

GOLIATH KAGONA
versus
SUNDEW GREEN (PVT) LTD
and
PROVINCIAL MINING DIRECTOR

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 16 July & 19 September 2018

Opposed Application

Applicant in person
B Masepa, for 1st respondent
No appearance, for 2nd respondent

TAGU J: This is a chamber application for discharge of an interim order granted by this court on the 16th of January 2017 under case no. HC 12931/16 interdicting the applicant and all other persons acting on his behalf from carrying mining activities within the prohibited distance from the first respondent's permanent structures and borehole, interdicting them from threatening the first respondent or any of the first respondent's employees as well as joining the second respondent as a party to the proceedings. Finally, the interim order gave the police details of Kadoma to enforce peace between the parties if the need arises.

The second respondent filed an affidavit in which he indicated that he did not oppose the application provided that the applicant regularized his operations. Only the first respondent opposed the chamber application.

At the hearing of the matter the first respondent which was automatically barred for failing to file its heads of argument in time applied for condonation and upliftment of the bar. The applicant who was a self-actor did not oppose the application and it was duly granted.

The first respondent then raised two points in limine. The first point was that the procedure adopted by the applicant had no foundation in the High Court Rules and was frivolous and

vexatious because there is a pending matter before the court under case HC 12931/16. The second point *in limine* was that the applicant was approaching the court with dirty hands when the parties had agreed to resolve the matter amicably.

On the first point *in limine* the applicant defended the chamber application by citing the portion of the provisional order which authorized him to make a chamber application for discharge. The portion relied on by the applicant reads as follows-

“If you wish to have the provisional order changed or set aside sooner than the rules of Court normally allow and can show good cause for this, you should approach the applicant/applicant’s legal practitioners to agree, in consultation with the Registrar, on a suitable hearing date. If this cannot be agreed or there is a great urgency, you may make a chamber application, on notice to the applicant, for directions from the judge as to when the matter can be argued.” (underlining is mine for emphasis)

It was therefore the applicant’s contention that he made a chamber application because the order told him to do so.

While generally the applicant as the respondent in HC 12931/16 after being served with the provisional order was obliged to file Notice of Opposition and Heads of argument against confirmation of the provisional order, *in casu* the provisional order gave him the right to file a chamber application for the discharge or alteration of the provisional order on good cause shown. Whether that is right or wrong, for this reason the applicant cannot be faulted for filing a chamber application for discharge because the provisional order authorized him to do so on good cause shown. The first point *in limine* is dismissed.

On the second point *in limine* that of approaching the court with dirty hands the applicant submitted that he tried to engage first respondent to talk but they refused to speak to him. They said they will call him but never did hence the application.

The second respondent’s response was that para 8 of the provisional order referred to when the matter could be heard and not to this application. Be that as it may it is clear the first respondent was not cooperating with the applicant hence the filing of the application. If it had cooperated with the applicant this chamber application would not have been filed when it was filed. For this reason I dismiss the second point *in limine*.

AD MERITS

The provisional order was granted on the 16th January 2017. The parties tried to engage each other but failed. Meanwhile the applicant regularized his mining operations and was granted a Certificate of Registration after Transfer. The transfer number is TR8497 and the registration number is 4569 issued on the 10th of March 2017. The mining claim before being transferred to the applicant had originally been registered before with the Mining Commissioner on the 25th day of June 2001 and operations were being carried out. The applicant filed this application on the 16th March 2017. In his founding affidavit he stated that the basis of the chamber application for the discharge of the provisional order is that there are valid material changes in the circumstances of this matter which can amount to a good cause for the discharge of the interim relief granted against him on the 16th January 2017. He further stated that there are material developments and changes in the circumstances of the matter which render the interim relief granted on 16th January 2017 oppressive and unjustified to him and his business operations in that since the granting of the interim relief he has managed to get the mining claims at the first respondent's estate registered formally in his name. He said at the time the provisional order was granted he was operating the claim under the tribute agreement 52/13 which had expired in June 2016 pending the transfer of the blocks to him as ordered by the court in case 2223/16.

The first respondent in its Notice of Opposition said that Honourable Justice CHITAPI who granted the provisional order in question urged the applicant and the first respondent to resolve the matter amicably and for the applicant to regularize his mining activities. Several phone calls were exchanged between the parties with a view of resolving the dispute. It was agreed tentatively that applicant regularize his claims first before parties engage each other to resolve the dispute. After the applicant obtained the certificate of registration, he engaged first respondent's legal practitioners and agreed to meet for a possible out of court settlement. Applicant did not confirm and or attend the meeting. On the 29th March 2017 the first respondent then filed its heads of argument and notice of set down for the confirmation of the provisional order under Case Number HC 12931/16. The matter is yet to be set down for confirmation.

The first respondent's explanation is but just a carbon copy of the applicant's explanation that parties tried to engage each other but failed. What the court has is a situation where the first

respondent only filed its heads of argument and notice of set down for confirmation of the provisional order some 13 days after the applicant had filed this application for discharge. To date the matter has not yet been set down for hearing of the confirmation of the provisional order. It seems clear the parties had tentatively agreed that the applicant had to regularize his claims first, which he has done. Unfortunately, the application for set down for confirmation of the provisional order has been overtaken by the application for discharge.

In my view the application has merit since the applicant has since regularized his mining operations and the provisional order is no longer necessary and must be discharged.

IT IS HEREBY ORDERED AS FOLLOWS

- 1) That the Provisional Order and interim relief issued by this Honourable Court on 16th January 2017 be and is hereby discharged.
- 2) That the applicant be and is hereby allowed to operate his mining claims at Flaxton Estate, commonly known as Countess 9 registered number 4569 registered on 25 June 2001, freely without any undue interference from any members/ Directors of the 1st Respondent herein.
- 3) That the prohibition imposed against the Applicant by the Interim Order referred to above be and is hereby uplifted forthwith.
- 4) That the 1st Respondent pays costs of this application.

Goliath Kagona, applicant in person
Muzangaza, Mandaza & Tomana, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners