa) or Chipfunde 1 registered number 1507BM (Murehwa).

SERVICE OF PROVISIONAL ORDER

Service of this provisional order is to be effected by the Applicant's legal practitioners."

The first respondent opposed the application, albeit, without having filed opposing papers. Ms *Manyowa* for the second respondent advised that she was not opposed to the relief sought. She acknowledged that it was in the interests of justice that mining operations on the disputed claim be suspended pending the determination of the pending application for review.

The Applicant's Case

The applicant is the registered holder of a block of 20 Dolorite Claims under the name Chidje 5, registration number 23175 BM. The applicant claims that on 13 July 2022, it discovered that the description of the area on the certificate of registration for Chidje 5 was not as precise as it ought to be when compared to the ground position. It brought the anomaly to the attention of the second respondent through a letter of 13 July 2022. In the letter, the applicant requested to have the area description on the certificate rectified.

According to the applicant, the first respondent is also a registered holder of certain granite claims in the vicinity of the applicant's claims. The applicant was not initially aware of the full description of the first respondent's claims. On 31 August 2022, the applicant discovered that the first respondent was interfering with its operations on its other claims, which are claims with registration numbers 26607BM and 26608BM. The first respondent was apparently encroaching and dumping on the applicant's claims. The applicant wrote to the second respondent complaining about the second respondent's conduct. It implored the second respondent to intervene in order to stop these illegal mining activities.

Sometime in August 2022, the second respondent held what the applicant termed a purported hearing concerning the applicant's letter of 13 July 2022. It was at this hearing that the applicant discovered that the first respondent had on 27 June 2022, acquired some mining claims

on the ground area incorporating Chidje 4 and 5 (which are registered in the applicant's name). The applicant claims that the first respondent had over pegged Chidje 4 and 5, but it was not conducting any mining operations at that stage. The applicant's representatives protested before the second respondent arguing that the applicant had only lodged a complaint in respect of claims 26607 and 26608, and not Chidje 4 and 5. The complaint was not heeded, and the second respondent proceeded to make a determination in respect of Chidje 4 and 5, by way of a letter of 4 October 2022.

Dissatisfied with the second respondent's determination, on 4 November 2022, the applicant filed an application for the review of the second respondent's decision under HC 7504/22. The application is ripe for hearing and awaits a set down date.

The urgency of the matter was dealt with as follows. On 23 December 2022, the applicant discovered that the first respondent had erected wooden cabins and moved its excavator and front-end loader on the applicant's claim at Chidje 5. Before that stage, no mining activity was taking place at Chidje 5. The applicant engaged its legal practitioners to write to the first respondent and request a cessation of any mining activities on the disputed claim pending the determination of the application for review. On 28 December 2022, the applicant's legal practitioners wrote to the first respondent's legal practitioners, and on 29 December 2022 they wrote directly to the first respondent. Both letters requested that the first respondent desists from carrying out any mining activity pending the determination of the said application for review. There was no response to both letters.

The applicant claims that on 3 January 2023, its representatives visited the disputed claim to check if the first respondent was complying with its demands as communicated by the letters from the applicant's legal practitioners. The applicant's representatives discovered that the first respondent had not stopped its mining activities at Chidje 5. There was an increase in the workforce at the site, as well as mining equipment. There was also ground clearing and opening up of routes around the disputed mining location. It was on this date that the applicant instructed its legal practitioners to file the present application having realized that the first respondent was determined to proceed with mining operations on the disputed claim.

The First Respondent's Case

Mr *Musimbe* for the first respondent raised two preliminary points at the outset. These are: citation of a non-existent party and lack of urgency.

Concerning the citation of a non-existent party, it was submitted that the second respondent did not exist at law. Such a flaw was fatal and it meant that the application was improperly before the court. It had to be struck off the roll with costs. The court was referred to the case of *Pahasha Somalia Mining Syndicate v Earthrow Investments (Private) Limited and Two Others*¹.

As regards the question of urgency, it was submitted that the need to act arose when the impugned decision of the second respondent was made on 4 October 2022. Mr *Musimbe* submitted that the application for review filed on 4 November 2022 did not suspend the decision of the second respondent. The first respondent had not given any undertaking that it was going to suspend mining operations on the disputed claims pending the determination of the application for review. The application for review did not stop the first respondent from enjoying its rights. It was submitted that the applicant ought to have sought an interdict much earlier than 3 January 2022. The alleged urgency was therefore self-created.

As regards the merits of the application, Mr *Musimbe* submitted that the applicant had failed to show that it had a *prima facie right* worth protecting through the granting of the interim relief sought. The application for review was not going to change anything on the ground. He further submitted that the technical report by the second respondent had concluded that the contested claim, that is Chidje 5 should maintain its ground position as highlighted on the area description on the registration card at the second respondent's offices. The same report had also concluded that the first respondent's block of claims, that is Chipfunde 1, was registered on ground open to prospecting and pegging and should therefore maintain its map and ground position since there was no over peg between these two blocks of claims.

Mr *Musimbe* argued that if one considered the relief sought under the application for review, there clearly was no dispute between the parties. This was because para 2 of the draft order sought the setting aside of the determination of the second respondent of 4 October 2022. Assuming that determination was set aside, then it meant that the parties simply reverted to their

¹ HH 450/21

original positions. There was absolutely nothing to protect and therefore the application was misplaced.

The Analysis

Preliminary Points

Ms *Mabwe* for the applicant dealt with the preliminary points as follows. As regards the citation of the second respondent, she submitted that one of the applicant's grounds for review under HC 7504/22 was an attack on the *locus standi* of the second respondent to render a decision on the dispute between the applicant and the first respondent. It was not an issue for determination at this stage of the proceedings. Counsel also submitted that the first respondent should not be allowed to approbate and reprobate. While on one hand it alleged that the second respondent did not exist, it also sought to rely on the decision of the same party asserting that the decision gave it rights to remain in occupation of the disputed mining claim. Counsel further submitted that in terms of r 62(1) as read with r 32, a party was required to cite in legal proceedings, the authority that made the decision that was the subject of the review. It did not matter that the decision was made without regard to the law.

Rule 62 (1) of the High Court Rules, 2021 states as follows:

“(1) Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected.” (Underlining for emphasis)

What is clear from the construction of r 62(1) is that the decision of an administrative functionary is reviewable. The law obliges the party seeking a review of that decision to direct and deliver such an application for review on the official who rendered the decision. Mr *Musimbe* drew my attention to the case of *Pahasha Somalia Mining Syndicate v Earthrow Investments (Private) Limited and Two Others*², in which the court determined that the office of the second respondent does not exist in the Mines and Minerals Act³. The court further determined that the Provincial Mining Director should therefore not have been cited in the proceedings.

² *Supra* at p 6 of the judgment

³ [Chapter 21:05]

What distinguishes this matter from the *Pahasha* judgment is that in *casu* no substantive relief is sought against the second respondent. The interim relief is only sought as against the first respondent herein. The second respondent herein is however cited as the first respondent in the review proceedings under HC 7504/22. The applicant seeks substantive relief against that party in that matter. This court cannot prejudge on the soundness and propriety of citing the second respondent in HC 7504/22. For purposes of the present matter, whether or not the second respondent had been cited does not change anything. The court can still make a determination on the relief sought in *casu* without any regard to the second respondent.

The other important point is that if the office of the second respondent does not exist, then it follows that any decision that was purportedly made by the second respondent from which the first respondent claims to have derived rights is consequently null and void. No legitimate rights can flow from a decision that is null and void. In my view, these are matters that must be properly ventilated in the application for review. For that reason, I find no merit in the point in *limine*.

Coming to the question of urgency, I agree with Ms *Mabwe*'s submission that there was no need for the applicant to have acted earlier than 3 January 2023, which is the date on which the first respondent commenced started mining activities on the disputed claim. No mining activities had taken place before then. There would have been no need to file the present application simultaneously with the application for review. I say so because when the application for review was filed, both parties became aware that they had subjected themselves to a judicial process. That process is set to determine their competing rights to the claim that is the subject of their dispute. The applicant was therefore justified in holding the view that after the filing of the application for review, and following the dispatch of the letters of 28 and 29 December 2022, it did not expect the first respondent to act in a manner that sought to undermine a legal process that was already underway.

The submission made on behalf of the first respondent that the application for review did not suspend the first respondent's rights to carry out mining activities on the disputed mining claims in the face of the aforementioned correspondence and the pending application for review which is almost ready to be argued, smacks of contempt of the judicial process and an act of bad faith. The first respondent did not respond to the said letters of 28 and 29 December 2022. One of the letters was actually addressed to the first respondent's legal practitioners of record. The first

respondent and its counsel did not deny receiving those letters. Professional etiquette demands that legal practitioners respond to letters from their colleagues. It does not matter that they hold divergent views on the subject matter. It follows that in the absence of a response to its letters, the applicant was justified to conclude that by its conduct of not responding to the letters, the first respondent had acceded to the applicant's request not to conduct any mining activities on the disputed claim.

Based on the circumstances of the case, and the conduct of the parties, I determine that the matter is urgent and that the applicant did not sit on its laurels as it were. It took urgent remedial action when the need to act arose. There are pending proceedings challenging not only the decision purportedly rendered by the second respondent, but his jurisdiction to preside over the matter. Litigants must show great reverence to a judicial process, especially when their conduct is the subject of the judicial scrutiny or enquiry. The court finds no merit in the preliminary point and it is accordingly dismissed.

MERITS

The requirements for granting an interim interdict were aptly set out in *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors.*⁴ MALABA JA (as he then was) said:

“It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) said an applicant for such temporary relief must show:

- “(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.”

The court is satisfied that the applicant has met the threshold for the granting of the relief it seeks. It has mining rights in the disputed claim, Chidje 5 acquired through registration. It is common cause that minerals by their nature are a finite resource. Allowing the first respondent to

⁴ 2004 (1) ZLR 511 (S) at 517 C-E

proceed with mining operations on the disputed claim in the face of a matter that is pending before this court, will undoubtedly cause irreparable harm to the applicant. The mineral resources will probably be severely depleted by the time the dispute gets resolved. The court also accepts the applicant's submission that there is no other remedy save approaching the court for the relief sought. The relevant authorities must be allowed to resolve the dispute between the parties before the resumption of mining operations.

The balance of convenience clearly favours the granting of the interim relief. The same parties are embroiled in a dispute that is pending before this court under HC 7504/22. This court cannot allow its own process to be undermined by leaving one of the parties to proceed with mining operations when the mining claim on which such operations are being conducted is the subject of the said pending review proceedings. In terms of s 176 of the Constitution of Zimbabwe, this court is endowed with powers to protect and regulate its processes.

In the result, the provisional order is hereby granted in terms of the draft order filed of record.

Mhishi Nkomo Legal Practice, applicant's legal practitioners

IEG Musimbe and Partners, first respondent's legal practitioners

Civil Division of the Attorney General's Office, second respondent's legal practitioners