

RONALD DAVISON MUGANGAVARI

Versus

PROVINCIAL MINING DIRECTOR – MIDLANDS N.O.

And

K & G MINING SYNDICATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 24 FEBRUARY 2020 & 11 MAY 2020

Opposed application

D. Mwonzora for the applicant
T. Zishiri for the 2nd respondent

MAKONESE J: This is an application for a declaratory made in terms of section 14 of the High Court Act (Chapter 9:06). The applicant seeks to nullify the decision made by the 1st respondent on 27th January 2018. The nature of the relief sought in the draft order is in the following terms:

“It is ordered that;

1. The order issued by the 1st respondent on 17th January 2018 be and is hereby declared unlawful and invalid.
2. The applicant be and is hereby allowed to rescind mining operations at Clifton 15 Mine.
3. The respondent be and is hereby ordered to pay costs of suit.”

FACTUAL BACKGROUND

On the 20th February 2012 the applicant registered and occupied a mining claim known as Clifton 15 on Clifton Farm, Mberengwa. The mine is inspected and bears an inspection certificate up to the period 20th February 2020. The applicant has been carrying out mining activities on that mining location and has been selling gold produce to Fidelity Printers and Refineries. Sometime in 2012, the 2nd respondent lodged a complaint with the 1st respondent

arguing that applicant's boundary encroached on 2nd respondent's mining claims. On 1st October 2014, and acting in terms of section 50 of the Mines and Mineral Act (Chapter 21:05) 1st respondent issued a directive ordering cancellation of applicant's certificate of registration in respect of Clifton 15 mine. Applicant launched an appeal with the Minister of Mines and Mineral Development in accordance with the provisions of section 50 (2) of the Mines and Minerals Act. The Minister ruled that applicant was the rightful owner of Clifton 15 Mine and that the certificate of registration issued in respect of 2nd respondent's mining claims had been fraudulently obtained. 2nd respondent made an application for review under case number HC 2031/15. The 2nd respondent contended in that application that the Minister's decision was grossly unreasonable and that in terms of section 361 of the Act the Minister had no jurisdiction to hear the appeal. 2nd respondent's application was subsequently granted. Applicant was undeterred and filed an appeal under SC 572/17. The appeal was declared to have lapsed. At the hearing of an application for reinstatement the Supreme Court (per GOWORA JA) opined that the judgment being appealed against cited the Ministry of Mines and Mining Development instead of the Minister. There was therefore, effectively no challenge to the decision by the Minister. In a sudden turn of events, on 17th January 2018, 1st respondent issued another directive stopping mining operations at Clifton 15 Mine. In that directive the 1st respondent averred in part as follows:

“... Reference is also made to the Officer Commanding Police, Midlands Province, dated 11th January 2018, indicating imminent violence between the disputing parties if operations continue to be conducted on the disputed area and that your office is already seized with numerous cases of violence emanating from this dispute where the cases on point are attempted murder, robbery, theft of gold ore and assault ...

In view of the foregoing mining and allied operations are hereby suspended until the matter is resolved before the courts and the dispute is put to rest ...”

It is this directive issued by the 1st respondent directing the Zimbabwe Republic Police to stop operations at Clifton 15 Mine which forms the basis of this application. The directive issued by the 1st respondent was challenged by the applicant on the following grounds;

1. There was no valid court order stopping the operations.

2. The applicant was not heard before the decision to cease mining operations was made.
3. There was no evidence of imminent violence and in any event if such acts of violence existed the police were mandated by law to investigate such criminal acts.
4. The directive was issued in the absence of any party to the mining dispute being given a chance to be heard.
5. The stoppage of mining operations was conducted without following any due process and is contrary to the Mines and Minerals Act.
6. The conduct of the 1st respondent was inconsistent with the requirements of the law particularly the Mines and Minerals Act which provides clear provisions relating to settlement of boundary disputes.
7. The conduct of 1st respondent was arbitrary and directly affects the applicant's operations.

For these reasons and on the basis of the factual background narrated herein the applicant has moved this court to issue a declaratory order in terms of the draft.

Whether the applicant is entitled to the relief sought

The 2nd respondent has opposed this application on two main grounds. The 2nd respondent avers that this application is improperly before the court in that applicant adopted a wrong procedure. 2nd respondent argues that applicant has no legal right in the mining claim forming the basis of the dispute. 2nd respondent contends that the decision being challenged was made by a quasi judicial authority. On that basis the applicant ought to have launched his challenge by way of a review application in terms of section 27 of the High Court Act (Chapter 7:06), so it is argued.

I find that there is no merit in the argument advanced by 2nd respondent. The applicant is entitled to seek redress in this court by virtue of the provisions of section 14 of the High Court Act.

Requirements for a declaratur

The application before this court is premised on the provisions of section 14 of the High Court Act which provides as follows:

“The High Court may, in its discretion, at the instance of any interested person, inquire after and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

It is not in dispute that the applicant and the 2nd respondent have had a long standing dispute over a boundary between Clifton 15 Mine and Midway 21 Mine. There have been various orders of this court related to this dispute. In this application however, I shall deal with the application before me. I shall not endeavour to explore the various aspects of the disputes that are not before me. In *Johnson v AFC* 1995 (1) ZLR 65 (H) GUBBAY CJ had occasion to consider when a declaratur can be granted. The learned Chief Justice remarked at page 72E-F:

“The condition precedent to the grant of a declaratory order under section 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an “interested person”, in the sense of having a direct and substantial interest in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical accessions unrelated thereto. But the presence of actual dispute or controversy between the parties interested is not a pre-requisite to the exercise of jurisdiction.”

It is not in contention that the applicant is an interested person. The applicant is still the registered owner of the mine forming the subject of this application. The first leg of the inquiry is therefore satisfied. The only issue for determination is whether the case is a proper one for the exercise of discretion under section 14 of the High Court Act.

It is trite that the office of 1st respondent is established in terms of the Mines and Minerals Act, in particular section 343 thereof. In terms of section 354 of the Act, 1st respondent is permitted to make injunctions for purposes outlined in the Act. In this matter, 1st respondent issued an injunction on the grounds that there was violence and acts of criminal conduct. It has not been argued by the 2nd respondent that the reasons given for the injunction still exist. It has

not been argued that the reasons given for the injunction followed due process. In considering whether the court should exercise its discretion to grant a declaratur, each case must be decided in its own merits and circumstances. This court does have the jurisdiction to grant the order sought in the circumstances of this case.

It was argued on behalf of 1st respondent that the applicant has no legal right to operate at the mining claims. Further it is contended that the court cannot aid an illegality by granting the declaratur. The 1st respondent cited the case of *Dongo v Naik & Ors* HH-73-18 in support of this argument. The circumstances of that case are totally distinguishable. The applicant holds mining rights in respect of Clifton 15 Mine. These rights have not been revoked by a court of competent jurisdiction.

I need to point out and observe that in recent times whenever mining disputes arise the Ministry of Mines through and Provincial Mining Director, will often issue directives or injunctions ordering the stoppage of mining operations. In most of cases no due process is followed. The parties to the dispute directly affected by these “orders” or “injunctions” are not consulted. Such conduct cannot be allowed to continue. When disputes are eventually brought before the court, the Provincial Mining Director and the Ministry remain silent, on the sidelines. Routinely, the Ministry of Mines will not file any papers in support of or against any parties to the dispute. This cannot be proper in that what would have brought the parties to court are these “directives” and “injunctions” issued by the Ministry of Mines.

In the matter before me the 2nd respondent has given its side of the story in response to the application for a declaratur. The 1st respondent has not filed any papers to shed light on the Ministry’s position. One can only make the assumption that this is because the 1st respondent has no basis for opposing the application regard being had to the fact that the order issued by 1st respondent on 17th January 2018 is not supported by the facts and is *prima facie* unlawful.

For the foregoing reasons, I am satisfied that the applicant met the requirements for a declaratory order.

Accordingly, the following order is made:

1. The order issued by 1st respondent on the 17th January 2018 be and is hereby declared unlawful and invalid.
2. The applicant be and is hereby allowed to resume mining operations at Clifton 15 Mine.
3. The 2nd respondent be and is hereby ordered to pay the costs of suit.

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