

FORBES AND THOMPSON (BULAWAYO)(PVT) LTD

Versus

S. MUSASIWA

And

ENVIRONMENTAL MANAGEMENT AGENCY

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO3 APRIL 2014

P. Ncube for the applicant
V. Majoko for the respondents

Urgent Chamber Application

MOYO J: This is an urgent application wherein the applicant seeks an order in the following terms:

“Pending the determination of this matter, it is ordered:

1. That applicant’s Vumbachikwe Mine, be and is hereby allowed and permitted to resume operations in the normal manner pending the determination of this honourable court of the propriety of the order to close it issued by the 1st respondent dated the 6th of March 2014.
2. That the applicant be and is hereby directed to observe the provisions of the Environmental Management Act (Chapter 20:27) in carrying out and executing the provisional order number 1 above.

The terms of the final order sought are as follows:-

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

1. The order issued by the 1st respondent, dated the 6th March 2014, to close applicant’s Vumbachikwe Mine, be and is hereby declared invalid and of no force or effect.

Or alternatively

2. That the said order issued by the 1st respondent, in terms of section 37 (4) of the Environmental Management Act Chapter 20:27 (“the EMA Act”) to close applicant’s Vumbachikwe Mine, be and is hereby declared automatically suspended by virtue of the appeal dated the 11th March 2014 lodged by the applicant against that order to the

Director General in terms of section 129 of the EMA Act.

Or alternatively

3. That the said order issued by 1st respondent dated the 6th March 2014, to close applicant's Vumbachikwe Mine, be and is hereby stayed pending the hearing, determination and finalization of applicant's appeal against the order lodged with the Director General on the 11th March 2014.

General

4. This order shall remain operational notwithstanding the noting of an appeal.
5. That 1st and 2nd respondents, jointly and severally, the one paying the other to be absolved, be and are hereby ordered to pay the costs of suit."

The background of this matter is that applicant owns Vumbachikwe Mine. On the 28th of February 2014 2nd respondent's officers visited the mine in the company of 1st respondent. This visit was in terms of the Environmental Management Act (Chapter 20:27) hereinafter referred to as the EMA Act. At the mine the 2nd respondent's representatives made findings that were documented in a report marked "AA" and is bound to the opposing papers. A number of findings and recommendations were recorded in the said report.

On the 6th of March 2014, a document was then prepared by the 1st respondent. The document states in the caption CIRCUMSTANCES GIVING RISE TO THE ORDER.

This document reproduces the findings of the team contained in the report dated 28th February 2014 and marked annexure "AA". It then goes on to state that:-

"Now therefore under and by virtue of the powers conferred upon me under section 37 (4) of the Environmental Management Act (Chapter 20:27), I hereby order that:-

1. You cease all operations within 7 days of receipt of this environmental protection order.
2. Install dust abatement measures around the crushing area.
3. Complete the paving of the CIL floor to prevent erosion and reduce surface and ground water pollution in the event of spillages (emphasis mine)
4. Decommission the return water pad close to the tailings dam which is not adequately protected. (emphasis mine)
5. Put neutralizing chemicals on the culverts of the road for neutralizing accidental spillages (emphasis mine), from CIL and tailings dam. You are required to collect water samples for analysis from the discharge point 3 times daily each time there is flow also conduct test for PH and free cyanide ALL records of results should be kept and produced upon demand.
6. Clean up all tailings spillages from the tailings dam and the CIL plant, and ensure regular maintenance of the tailings management system to prevent blockages, overflows and accidental spillages.
7. Make full payments of all outstanding statutory environmental fees to the Agency by the 30th day of March 2014."

At this juncture I wish to state that the underlined portions give an impression that these are preventive recommendations rather than recommendations to stop an actual activity

causing harm to the environment.

The order goes on to state:-

“Conditions of the order”

1. This order will be withdrawn on your compliance with the conditions contained above to the satisfaction of the Agency but otherwise shall remain in full force and effective until it is withdrawn or set aside or suspended by an order of the Minister in terms of section 37 (7) of the Environmental Management Act (Chapter 20:27).
2. An inspection to monitor progress of compliance with this order may be done at all measurable times without prior notice.

The applicant noted an appeal to the Director General in terms of section 129 (1) (2) of the Act. The applicant’s case is mainly that the closure of the mine is not in accordance with the provisions of section 37 (4) (a) of the EMA Act and that the appeal lodged with the Director General in terms of section 129, of the EMA Act, suspends the order of the closure of the mine as section 130 provides that only an appeal against the authority does not suspend the decision of the authority, but there is no mention of the suspension or otherwise of the decision of the inspector, meaning that the specific mention in section 130 of the non-suspension of the appeal to the Minister of the decision of the (authority) would mean that the decision of the inspector is suspended by an appeal. Respondents contend that the appeal does not suspend the decision to close the mine but I doubt if ever the disposal or otherwise of this issue is relevant to the issues before me except to the extent that it is given as an explanation for failure to lodge this application prior to other 18th of March 2014.

The respondents on this part contend that only the decisions of the superior court are the ones suspended by appeals and nothing else. I will thus not dwell on this issue as I am of the view that the exercise of the Respondent’s powers in terms of section 37(4) of the EMA Act is the pivotal issue here.

The applicant’s case is also that the provisions of section 37 (4) of the Act do not allow the 1st respondent to order the closure of the mine for the reasons given in his order. Section 37 (4) provides that:

“An officer or inspector may, if he or she considers it is necessary to act for the immediate protection of the environment, do either or both of the following:-

- (a) Close any premises for a period not exceeding 3 weeks where an activity which pollutes the environment contrary to the provisions of this Act or any standard issued under it is carried out;
- (b) Serve an order in writing on the owner, user or occupier of any land or premises requiring that owner, user or occupier to take such measures as may be specified in the order for the prevention of harm to the environment and natural resources.”

Subsection 5 of the same section provides that an order issued in terms of subsection 4 (b) shall be of full force or effect until it is withdrawn, set aside or superseded by an environmental protection order.

The 1st respondent invoked his powers in terms of section 37 (4) as per his reference to

this section in the order.

Applicant's contention is that 1st respondent failed to observe the provisions of section 37 (4), the section he purported to be acting upon, as applicant is not informed by 1st respondent as to the reasons for closure. Applicant's contention is that the Act is clear as to what can lead to closure, that being an activity that pollutes the environment. Applicant's contention is that the 1st respondent's order for closure and the report that was prepared on the 28th of February 2014, do not identify or specify any activity that applicant is doing that pollutes the environment, but they have made recommendations and preventive measures, to take care of accidental occurrences which are expected in the normal course of business. Applicant's contention is that for respondents to involve section 37 (4) (a) there must be a specific identified activity that is polluting the environment warranting closure of the mine.

The respondents on the other hand contend that it is the statutory duty of the environment agency to take preventing and corrective steps to protect the environment generally. 1st respondent goes further in his affidavit to state that section 37 (4) empowers him if he considers it necessary to act immediately for the protection of the environment by either closing the premises or ordering compliance with measures to protect the environment or both. He says it is in this context that he acted. In his affidavit he also alludes to the history of problems they have had with the applicant mine, for instance that six such orders had been granted in the past and that therefore this was not the 1st time that such an order was issued.

The respondents contended that this application is not urgent and that it should therefore be dismissed. I hold a different view, of course it does not matter where and how a certificate of urgency was typed, but what is essential is that a legal practitioner has given his reasons for the urgency in such certificate and that he has appended his signature and affixed his stamp. I hold the view that the closure of the mine obviously is affecting productivity therein and consequently impacting negatively on the production at the mine. This therefore qualifies this matter to be treated as urgent. I further hold the view that applicant's reason for filing an urgent application on the 18th of March as opposed to the 13th when they were served with the order is a valid reason in that applicant explains that after noting an appeal on the 11th of March, they were then of the view that 1st respondent's order had been suspended.

My reading of section 37 (4) (a) and (b) creates a picture wherein the legislature provided for the closure of premises for a period not exceeding 3 weeks where an activity which pollutes the environment ... is carried out (my emphasis) or an order requiring that the owner or occupier takes such measures as may be specified for the prevention of harm to the environment can also be served on the occupier. An inspector can order either the clause (a) or clause (b) or both, meaning that clause (a) is independent of clause (b).

Clause (a) is specific that premises can only be closed where an activity which pollutes the environment is carried out. In his opposing affidavit 1st respondent does not clearly state that he had to order closure in terms of clause (a) because a specific activity has been carried out resulting in harm to the environment, he in fact states that (paragraph 31) " I do not agree that an inspector should act only when an activity pollutes the environment." He in fact interprets section 37 (4) (a) as empowering him to act if it is necessary to protect the

environment. Section 37 (4) (a) is clear and unequivocal in so far as the order of closure is concerned. If the legislature wanted to give the inspector powers to close premises so as to protect the environment and have preventive measures taken it would not have specifically tied closure with an activity that is being carried out. I therefore disagree with 1st respondent's contentions on the interpretation of that clause.

It follows therefore that the powers that 1st respondent invoked in terms section 37 (4) were in fact misunderstood by him. He thus failed to adhere to the statute in exercising the powers given to him by same hence his closure of premises to protect the environment rather than to stop an activity that is polluting the environment. A reading of the report made on the 28th February report, also creates the same picture. The gist of the recommendations are suggestions made to improve the situation at the mine rather than address a specific activity that warrants the closure of the mine.

1st respondent's counsel concedes that the 1st respondent did not have the powers to close the mine indefinitely as section 37 (4) (a) is clear that the period should not exceed 3 weeks, and the fact that one of the conditions that should be fulfilled prior to the re-opening of the mine is that all outstanding fees should be paid by 30th March 2014, buttresses the finding I have made that 1st respondent did not appreciate the powers given upon him by section 37 (4) as to under what circumstances and for what reasons he could exercise same.

I accordingly find that 1st respondent's actions do not conform with the provisions of section 37 (4). The 1st respondent could not exercise powers that he did not have, neither could he invoke the powers in circumstances that were not specifically stated in section 37 (4) (a). His order is both unlawful and *ultra vires*. I accordingly grant the provisional order in terms of the draft for the aforesaid reasons.

Coghlan & Welsh, applicant's legal practitioners

Majoko & Majoko, respondents' legal practitioners