

**JUDA MOYO
SIBANGANI NCUBE
JUSTIN MACHEZA
STANELY NCUBE
BELIEF NDLOVU
MABOLYN MAKWENA
MAHLABA S. NKOMO
AXWELL SIZIBA
BUTHOLEZWE SIZIBA
MERESHARD GWANANGARA
RODRECK NYONI
SINDISIWE KAMHUKA
THABO NARE
SIHLE NDLOVU
EMMELY NDLOVU
REMEMBER NKOMO
DION NCUBE
BONGANI SIBANDA
NKULULEKO DABENGWA
EDMORE SIBANDA
BUTHOLEZWE HLABANDLELA**

Versus

**PROVINCIAL MINING DIRECTOR –
MATABELELAND NORTH, PROVINCE N.O.
FARVIC CONSOLIDATED MINES (PVT) LTD
PHILEMON MOKWELE
THE OFFICER IN CHARGE MINERALS, GWANDA N.O**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 5 MARCH & 3 MAY 2018

Urgent Chamber Application

Advocate L. Siziba & H. Moyo for the applicants
P. Tarubereka & Ms B. Nyoni for 1st and 4th respondents
Ms S Mbondiya for 2nd respondent
K. Ngwenya for 3rd respondent

TAKUVA J: This is an urgent chamber application wherein the twenty-one applicants seek the following interim relief:

“Pending the return day applicants are hereby granted the following interim relief:-

1. All mining operations at West Nicholson B mine shall be stopped pending the return date.
2. An order that the gold ore under the custody of the 4th respondent be processed in the presence of 1st applicant and his shift. The gold recovered be sold to Fidelity Printers and refineries and the proceeds be distributed equally amongst 1st applicant and the shift he worked with.”

The facts

Sometime in 2015, the West Nicholson Development Committee hatched an initiative to assist youths in their community to eradicate unemployment and poverty. These efforts culminated in the formation of the West Nicholson Youth in Mining Association (the Association) around August 2017. A draft constitution was produced but not finalised. Residents aged between 17 and 45 years joined the association including the 21 applicants as shown by Annexure A.

During that time, the 2nd respondent offered to grant a tribute to the Association to work the same and mine gold ore and other valuable products. The Association selected representatives to negotiate with the 2nd respondent. They were Natsai Faith Ncube, Paul Gwanangara and Mpumelelo Nyoni. A tribute agreement was eventually signed between the 2nd respondent and the Association. The 3 representatives signed the agreement in their capacity as “accredited agents” of the Association on 27 November 2017. The agreement expires on 26 September 2020 with an option to extend or relinquish the tribute. It should be noted that in terms of clause 2 of the Tribute Agreement, the right to work the mining location, to develop, to extract, mill and treat ore from the same and to dispose of the products for own account is bestowed on the “Tributor” who is named as the West Nicholson Youth in Mining. That right does not reside in the 3 representatives or the Executive Committee.

Further, in terms of the agreement, the Tributor is required to perform all operations under this Tribute in a proper and workmanlike manner and to conform to the provisions of the Mines and Minerals Act and Mining Regulations of Zimbabwe. As operations progressed,

disputes arose as to the manner in which the mining activities were conducted. The three representatives mentioned *supra* unilaterally incorporated 3rd respondent into the Association. Third respondent is neither a member nor a resident of West Nicholson. Sub letting is prohibited by the Tribute Agreement. The trio and 3rd respondent dictated that the share of profits would be 50% in favour of the 3rd respondent plus the named trio while the remaining 50% would then be shared by members in a group of 20 – 25 people who would have produced the ore from the ground.

This unfair and perplexing conduct by the trio and 3rd respondent persisted and in February 2017, 1st and 7th applicants together with their group produced gold ore estimated at 42 tonnes which potentially translated to 1,5kg of gold with an estimated value of plus US\$600,00. The 3rd respondent and his group insisted on the profit sharing ratio forcing the 1st applicant to file a report of theft of gold ore with the 4th respondent against the trio and 3rd respondent. During investigations, 4th respondent was shown a “constitution” by the trio purportedly granting exclusive power to run the mine. During the hearing the 4th respondent indicated that he had since released the gold ore to the trio upon advice from the Area Public Prosecutor at Gwanda. As regards safety, the applicants contended that the mining activities are carried out in a dangerous manner in that blasting and drilling is done haphazardly on support pillars. The executive is also accused of having abandoned community consultative and engagement meetings on the finalisation of the constitution making process.

The 1st, 2nd and 4th respondent did not oppose this application. The 3rd respondent’s opposition is based on the ground that the application does not satisfy the requirements of an interdict in that the applicants have no *prima facie* right. He also argued that he is an “employee of the executive” and conceded he is neither a member of the Association nor a resident of West Nicholson.

The issue

The sole issue is whether or not the applicants have satisfied the requirements of an interdict.

The law

The standard formulation of the requirements of an interdict is that given by CORBET J (as he then was) in *L.F. Boshoff Investments (Pvt) Ltd v Cape Town Municipality* 1969 (2) SA 216 (c) at 267A-F as:

“Briefly these requisites are that the applicant for such temporary relief must show-

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of an interim relief is clear or if not clear is *prima facie* established, though open to some doubt;
- (b) that if the right is only *prima facie* established, there is a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeded in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.

In casu, the 3rd respondent’s contention that the applicants have not established a *prima facie* right because they are not members of the Association is not supported by the evidence. The 3rd respondent has argued that the 1st applicant is an employee but has failed to produce any contract of employment between the Association and 1st applicant. Surprisingly there is a deafening silence on the status of the twenty (20) applicants. More importantly, the trio or 3rd respondent has not produced a membership register for the Association. Applicants filed annexure A which contains a list of names of founding members of the Association. Obviously, 3rd respondent does not know how the Association came into being since he was not in the picture when it was established. In that regard, I find the applicants’ explanation of who is and who is not a member of the Association credible. In any event the right set up by the applicants need not be shown by a balance of probabilities. If it is *prima facie* established though open to some doubt that is enough. Consequently, I take the view that the applicants as members of the Association I have a *prima facie* right to the mining locations granted by the tribute agreement.

That there is a well-grounded apprehension of irreparable harm to the applicants if the interim relief is not granted has been clearly proved by the applicants. It goes without saying that the object of the activities on the mine is to harvest gold for the financial benefit of the

Association's members. On the evidence, the 3rd respondent and his associates have produced a constitution that seems to have abrogated the initial objectives of the Association. That disputed constitution is not a product of the collective efforts of the generality of the members. The 3rd respondent and the "executive" have used that constitution to successfully convince the National Prosecuting Authority to direct the 4th respondent to release the gold ore produced by some of the applicants to them. This directly interferes with the applicants' rights in the mine and this loss or injury is of an irremedial character. In my view this is one of those cases where unless the application is granted, irreparable damage to the applicants would ensue.

As regards the balance of convenience the 3rd respondent argued that since the applicants did not sign the tribute agreement and have not cited the signatories, they have not shown that the balance of convenience favours the closing of the mine. This argument is lame in that it under plays the dynamics surrounding the creation of the Association and the fact that the trio signed the agreement in their representative capacities.

The duty of the court is to weigh the prejudice the applicants will suffer if the interim relief is not granted against the prejudice to the 3rd respondent if it is. The object is to assess which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the just answer may be found at the end of the trial - see *Multitube Systems (Pvt) Ltd v Ponting & Ors* 1984 (3) SA 182 (D) at 190C-D.

In casu, if the interdict is refused the applicants will suffer financial prejudice greater than that of the 3rd respondent in that the latter will continue to unjustifiably benefit from the sweat of the Association's members. On the other hand if the interdict is granted, the 3rd respondent as an "employee" will simply seek employment elsewhere. The real parties will endeavour to come up with a valid constitution that defines their respective rights. That process cannot be described as an infringement of the so-called "executive" members' rights.

Finally as regards the question of whether or not there is another satisfactory remedy, the issue is whether the applicants' rights can be protected by any other ordinary remedy with the same result. The 3rd respondent submitted that the applicants have an existing remedy namely

that they should compel the “representatives” to be accountable rather than have the mine closed. In my view, this is not a satisfactory remedy in that the injury *in casu* is a continuing violation of applicants’ rights.

All in all, I find that the applicants have established all the requirements for an interdict.

Accordingly, it is ordered that pending the return day applicants are hereby granted the following interim relief:

All mining operations at West Nicholson B Mine shall be stopped pending the return date.

Joel Pincus, Konson & Wolhuter, applicants’ legal practitioners
Legal Aid Directorate, respondents’ legal practitioners