

ENVESTRA RESOURCES (PVT) LTD

Versus

ILASHA MINING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 & 14 JUNE 2018

Urgent Chamber Application – Interdict *pendete lite*

T. Khumalo for applicant
Ndubiwa for respondent

MAKONESE J: This is an urgent application for an interdict *pendete lite*. The order sought seeks to restrain the respondents from disposing of 3 stamp mills, pending the finalisation of proceedings under case number HC 1003/18. The order sought by the applicant is framed as follows:

“Final order sought

It is ordered that:

1. Respondent be and is hereby interdicted from disposing of three stamp mills located at Avalon B Mine, Filabusi, Insiza.
2. Respondent be and is hereby directed to pay costs of suit on an attorney and client scale.

Interim relief granted

Pending the return date this order shall operate in the interim as a provisional order giving effect to the provisions of paragraph 1 (above).”

This application is opposed by the respondent who has raised points *in limine* and it is contended that one or more of these preliminary points should dispose of the matter without going into merits.

Background

For the sake of completeness I shall set out the brief background to this application. The applicant and respondent entered into a contract in terms of which the applicant sold to the respondent a mine lab for a sum of US\$50 000. In terms of the agreement the purchaser tendered as security for the performance of its obligations, three stamp mills held by the respondent and located at Avalon B Mine in the District of Filabusi, Insiza. Under case number HC 1003/18, the applicant has instituted legal action against the respondent for the recovery of certain amounts allegedly due to the applicant. The respondent, in a plea filed on the 7th May 2018 disputes liability. Respondent has in paragraph 5 of its plea denied that the stamp mills were pledged as security and that the words used in the agreement do not refer to a “pledge” of property as security. The applicant contends that strictly speaking the word used is “tendered” instead of “pledge”. The applicant avers that there is a likelihood that the respondent may dispose of the stamp mills whilst the matter under case number HC 1003/18 is still pending. The applicant avers that in the event that the stamp mills are disposed of, applicant will suffer irreparable harm. Applicant exhorts this court to deal with this matter on the basis of urgency to avert the danger of adverse conduct on the part of the respondent.

Urgency

The first preliminary point taken by the respondent is that this matter is not urgent as contemplated by the rules of this court. The agreement which forms the subject of the “pledge” referred to by the applicant was concluded way back on the 29th May 2015. A period of over 3 years has since elapsed since that agreement was entered into. The applicant has not alleged that the respondent has attempted to dispose of the 3 stamp mills. It seems to me, that no urgency has been established in applicant’s certificate of urgency and the founding affidavit. This is a matter that has been outstanding for a long time and the urgency alleged by the applicant simply does not exist. The urgency is contrived. The requirements for urgency are now well established in our law. See *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188,

The interim relief sought is similar to the final relief

The interim relief provides that pending the return date the order shall operate in the interim as a provisional order giving effect to the provisions of paragraph 1 of the final order. There can be no doubt that the terms of the final order are similar to the interim relief sought. *Mr Khumalo* appearing for the applicant, argued that ROBINSON J, in *Mutsotso & Ors v Commissioner of Police & Anor* 1993 (2) ZLR 329 (H) used a similar format in granting interim relief. I have examined the cited case and observe that the brief facts of that matter were that applicants were residents of a farm acquired by the Government known as Churu farm. They alleged that they had been forcibly removed from the farm by police officers. They sought a provisional order allowing them to return to the farm. The court granted a provisional order granting a spoliation order even if the applicants were in unlawful possession. In the instant case, it would be inappropriate to grant what purports to be an order *pendete lite* when in fact I would have granted final relief. There would be no need for the applicant to seek confirmation of the interim order, whose effect is final in nature. See; *Maudy Kembo & Ors v Mazhande (NO) & Anor* HH-162-18.

The form used by the applicant is not in compliance with the rules

The respondent raised a third preliminary issue attacking the form used by the applicant. It is common cause that in terms of Order 32 Rule 241 where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications. The applicant did not attempt to justify the use of an inappropriate format. The use of a wrong format is deliberate and inexcusable. The defect renders the application fatally defective. See; *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101 (H) and *Jensen v Acavalos* 1993 (1) ZLR 216 (S)

Mr Ndubiwa, appearing for the respondents raised points *in limine*, which dispose of the matter without delving into the merits. As I have alluded to, there is no basis for the apprehension on applicant's part that the 3 stamp mills are likely to be disposed of. The assertion is purely speculative and the courts may not be drawn to decide matters based on

conjecture. The applicant failed to establish the basis for this apprehension, and for that reason alone, the application is not well grounded on the facts and on the law. The applicant has not treated the issue of the likelihood disposal of the stamp mills, if at all it exists, with urgency. Further, the application does not comply with the rules and is fatally defective.

Accordingly, the application is hereby dismissed with costs.

V.J. Mpofu & Associates, applicant's legal practitioners
Mashayamombe & Co. Attorneys, respondent's legal practitioners