

HOLAM MINING (PVT) LTD
and
CHEN SHAOLING
versus
BENWISE INVESTMENTS (PVT) LTD
and
JAMESON RUSHWAYA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 22 March and 7 April, 2016

Urgent chamber application

ER Samukange, for the applicants
P Chitsa, for the respondents

MANGOTA J: In October, 2015 the applicants and the respondents entered into a Contract Mining Agreement. They agreed to work together in a joint venture partnership. Their aim and object were to mine the respondents' claims and share the proceeds of the mined and sold product between them.

The respondents' claims appear in the appendix which the applicants attached to their application. The claims are fifteen (15) in number. They lie in the District of Kadoma. They are described in appendix 1 as follows:

NAME OF CLAIM	REGISTRATION NUMBER	LICENCE NUMBER
Hope 161	12555	410340J
Hope 162	12556	410339J
Hope 163	12557	410338J
Hope 164	12558	410363J
Hope 165	12559	417158J
Hope 166	125760	417159J
Glenmore 51	12561	410331J
Glenmore 52	12562	410332J

Glenmore 53	12563	410333J
Glenmore 54	12564	410334J
Glenmore 55	12565	410335J
Glenmore 56	12566	410337J
Glenmore 57	12567	410336J
Glenmore 58	12568	410341J
Glenmore 519	12569	410342J

It was in pursuance of the partnership agreement that the respondents availed the above mentioned claims to the applicants. The applicants' contribution to the partnership comprised provision of capital and equipment which was required to set up the project.

The parties agreed between them that the applicants would manage and control the operations which related to the joint venture. They also agreed that the respondents would appoint a financial representative who would compliment the personnel whom the applicants would appoint to manage the project.

The record showed that the parties managed their Contract Mining Agreement smoothly from the inception of the same to about 4 March, 2016. It was the second applicant's statement that, on the mentioned date, his workers were chased away from the mine and they were threatened with assault.

The supporting affidavit of one Elias Vitori is relevant. He said he was the applicants' assistant manager. He stated that, on 4 March, 2016 the respondents' workers uttered words, in loud voices, to the effect that the second respondent did not want the applicants' workers to be at the mine any longer. He submitted that a few minutes later a group of rowdy workers approached the applicants' workers and him. The group, according to him, was holding sjamboks, stones, sticks as well as iron bars. He said the group started chasing the applicants' workers away from the mine. He stated that his workers and him ran out of the gate of the mine to safety. He averred that, as they assembled outside the gate, one of the rowdy workers went into the rooms of the applicants' workers and threw the latter's belongings over the fence. He stated that the rowdy group gave them thirty (30) minutes within which they were to pack their clothes and disappear from the mine. He said the respondents' workers threatened and told them that, if they remained in Kadoma, the rowdy group would assault them. He stated that his workmates and him jumped into a lorry which was parked outside the gate and drove off to Chinhoyi. He said they remained in Chinhoyi from 4 March, 2016 to date.

The respondents opposed the application. The second respondent deposed to an affidavit for, and on behalf of, the first respondent as well as for himself. He raised a number of *in limine* matters after which he proceeded to deal with the substance of the application. Among the preliminary issues which he raised were that:

- (a) the second applicant did not have a resolution which authorised him to file the urgent chamber application;
- (b) the agreement which the parties signed in October, 2015 related to his claims which lay outside Tolrose Investments (Pvt) Ltd;
- (c) the applicants were working outside the parties' agreement in that they refused to develop shafts which were on claims covered by the agreement.
- (d) the matter was not urgent.
- (e) the applicants had not exhausted the domestic remedies which were contained in the Contract Mining Agreement, clause 13 thereof in particular- and
- (f) the interim order sought was incompetent as it sought confirmation of restoration of possession which had not been granted.

On the substance of the application, the second respondent stated that problems between the parties started in December, 2015. He said it was at that time that he realised that the applicants were reluctant to sink new shafts in the claims which the agreement covered. He stated that, following a misunderstanding which occurred between them, the applicants left the mine on their own accord. He insisted that the applicants were not despoiled as they claimed. The statement which he made in para 18 of the affidavit is pertinent. It reads:

“The applicants are aware that they volunteered out of the agreement and indeed the meeting with our respective practitioners took place at which we maintained that they left voluntarily and only made an about turn crying spoliation when they realised the reality on the ground i.e. they could not sink shafts on the claims covered by the agreement” [emphasis added]

He denied the assertion that the applicants' workers were forced out of, and away from, the mine. He stated that, as at 4 March 2016, the applicants had long left the mine. He said they left when they realised that they could not work on the claims which the Contract Mining Agreement covered.

It was on the basis of the foregoing matters that the applicants filed the present application. They moved the court to grant them the interim relief as it appeared in the amended draft order which they filed with the court on the day of the hearing of the application [i.e. 22 March, 2016]. The court will consider the draft order in the course of this judgment.

It is pertinent, at this stage, to make a comment on the certificate of urgency which accompanied the application. A glance of the certificate revealed even to the naked eye that its contents were a cut and paste exercise. They resembled, in every aspect of them, the contents of the notice upon which the application was premised.

It is not known if the person who purported to have prepared the certificate of urgency is a legal practitioner or not. He simply stated his name and proceeded to certify that the matter was urgent. The reasons which he gave for certifying as he did were the same as those which appeared in the notice of the application. He did not state the law firm under which he practices, if such exists.

Mr *Garabga* did not apply his mind at all to what he was certifying as being urgent. His certificate left a lot to be desired. It did not at all comply with the rules of court and/or case authorities. It was just a statement which regurgitated the contents of the notice word for word and comma for comma save its last paragraph which appeared to be somewhat different.

Applications of the present nature are always accompanied by a certificate of urgency. A legal practitioner prepares such. He does so in terms of r 244 of the High Court Rules, 1971.

It is always preferable that a legal practitioner who is divorced from the application prepares the certificate. Such a legal practitioner, it is desirable, should be from a law firm which is different from the applicant's legal practitioner. The legal practitioner prepares the certificate after he has read the founding affidavit and all the documents which support the urgency of the application. He should, after he has read those, formulate a genuine and honest opinion of the urgency of the application. He then proceeds to express his views in regard to the urgency, or otherwise, of the same.

The view which the court holds of the matter on this aspect of the case finds fortification from the headnote of *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd*, 1998 (2) ZLR 301 (Cit) wherein the following remarks appear:

“The preferential treatment of allowing a matter to be dealt with urgently is only extended if good cause is shown for treating the litigant in question differently from most litigants. Where a party brings a chamber application for urgent relief, it is a procedural requirement that the application be supported by a certificate by a legal practitioner setting out with reasons the legal practitioner's belief that the matter is urgent. The reason behind such a certificate is that the court is only prepared to act urgently, in a matter where a legal practitioner is involved if the legal practitioner is prepared to give his assurance that such treatment is required. Before

putting his name to such a certificate, the legal practitioner must apply his mind and judgment to the circumstances and reach a personal view that the matter is urgent. He must support his judgment with reasons.....” [emphasis added].

The certificate which Ticharwa Garabga purportedly prepared *in casu* did not in any way comply with what was stated in the headnote of the abovementioned case. It, in fact, was nothing other than a dishonest statement in which the person who purportedly prepared it did not have any belief. It is, under the stated circumstances, only fair for the court to state that the application did not have any certificate of urgency which accompanied it.

On a strict interpretation of the rules of court, therefore, the application should have been dismissed on the stated basis. A reading of the application as a whole, however, persuaded the court to exercise its discretion in terms of r 4 C of the High Court Rules, 1971. The discretion was exercised in the interests of doing justice to the parties. The court remained alive to the fact that a litigant whose case appears to be sound on the merits should not be unduly punished for the sins of his legal practitioner.

It was on the basis of the foregoing that the court proceeded to consider the merits and demerits of the application. Its observations showed that Annexure A which the applicants attached to their application is the parties Contract Mining Agreement. Attached to the annexure is Appendix 1. The appendix is a list of mining claims which form the basis of the agreement between the parties.

The first portion of the preamble to the annexure reads:

“WHEREAS

A. The First Party’s representative, Jameson Rushwaya is the owner of gold mining claims in Kadoma as shown in Appendix -----”

The last but one part of the preamble to the annexure reads:

“C. The parties have agreed to associate together in a CMA with the aim of conducting the business of mining on the aforementioned mining claims to their mutual advantage

Clause 3 of the Agreement reads:

“3. **Contribution**

3.1.1 The First party provides the mining claims”

Clause 12 of the same reads:

“12. **Representations and Warranties**

First party undertakes to provide and make available to the second party the mine claims and ---.

Both parties undertake not to in any way interfere with the smooth running of the project and take reasonable care of the mining claims, --- machinery” [emphasis added].

It is evident that the parties’ contract mining agreement was premised on the second respondent’s mining claims. He availed the claims to the applicants. The applicants agreed to work the claims for the benefits of the parties.

Tolrose Mine was not mentioned at all in the agreement. It was not mentioned in the present application. The second respondent’s averments were that Tolrose Mine was separate and distinct from his claims which appear in Appendix I.

The court remains of the view that the applicants’ assertion which was to the effect that they were despoiled of Tolrose Mine was misplaced. If the parties’ agreement related to Tolrose Mine as the applicants would have the court believe, the latter would have had no difficulty at all in stating that matter as such. Nothing stopped them from mentioning the name of the mine in the Contract Mining Agreement or in the application which they placed before the court. The applicants’ prayer which was to the effect that peaceful and undisturbed possession of Tolrose Mine, Kadoma, be restored to them could not, therefore, hold.

It is the court’s view that the applicants were despoiled of the second respondent’s mining claims. They stated as much in the application. They said the respondents’ workers chased them away from the claims.

The respondents did not challenge the applicants’ averments in the mentioned regard. The second respondent, in fact, said the workers and not him chased the applicants away from the mining claims. He stated, in the same breadth, that the applicants left the mining claims on their own accord. He alleged that, after they had voluntarily left the claims, the applicants cried spoliation. He denied that he chased the applicants away from mining claims.

The import of the second respondent’s assertion was that the applicants, whom he said left the mining claims on their own accord, were free to return to the same. The parties’ minds are, to the observed extent, *ad idem*.

The applicants moved the court to order that the claims which are in Appendix I be restored to them. The respondents’ position was that the applicants were at liberty to return to, and work upon, the mining claims. That stated matter resolves the case in favour of the applicants.

The respondents raised a number of *in limine* matters which the court did not delve into. Its considered view was that the application should be disposed of on the merits more than on technical issues.

Whilst technical issues are not only important but do also, in some cases, assist the court to dispose of a matter as speedily as it is placed before it, those issues should not be allowed to take precedence over the merits of the case.

Litigants take their cases to court to receive justice. Justice is, by and large, a *sine qua non* of a properly considered case, its merits and demerits in particular, from which a well reasoned judgment flows to the satisfaction of the parties. Dismissing a case on the basis of technical issues is, in the court's view, only proper where the foundation upon which such a case rests is hopelessly beyond redemption.

The court has considered all the circumstances of this application. It is satisfied that the applicants proved their case on a balance of probabilities. It is, accordingly, ordered in the interim as follows:

Pending determination of this matter, the applicants are granted the following relief:

1. That the applicants be and are hereby restored peaceful and undisturbed possession of the mining claims which are in Appendix I, Kadoma and, in the event of the respondents resisting to so comply with this order, the Sheriff be and is hereby empowered to enlist the services of any member of the Zimbabwe Republic Police to enforce the order.
2. That the respondents and anyone claiming rights through them be and are hereby ordered to maintain peace and undisturbed access to the mining claims which are in Appendix I, Kadoma.
3. That the respondents or anyone acting through them be and are hereby interdicted from interfering, and/or threatening, physically or verbally, any of the applicants' employees.
4. That the respondents be and are hereby ordered to allow the applicants' employees to move freely within the mine compound.

Venturas & Samukange, applicants, legal practitioners

Mkushi, Foroma & Maupa, respondent's legal practitioners