

DULLY HUNI  
versus  
GEORGE PEDZISAI FICHANI

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 7 February 2013

### **Urgent Application**

*K Musoni*, for the applicant  
*I Murambasvina*, for the respondent

MATHONSI J: The parties are involved in an ownership dispute of certain mines situated in Kadoma. Sometime in July 2009 they entered into a written agreement in terms of which they swapped certain mining claims with the applicant taking over mining blocks known as Gazemba 105 to 108 belonging to the respondent. In terms of that agreement, the respondent was to take over certain gold mining claims belonging to the applicant.

It would appear that the respondent later purported to cancel the agreement and reclaimed his own mining blocks which were then being mined by the applicant. He approached the magistrates' court in Gokwe seeking relief against the applicant in respect of those claims.

On 24 January 2013 the magistrates' court, sitting at Gokwe issued a final order in the following:

“WHEREUPON after reading evidence filed of record and evidence submitted in court the rule *nisi* is confirmed as the final order. It is ordered as follows:

- (1) An order to interdict the first respondent from doing mining and managing applicant's mines be and is hereby granted (Gazemba 105 -108).
- (2) The first respondent be and is hereby barred from removing ores from the applicant's mines named above.
- (3) The second respondent release ores in his custody which ores came from the applicant's mine, to the applicant forthwith.”

It is common cause that the applicant noted an appeal against that order of the magistrates' court which appeal is now pending in this court. That notwithstanding, the

applicant has filed an urgent application seeking, in essence, a stay of execution of the order of the magistrates court. The relief that the applicant seeks is as follows:

**“Terms of the final order sought**

1. That the applicant be granted leave to continue doing mining business in respect of Gazemba 105 to 108 mines as per the agreement between the parties pending the hearing of the appeal filed of record.
2. The respondent to pay costs of suit on legal practitioner- client scale.

**Interim Order granted**

That pending the return date, the respondent be ordered to stay executing the order granted by the court a *quo* sitting at Gokwe magistrates’ court on the 24<sup>th</sup> day of January 2013.”

It is trite that an appeal to the High Court in terms of s 40 of the Magistrates’ Court Act [*Cap 7:10*] has the effect of suspending the order appealed against. The applicant has not suggested that the respondent is guilty of any conduct as would entitle him to the relief that he seeks. Quite to the contrary, Mr *Musoni* appearing for the applicant submitted that from the time the order of the magistrate was made on 24 January 2013 both parties did not do anything at the mine.

This means that at the time the applicant made this application, there was no basis whatsoever for seeking relief. Indeed, the founding affidavit does not even begin to suggest any perverse conduct on the part of the respondent as would entitle the applicant to approach the court as he has done.

Clearly therefore there was no reason for the applicant to make this application. The submissions of Mr *Musoni*, which in my view are very vague, that the applicant approached the court because after receiving the notice of appeal, the respondent then started going to the mine, should be looked at in the context that, its the same counsel who conceded that applicant only came to court seeking relief, “out of abundance of caution”. It is unlikely that the respondent is guilty of such action.

This court cannot baby sit over cautious litigants who approach it when clearly there is no need to do so. The applicant already enjoys the benefit of the *status quo*. Having appealed against the decision, the applicant is entitled to continue with his activities as the order has been suspended.

It should have been clear to the applicant, especially with the benefit of legal counsel, that it was unnecessary to come to court. He has however found it necessary to come to court

and in so doing, he has put the respondent out of pocket. I am of the view that this is a case where an order for costs on a higher scale should be made.

Having come to the conclusion that the applicant unnecessarily came to court and therefore is not entitled to the relief sought, I find it unnecessary to determine the rest of the points in *limine* made by M r *Murambasvina* for the respondent.

In the result the application is dismissed with costs on the scale of legal practitioner and client.

*C Mutsahuni Chikore & Partners*, applicant's legal practitioners  
*J Murambasvina Legal Practitoners*, respondent's legal practitioners