

**K AND G MINING SYNDICATE**

**Versus**

**RONALD MUGANGAVARI**

**And**

**PROVINCIAL MINING DIRECTOR GWERU**

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 27 JANUARY 2022 & 3 FEBRUARY 2022

**Urgent chamber application**

*T. Zishiri* for the applicant

*D. Mwonzora* for the 1<sup>st</sup> respondent

*B. Moyo* for 2<sup>nd</sup> respondent

**DUBE-BANDA J:** This is an urgent application. This application was filed in this court on the 19<sup>th</sup> January 2022. It was then placed before me and I directed that it be served on the respondents together with a notice of set down for the 27 January 2022.

Applicant seeks an order couched in the following terms:

Final order

- a. The letter dated 12 January 2022 issued by the 2<sup>nd</sup> respondent be and is hereby declared null and void.
- b. The letter dated 12 January 2022 issued by the 2<sup>nd</sup> respondent is consequently set aside.
- c. The 1<sup>st</sup> respondent to pay costs of suit on a legal practitioner and client scale.

Provisional order sought

Pending the determination of case number HC 365/21 the 1<sup>st</sup> respondent be and is hereby interdicted from carrying out mining operations on Clifton 15 Mine or Midway 21 Mine as it is known by applicant.

The application is opposed by both respondents.

This application will be better understood against the background that follows. The dispute between applicant and 1<sup>st</sup> respondent has been raging for a number of years. The basis of the dispute is that both parties lay claim to the same mining claim. Although both parties agree that the dispute turns on the same mining claim they have different names for it, applicant name it Midway 21 while 1<sup>st</sup> respondent name it Clifton 15. The dispute has been to the Provincial Mining Director – Masvingo, Provincial Mining Director – Midlands, climbed to this court and even escalated to the Supreme Court.

On the 17 January 2018 the Provincial Mining Director - Midlands issued a prohibition order suspending operations on the disputed mining claim until such time that the dispute is resolved by the courts. On the 20 April 2021 applicant filed a court application (HC 365/21) in terms of section 14 of the High Court Act [Chapter 7:06] seeking an order drawn in the following terms:

1. That the applicant be and is hereby declared to be the legitimate holder of title over the mining claim known by applicant as Midway 21 and known by 1<sup>st</sup> respondent as Clifton 15.
2. That the 1<sup>st</sup> respondent, his agents and anyone mining through him be and are hereby evicted from the mining claim known by applicant as Midway 21 and known by 1<sup>st</sup> respondent as Clifton 15.
3. That the 1<sup>st</sup> respondent shall pay costs of suit on an Attorney-Client scale only in the event of opposition.

HC 365/21 is still pending before this court. What seems to have motivated this application is that on the 12<sup>th</sup> January 2022, the Provincial Mining Director lifted the prohibition order and permitted 1<sup>st</sup> respondent to resume mining operations at the disputed mining claim. Applicant contends that mining operations must cease pending the finalisation of HC 365/21. It is against this background that applicant has launched this application seeking the relief mentioned above.

Other than resisting the relief sought on the merits, respondents took a number of points *in limine* which were also the subject of argument in this matter. Respondents took the

following points *in limine*, these are: - that the matter is not urgent; citation of a wrong party; and material non-disclosure. I asked the parties to argue both the merits and the points in *limine*. This approach avoids a piece-meal treatment of the matter, in that the points *in limine* are argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on the basis of the points *in limine* despite that they were argued together with the merits.

Again at the hearing of this matter I asked Mr *Zishiri* counsel for the applicant whether the provisional order sought in this application was competent at law. I raised this issue with counsel because applicant approached the court seeking what it terms a provisional order, however the order sought has all the hallmarks of a final relief. The provisional order ought is this: that pending the determination of case number HC 365/21 the 1<sup>st</sup> respondent be and is hereby interdicted from carrying out mining operations at the disputed mining claim. To me this order sought is final *viz-a-viz* this application. I say so because it seeks to interdict 1<sup>st</sup> respondent from carrying out mining operations not pending the finalisation of this application but pending a separate case under cover of case number HC 365/21. Therefore in respect of this application the interdict sought is final. I take the view that an interim relief must seek to protect a litigant pending the return date of the matter and not pending another matter pending before the courts. What may protect a litigant pending the conclusion of a separate matter may be a final order obtained on the return date.

My view is that once an interdict sought is granted applicant would have achieved his goal. His goal is to interdict 1<sup>st</sup> respondent carrying out mining activities on Clifton 15 Mine or Midway 21 Mine. This is the final relief that he is litigating to achieve. His mission would have been accomplished. This application would have been sealed. See: *Chikafu v Dodhill (Pty) Ltd and Others* SC 16 / 2009. There would be nothing to confirm on the return date. Applicant would have achieved this milestone under the guise of a provisional order. Such finality cannot be achieved *via* a provisional order. Applicant is seeking a final relief disguised as an interim relief. The provisional order sought in this application is incompetent and bad at law. See: *S v Williams & 9 Ors* CC 14/17; *Chikafu v Dodhill (Pty) Ltd and Others* SC 16 / 09; *Chiwenga v Mubaiwa* SC 86/20; *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368; *J.C. Conolly and Sons (Private) Limited v R.C. Ndhlukula the Minister of Lands and Rural Resettlement* SC 22/18.

Mr *Zishiri* conceded that the interim relief sought in this application has a ring of finality. He then sought an amended of the draft provisional order. What exercised my mind was whether or not I should permit the amendment of the draft provisional order as prayed for by Mr *Zishiri*. I take the view that it is not for this court to start panel beating an incompetent draft order. The applicant sought relief that was incompetent and a nullity at law. A nullity cannot be amended. What is appropriate is to strike out the entire chamber application without any further ado. See: *Chiwenga v Mubaiwa* SC 86/20.

It is trite that the issue of costs falls within the discretion of the court. In exercising this discretion however, the court is guided by a number of settled principles which all support the achieving of fairness and justice between the parties. The general rule is that costs follow the cause. However, *in casu*, I take the view that the respondents did not raised the issue upon which this matter turns, i.e. the incompetence of the interim relief sought by the applicant. This issue was only raised by this court, therefore no award of costs should be made in their favour. See: *Commander Zimbabwe National Army, Commander Zimbabwe Defence Forces, Minister of Defence v Nester Chidembo, Emmanuel Masendeke* SC 117/20.

Having made a finding that the relief sought is incompetent no useful purpose would be served by ploughing into the points *in limine* taken by the respondents. As the applicant's claim is incompetent and a nullity at law, this court finds that it is not properly before it and it ought to be struck off the roll.

In the result, this application be and is hereby struck off the roll of urgent matters with no order as to costs.

*Kwande Legal Practitioners* legal applicant's legal practitioners  
*Mwonzora & associates* 1<sup>st</sup> respondent's legal practitioners  
*Civil Division of the A-G's Office* 2<sup>nd</sup> respondent's legal practitioners