

GEORGE MUKURIRA
versus
JIN YANG AFRICA MINING (PVT) LTD

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 23 JULY 2018 AND 26 JULY 2018

Urgent application

R Chidawanyika for the applicant
N Hlabano for the respondent

MOYO J: This is an application wherein the applicant seeks the following interim relief:

“That pending the confirmation of the provisional order the applicant is granted the following interim relief:

“The respondent and or its agents be and are hereby ordered to suspend all the mining activities they are conducting at applicant’s mining claim being Olympia 7 mine Shurugwi forthwith. The respondent and or its agents be and are hereby ordered not to remove and transport to its processing place all the gold ore mined at applicant’s claim being Olympia 7 Mine Shurugwi forthwith.”

The facts of this matter are that applicant and respondent are both miners in Shurugwi and they share a vertical boundary. They have one shaft that they use to go underground and access their respective mines. The parties had a boundary dispute before which was resolved by the Provincial Mining Director. After 29 June 2018, applicant discovered that respondent was mining on his claim. He found about 20 tonnes of gold ore that was bagged in cement bags, a jack hammer and a pressure hose that they were using and left in applicant’s claim. Applicant made a report to the police. Last week applicant discovered that respondent was continuing with the illegal mining on his claim and he went back to the police who stated that they were still investigating his initial report. Applicant also approached the Provincial Mining Director who also stated that for their part, they had since resolved the dispute between the parties.

Respondent raised points of lack of urgency and that of failure to sight the Provincial Mining Director as a fatal non-joinder to the application.

On the merits, the respondent refutes applicant's claims, respondent avers that it is mining within its own claim and has thus not affected applicant's rights in any way.

In my view, this court is unable to discern from the filed papers what the situation on the ground is. The map filed by the applicant does not give the court any clue as to the situation on the ground. Neither does it substantiate applicant's claims as to what is obtaining currently on the ground. Respondent disputes the facts as presented by applicant and avers that they are not correct and that it in fact respondent is mining on its own claim. The difficulty that I have in this matter is that I have a factual basis of applicant's case which is disputed by the respondent. Respondent presents its own factual picture of the situation on the ground. This being an application parties have not been subjected to cross-examination. I am unable to find that one party is telling the truth as opposed to the other. Whilst the non-joinder of the Provincial Mining Director, is not fatal to the application as submitted by the respondent, in my view, the Provincial Mining Director is relevant in that their office was going to conduct an inspection on the ground and discern what the factual situation on the ground is so that they would assist the court in coming to the appropriate conclusion. As matters stand, this court does not have the tools or the technical knowhow to establish who is telling the truth between the parties before it. I hold the view that applicant was duty bound to lay a proper foundation for the case, by including the Provincial Mining Director, who could establish the situation on the ground and provide the appropriate information to the court. I am unable to find from the facts that a *prima facie* right has been or is about to be infringed as respondent disputes the trespass or encroachment.

As matters stand this court has the following unanswered questions:

- a) Where exactly is the respondent's mining?
- b) Is the respondent trespassing on applicant's claims?
- c) Where is the factual basis for such a conclusion?
- d) Should the court take applicant's mere say so and grant the provisional order?
- e) If this court can take applicant's mere say so that respondent is encroaching what about respondent's own mere say so that it is not encroaching?

This court finds itself hamstrung as the parties must prove their allegations before it. This is a matter that cannot be resolved on the papers that have been filed. It requires further facts to be established on the ground especially by the Provincial Mining Director, to enable the court to draw conclusions from them.

It is for the reasons stated herein that I am unable to find for the applicant. The application is accordingly dismissed with costs.

Chitere Chidawanyika and Partners, applicant's legal practitioners
Hlabano Law Chambers, respondent's legal practitioners