

EASY CASH SYNDICATE
versus
CARRY MINE COMPLEX (PVT) LTD
and
PROVINCIAL MINING DIRECTOR
MATABELELAND SOUTH (NO)
and
THE CO-ORDINATOR ZIMBABWE REPUBLIC
POLICE MINERALS AND BORDER CONTROL (N.O)
and
MINISTER OF MINES AND MINING DEVELOPMENT (NO)
and
BULAWAYO ASSISTANT SHERIFF (NO)

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 25 JULY 2017 AND 27 JULY 2017

Urgent Chamber Application

Ms V Chikomo for the applicant
L Nkomo for the 1st respondent
Ms R Hove for the 2nd, 3rd, and 4th respondents

MATHONSI J: The applicant and the first respondent have been involved in a mining dispute over quite sometime. Apparently there has been a boundary dispute between them as the applicant is the holder of a special grant to mine for gold number 5968 covering about 194, 961 hectares situated around Matopos National Park in Matabeleland South. The claim shares a common boundary with the first respondent's Shamrock claims registration number 33197.

In HC 1039/17 the applicant brought an urgent application bitterly complaining that although it had been mining peacefully at its mining site for some time, on 7 April 2017 the first respondent's employees had approached its employees challenging their presence at their mining site. Despite the involvement of Hillside Police, the first respondent had proceeded to illicitly confiscate the gold ore which the applicant had mined before taking over mining activities at the

applicant's mine and extracting gold ore for itself. That was the beginning of the mining dispute between the parties which brought the parties before me on 21 April 2017.

At the conclusion of a protracted hearing the parties consented to a provisional order being granted whose interim relief read:

“INTERIM RELIEF GRANTED

Pending the confirmation of the provisional order, the applicant be and is hereby granted the following relief:

1. All mining activities on area 1090 which was under special grant 5968 issued in favour of the applicant whether by the applicant or the 1st respondent are hereby interdicted pending the resolution of the dispute by the mining commissioner.
2. The dispute between the applicant and the 1st respondent over the said mining claim is hereby referred to the mining commissioner.”

It would appear that the first respondent did not file opposition to the confirmation of that provisional order. The applicant later moved for its confirmation and on 1 June 2017 the provisional order was confirmed with a final order being granted by this court, per MAKONESE J, in the following:

“IT IS ORDERED THAT:

1. The applicant is the registered owner of Area 1090 under special grant 5968 and 1st respondent has no lawful right to disturb applicant's operations.
2. There shall be no order as to costs.”

I must mention that at the time the application in HC 1039/17 was being made, the applicant had already submitted an application for renewal of its special grant which had expired. The application was still being considered by the Ministry of Mines and Mining Development which had however receipted the renewal fee. The special grant has since been renewed to subsist until 9 July 2018 it having been renewed on 10 July 2017. Meanwhile the dispute between the parties started simmering again forcing the applicant to return to court again filing this urgent application seeking the following relief:

“TERMS OF FINAL ORDER SOUGHT

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

1. That the provisional order granted herein be and is hereby confirmed as final and 1st respondent is permanently evicted.

2. That the ore extracted from the applicant's shaft by 1st respondent and all those acting through (it) be and is hereby declared to be the property of the applicant.
3. That 1st respondent bears costs of suit on an attorney client scale.

INTERIM RELIEF GRANTED

1. That the 1st respondent and all persons occupying the area 1090 under special grant 5968 at the 1st respondent's instance and all their property be and are hereby evicted from the mining area granted to applicant.
2. That the sheriff, with the assistance of the Zimbabwe Republic Police be and are hereby ordered to evict the 1st respondent in terms of paragraph 1 above.
3. That the 1st respondent and all those on the applicant's mine at the instance of the 1st respondent, upon eviction, be and are hereby prohibited from moving the ore extracted from the applicant's mine."

In its founding affidavit deposed to by Wellington Nyoni, a member and co-director of the applicant, the applicant again complained that despite the grant of a final order declaring it to be the owner of Area 1090 and that the first respondent has no lawful right to disturb its operations and indeed the resolution of the boundary dispute by the second respondent on 22 June 2017 who made it clear that all but one shafts being mined by the applicant were on its mining claim, starting on 16 July 2017 the first respondent returned to the applicant's mining claim and started extracting gold ore from two of the applicant's shafts in breach of the court order and in utter disdain of the decision of the mining director made in compliance with an order of this court which referred the boundary dispute to the mining director for resolution.

When that happened, the applicant says it reported the matter to Hillside Police who attended the scene. Indeed a statement given by the attending police detail, Wilson Gondo of ZRP Hillside was attached. He said in part;

- "04. I then attended the scene in the company of constable Wurayayi.
05. When we got to Easy Cash Syndicate Mine we found Beki Moyo and his colleagues operating at the mine.
06. I then called Beki Moyo and one of his colleagues and told him that their actions were in contempt of a High Court order which was granted by the Honourable Justice Makonese on the 1st of June 2017 which states that they were barred from operating at the mine which belonged to Ismael Ncube and his Easy Cash Syndicate Mine.
07. I showed him the court order which he read and then asked to be shown a special grant permit of which I told him that if the other party wanted to show him it was up to him as it was irrelevant to the offence.

08. The accused then said that he was then going ahead with operations saying he was taking samples as some of his workers were being lowered down the shaft.”

Therefore, accordingly to the police officer, the first respondent was aware of the court order but demanded the special grant before continuing with its activities disregarding the court order. In fact when that was happening the first respondent was already privy to the determination of the second respondent dated 22 June 2017 issued in terms of a referral of the dispute by this court with the consent of the parties. The second respondent found that of the seven active mining shafts being operated by the applicant only one, that is shaft 6, fell within the first respondent’s Shamrock 33197 boundaries. He resolved that the applicant should adjust its boundaries to correct the partial overpegging in order to avoid future disputes. In making those findings the second respondent relied on the survey conducted by the Mine Surveyor for Matabeleland South following a site visit carried out on 1 June 2017. To that survey report is attached a diagram clearly showing the location of the applicant’s shafts numbers 1, 2, 3, 4, 5, and 7 as sitting squarely on the applicant’s mining claim while shaft number 6 slightly overpegs the first respondent’s Shamrock 33197.

Therefore if the first respondent is mining at shafts 2 and 3 as alleged by the applicant and confirmed by Wilson Gondo in his statement, then it means that the first respondent is blatantly disregarding both the order of this court and the determination of the second respondent. The statement of Gondo gives useful insight into Bekezela Moyo’s thought process. He will continue to do so as long as he has not been shown the renewed special grant. He may have taken advantage of the fact that in the previous application the applicant did not have a renewed special grant. In his warped way of thinking he will continue extracting gold ore at a mine clearly not belonging to his company as long as the grant has not been renewed never mind the court order which remains extant. A contempt of a court order has never been so blatant.

I have said that the applicants special grant has been renewed lending more weight to its claim. The matter has already been resolved by the second respondent whose judgment has not been contested and also remains effectual. Those inconvenient facts have not stopped the first respondent opposing the application with everything it has got. The same Bekezela Moyo who is in contempt of an order of this court has, in his wisdom or lack of it, deposed to the opposing affidavit on behalf of the first respondent challenging the procedure adopted by the applicant.

According to the first respondent the applicant should have proceeded by summons action as an eviction cannot be obtained by urgent application. The applicant cannot be allowed to seek interim relief which is final in nature because it will have no incentive to confirm it once granted.

The first respondent states that although it did not oppose the confirmation of the provisional order, the applicant had no business confirming it because the dispute had been referred to the second respondent. The applicant snatched a judgment. For that reason it has filed an application for rescission of judgment.

Mr *Nkomo* who appeared for the first respondent abandoned the point *in limine* raised in the opposing affidavit on the lack of authority by the deponent of the founding affidavit to represent the applicant in making the application. He however maintained that the dispute between the parties is not over ownership but over a boundary dispute. As such since it is the applicant who has been shown to have encroached onto the first respondent's mining claim by the survey commissioned by the second respondent, the matter should end there the applicant having failed to prove its case. In my view that may well be so except that what is before me is a complaint by the applicant that the first respondent has been mining at shafts 2 and 3 which have been shown to belong to the applicant. The first respondent has denied that but the behaviour of Bekezela Moyo when Wisdom Gondo and Constable Wurayayi attended the scene, that of demanding the special grant and not disputing that they were mining on the applicant's claim, betrays a guilty mind. On a balance of probabilities, I am satisfied that as much as the boundaries have been determined, the first respondent is mining on the wrong side of the boundary.

This court has the benefit of the determination of the second respondent which I have already made reference to. For that reason, there is no possibility of the first respondent being evicted from its own claim as feared by *Mr Nkomo*. It should be recalled that s345 (1) of the Mines and Minerals Act [Chapter 21:05] allow the parties to a mining dispute to agree in writing that a complaint or dispute be decided by the mining commissioner. The same section also allows this court in the course of any proceedings if it appears expedient and necessary to it, to refer any matter to a mining commissioner for investigation and report. In this case the parties to the dispute consented and this court, in the exercise of its discretion reposed to it by the Act, did refer the matter for investigation and report by the second respondent who has done so. Infact

the second respondent went further and commissioned a survey which resolved the issue of encroachment but not the allegation that the first respondent was mining the applicant's shafts. See *Rock Chemical Fillers (Pvt) Ltd v Bridge Resources (Pvt) Ltd and Others* 2014 (2) ZLR 30 (H) 34 E –F; *BMG Mining (Pvt) Ltd v Mining Commissioner, Bulawayo and Others* 2011 (1) ZLR 74 (H) 79G. I have said that the findings of the second respondent have not been challenged and I intend to rely on them. To that extent the first respondent has no business being at any of the shafts shown to be located on the applicant's claim.

I agree with Ms *Chikomo* for the applicant that the applicant's right to that part of the land covered by the special grant number SG 5968 has been determined by the court order issued on 1 June 2017 which remains extant. In addition the applicant's right to shafts 1, 2, 3, 4, 5, and 7 have been determined by the second respondent acting in terms of both the consent of the parties and the order of this court. That right is therefore unassailable. It is therefore not gain said by the first respondent that an eviction from there cannot be obtained by urgent application. It can because the applicant's right thereto is unassailable and the first respondent's contempt vis-à-vis the court order is glaring.

In the result, the provisional order is hereby granted in terms of the draft order as amended. The interim relief granted is in the following;

“INTERIM RELIEF GRANTED

Pending determination of the matter, the applicant is granted the following relief-

1. The 1st respondent and all persons occupying the area 1090 under special grant 5968 and in particular the applicant's mining shafts numbers 1, 2, 3, 4, 5, and 7 as determined by the 2nd respondent in his report dated 22 June 2017 and the survey report thereto attached at the instance of the first respondent and all their property be and are hereby evicted from that mining area.
2. The sheriff of the High Court, with the assistance of the Zimbabwe Republic Police is hereby directed to evict the first respondent and those claiming through it in terms of paragraph 1 above.
3. The 1st respondent and all those claiming through it are hereby prohibited from moving any ore extracted from shafts numbers 1, 2, 3, 4, 5, and 7 under special grant 5968 issued to the applicant upon their eviction therefrom.”

Dube-Tachiona and Tsvangirai, applicants' legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners