

FIDELITY PRINTERS AND REFINERS (PRIVATE) LIMITED
versus
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
THE PROVINCIAL MINING DIRECTOR FOR MIDLANDS PROVINCE N.O
and
JONAH NYEVERO

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 10 February & 17 February, 2021

Urgent Chamber Application

Coghlan, Welsh & Guest, for the applicant
Mutatu & Partners, for 3rd respondent

TAGU J: This application has been decided on papers without hearing oral submissions from the parties pursuant to paragraph 4 of Practice Direction 2 of 2021 headed Operational Directions on hearing urgent chamber and bail applications during the Level IV Covid-19 Lockdown period. Paragraph 4 of the said Practice Direction reads as follows:

“4) With effect from 22 January 2021, a Judge may consider and dispose of an urgent chamber or bail application on the papers without calling the parties to make oral representations or arguments...”

In casu the Applicant filed its application, the third Respondent filed his Notice of Opposition and the Applicant filed its Answering Affidavit. The other Respondents did not file any papers despite being duly served with the application and advised to file Notices of Opposition if they so wished.

INTRODUCTION

The applicant is FIDELITY PRINTERS AND REFINERS (PRIVATE) LIMITED, a private company incorporated and registered in accordance with the laws of Zimbabwe. It is wholly owned subsidiary of the Reserve Bank of Zimbabwe. The first respondent is the Minister of Mines and Mining Development, cited in his official capacity as the authority responsible for administering the Mines and Minerals Act [*Chapter 21:05*]. The second respondent is the Provincial Mining Director for Midlands Province, cited in his official capacity as the authority that has been purportedly delegated the functions of a Mining Commissioner for the Midlands

Province in Zimbabwe. The third respondent is Johan Nyevero, an adult male whose better particulars are unknown to the applicant.

THE APPLICATION

This is an urgent application for the following orders:

Urgent Interim Relief:

1. The applicant seeks an order suspending the decision by the first and second respondents to forfeit its mining claim known as Mirage 3 Mine registered under Certificate Number 18132 pending the return day.
2. An order suspending the decision by the first and second respondents, consequent to the illegal and unlawful forfeiture, to award or grant any mining rights including the suspension of mining grant rights purportedly awarded to the third respondent over the land covered by Mirage 3 Mine registered under Certificate Number 18132.
3. An order temporarily interdicting and restraining the third respondent from doing any of the following acts:
4. Entering the land covered by Mirage 3 Mine registered under Certificate Number 18132.
5. Disturbing, or threatening the applicant's mining operations in the area under Mirage 3 Mine registered under Certificate Number 18132.

FINAL RELIEF ON THE RETURN DAY

The applicant is moving for an application in terms of section 4 of the Administrative Justice Act [Chapter 10:28] seeking:

1. An order setting aside the forfeiture of the applicant's claim Mirage 3 Mine registered under Certificate Number 18132 purportedly done on 5 June 2020.
2. An order declaring as invalid, subsequent grants, awards or any act done by the first and second respondents, whose effect is to alienate the area under Mirage 3 Mine registered under Certificate Number 18132.
3. An order directing those of the respondents who oppose the application, to pay the applicant's costs on a scale of attorney and client.

THE FACTS

On the 8th January 2021 the applicant voluntarily addressed a letter to the first and second respondents seeking to be informed of any arrears in respect of statutory payments over its claim known as Mirage 3 Mine registered under Certificate Number 18132. On the 11th January 2021 the second respondent responded to the letter and informed the applicant for the first time that its claim had been forfeited on the 5th of June 2020. No notice of such forfeiture had been served upon the applicant. On 2 February 2021 the applicant's legal practitioners addressed a letter to the first and second respondents on the issue. The letter has not been responded to. On the same day hooligans purportedly acting under the instructions of and authority of the third respondent forcibly attended at the applicant's mining operations and gave an illegal oral notice of eviction. They demanded that the applicant vacates the premises within forty-eight hours failure of which unspecified actions will be taken. These people did not have a court order and none had been previously served on the applicant. The hooligans declared that their principal the third respondent

had been awarded a special mining grant over the land and that applicant should vacate. Applicant avers that it had the right to be given adequate notice to cease operations by the first and second respondents. The notice would have given the applicant adequate time to wind up its operations and remove its mining equipment as well as advising it of the basis of the eviction. In the absence of a court order to vacate applicant is of the view that the order to vacate was being made arbitrarily, without recourse to court proceedings hence the actions of the hooligans are unlawful, criminal and must be interdicted. It is of the view that the duty to give personal notice was very important. By acting clandestinely the first and second respondents denied the applicant the right to have any intended forfeiture revoked. The first and second respondents did not give the applicant the right to make representations.

As regards the actions of the third respondent he acted unlawfully without a court order. The applicant's administrative rights were violated. The first and second respondents violated legal duties imposed upon them by the administrative Justice Act. The applicant viewed this matter as urgent because the hooligans issued the threats on the 2nd of February 2021 which was to be carried within forty-eight hours.

The first and second respondents did not file any Notices of Opposition to the applicant's claim despite being served with the application. I take it that they are content to abide by the order of this Honourable Court.

In his Notice of opposition the third respondent raised three points *in limine*. The first being that the matter is not urgent. The second being that the applicant does not have locus standi to bring the current application. The third being that the interim order being sought is incompetent.

URGENCY

The third respondent's contention is that the mining rights were forfeited in 2020. He said he was granted the Special Grant Number 8202 on the 01st February 2021 and the applicant should have filed an ordinary court application the applicant on the other hand submitted that the hooligans came and made threats on the 2nd of February 2021.

A reading of the papers clearly shows that the applicant became aware of the forfeiture through a letter dated 11 January 2020 and his legal practitioners wrote to the first and second respondents seeking clarifications on the issue. A second letter was written on the 2nd February 2021 which has not been responded to. The hooligans came on the 2nd February 2021 making the alleged threats 4 days later the applicant filed the present application.

A reading of the papers show that although the forfeiture was done some time in 2020, this was not brought to the attention of the applicant until the applicant voluntarily wrote to the first and second respondents. In my view there is no way the applicant could have taken any action then because it was not aware of the forfeiture. I therefore find that this matter is very urgent. I therefore dismiss the first point *in limine*.

LOCUS STANDI

The third respondent's contention is that the mining claim was forfeited to the state. He said the mining area is now under his names in terms of the law. He therefore said the applicant lost the locus standi to sue in this matter upon forfeiture. He said since the applicant says it sold the mining area to one Caesar Zvayi then it should be Caesar Zvayi who should bring the application. The applicant in its answering affidavit maintained that it is the one in possession of the mining claim under Certificate number 18132 and the issue of forfeiture is at the heart of the dispute. It claims it has always been in possession of the mine claim since it was registered.

My view is that the applicant has always in possession of the mining claim. There is no proof yet that the applicant was aware of the forfeiture until it wrote the letter dated 8th January 2021. It therefore has the locus standi to bring the present application. The second point *in limine* has no merit and is dismissed.

COMPETENCY OF THE INTERIM ORDER.

The third respondent submits that the applicant is seeking the suspension of the Special Grant which was followed in terms of the provisions of the terms of a statute. That the court has no power to suspend a process or document issued after following a due process. He said the applicant is seeking an order based on a futuristic potential right. In its answering affidavit the applicant disputed the averments and said the order is not based on a futuristic potential right because the applicant has been the holder of the claim until the purported forfeiture.

A reading of the papers show that it is not in dispute that the applicant has been in possession of the mining location in question under certificate number 18132. The forfeiture is what is being challenged pending the return day. In my view there is merit in the order being sought. The point *in limine* is therefore dismissed.

AD MERIT

What I found from the papers and which is not in dispute is that the applicant has always been in possession of the mining claim in question under certificate number 18132. I also noted that the first and second respondents did not engage the applicant before forfeiting the mine claim in question. In carrying their administrative duties the first and second respondents did give the applicant the opportunity to make representations before they forfeit the mining claim and awarding it to the third respondent. The third respondent cannot aver that the Special Grant he now possesses was lawfully issued because he does not preside over the process. The first respondent is in better position to explain. He did not dispute the allegation that this was unlawfully issued when given the opportunity to do so. This will be decided on the return day. It appears the provisions of section 220 of the Mines and Minerals Act were not adhered to. The first respondent did not notify applicant or anyone of the forfeiture. There is nothing unreasonable and impractical about simply sending a notice to the applicant and inviting it to be heard before an adverse decision is made. There is nothing in the law as automatic forfeiture or forfeiture but operation of the law. The first respondent makes administrative decisions which are subject to the provisions of the law. The powers reposed in the first respondent must be exercised according to law after following due process. It appears he clandestinely forfeited the mining claim without following due process.

The third respondent stands or falls by the decision of the first and second respondents. The third respondent on the face of it cannot take the law into his own hands. The third respondent has already accepted that he visited the mining location in question with his business associates. Whether he issued threats or not is an issue that can be decided on the return day.

The applicant has established that it has a prima facie right in this matter and that it has no other alternative remedy other than approaching the court. The balance of convenience favours the granting of the application and the interim relief pending the determination of the main matter on the return date. The third respondent would not suffer any prejudice by simply being ordered to observe the law and to maintain the status quo until the parties' respective rights have been determined. This court has inherent jurisdiction to determine any matter which is precluded or forbidden by law. It can on the final analysis set aside a Special permit it was not unlawfully issued. The applicant is right to approach the court for protection. The provisional order would be granted as prayed for.

IT IS ORDERED THAT

TERMS OF FINAL ORDER SOUGHT

1. The forfeiture of the Applicant's claim Mirage 3 Mine registered under Certificate Number 18132 purportedly done on 5 June 2020 is set aside.
2. For the avoidance of doubt, further to paragraph 1 (one) hereof, any act done by the first and second respondents further to the forfeiture aforesaid, whose effect is to alienate the area under Mirage 3 Mine registered under Certificate Number 18132 is declared invalid, and consequently null and void.
3. Those of the respondents who oppose the application, are ordered to pay the applicant's costs on a scale of attorney and own client, jointly and severally, the one paying the others to be absolved.

INTERIM RELIEF GRANTED

Pending the return day this court orders that-

1. The operation of the decision by the first and second Respondents to forfeit Applicant's mining claim known as Mirage 3 Mine registered under Certificate Number 18132 is hereby suspended pending the return day.
2. The operation of decisions by the first and second Respondents, subsequent to the forfeiture referred to in paragraph 1 (one) hereof, including the award of a Special Mining Grant to the third Respondent over the land covered by Mirage 3 Mine registered under Certificate Number 18132 is also suspended pending the return day.
3. Pending the return day, an interdict is granted restraining the third Respondent or his agents from doing any of the following acts:
4. Entering the land covered by Mirage 3 Mine registered under Certificate Number 18132.
5. Disturbing, or threatening the applicant's mining operations in the area under Mirage 3 Mine registered under Certificate Number 18132.

SERVICE OF PROVISIONAL ORDER

The service of the Provisional Order with supporting urgent chamber application and annexures shall be effected on the Respondents by the Applicant's Legal Practitioners or the Sheriff of the High Court as follows:

BY HAND.

Coglan, Welsh & Guest, applicant's legal practitioners
Mutatu & partners, 3rd respondent's legal practitioners.