

DANANGWE DISTRICT YOUTH MINING CO-OPERATIVE
versus
LESCAUT INVESTMENTS (PVT) LTD
and
RWIZI ESQUIRE N.O
and
THE MESSENGER OF COURT (CHEGUTU)
and
OFFICER COMMANDING, ZIMBABWE REPUBLIC POLICE CHEGUTU DISTRICT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 5 March 2019 & 13 March 2019

Urgent Chamber Application

E Mubaiwa with *F. M. Katsande*, for the applicant
S Hashiti with *M Ndlovu*, for the 1st respondent
2nd respondent, in default
3rd respondent, in default
4th respondent, in default

TAGU J: The applicant filed a court application for review of the proceedings conducted and presided over by the second respondent at the court of the Magistrates at Chegutu in case number MC-CIV-51-2019. Pending the determination of the application for review the applicant filed the current urgent chamber application for stay of execution of the order by the Magistrate court in case MC-CIV-51-19.

The facts of this case are that there is a mining dispute between applicant and the first respondent concerning applicant's mining activities at and possession of land over which first respondent alleges it has mining claims. The proceedings in MC-CIV -51-19 which the applicant seeks to be stayed pending review were filed by the first respondent as an ex parte application to arrest this mining dispute through an order firstly interdicting applicant from mining activities and

secondly, evicting it and its members therefrom. The rule nisi made by the magistrate (herein referred to as the second respondent) which the applicant takes issue with reads as follows:

“FINAL ORDER SOUGHT

1. Respondent or anyone acting through it be and are hereby interdicted from mining, processing, taking out and dealing in any manner whatsoever with gold ore or gold resources from Applicant’s mine claims Registration Numbers 12731G, 12734G and 21715BN;
2. Respondent or anyone acting through it be and are hereby ordered to vacate the Applicant’s Mine claims registration Numbers 12731G, 12734 G and 21715BN within 24 hours of this order,
3. In the event that Respondent and all those acting through it refuse or fail to vacate the aforementioned mine claims, the Messenger of court/ or members of the Zimbabwe Republic police are authorized to remove Respondent and all those acting through it from the claim.
4. The Respondent shall bear the costs of this application.

INTERIM RELIEF GRANTED

1. That this order shall act as an interim order and shall be binding on the Respondent pending the return date.”

The applicant stated in its founding affidavit that since the proceedings in MC -51-19 were brought *ex parte*, they never came to the attention of the applicant until after the order was issued. Secondly, the applicant came to know of the order on 14 February 2019. Despite the applicant having served the first respondent with its application for review of that order the first respondent threatened to and indicated its intent to proceed with execution of the order granted as parte by the second respondent since there is no order of court stopping the first respondent from execution. Thirdly, despite the applicant’s legal practitioners intervening the first respondent remained adamant that it will execute the order. Fearing that since the provisional order granted *ex parte* and the final order are the same the applicant is of the view that the orders granted by the magistrate court are final in nature hence there is nothing to argue on the return date. The other concern is that an interdict and an eviction order cannot be given *ex parte* without notifying the affected party

who has rights that needed to be protected. Lastly, the applicant's argument is that the magistrate that granted the order ex parte had no jurisdiction to entertain mine dispute which are the prerogative of the Mining Commissioner in terms of section 345 (1) of the Mines and Minerals Act [21.05]. To that extent the applicant submitted that the order by the magistrate court which the first respondent want to execute is null and void and of no force and effect.

The applicant therefore said it fears that the first respondent may carry out its threats before the review is heard and if that happens will be prejudiced hence the balance of convenience favours the granting of the order it is seeking.

The first respondent opposed the application.

It submitted through its defence counsel that this is an abuse of court process by the applicant which must not be heard or assisted by the court on the basis of dirty hands. The argument advanced being that there is a conviction by the magistrate court of trespass against the applicant on the very same claims that it is on which it seeks the court to permit it to stay on. Reference was made to the cases of *KMFS Insurance Company of Zimbabwe (Private) Limited v The Insurance Council of Zimbabwe and Insurance Pensions Commission and Zimbabwe National Road Administration* HH-992-15 at p 6;.....ANZ 2004 (1) ZLR 378. Also *Source-Net (Private) limited and Nelson Banya and Alfonse Mbizwo and Benard Mpofo v Steward Bank Limited and Econet Wireless* HH- 343-15 per MUSAKWA J. The first respondent further argued that the applicant is an illegal trespasser at the mine in that it:

1. It has no right conferred upon it in terms of section 169 of the Mines and Minerals Act;
2. It has no tribute agreement and
3. It has no prospecting licence.

Further the first respondent argued that the applicant had been temporarily allowed to be on the mining claim by the first respondent who have withdrawn or revoked the presence of the applicant on the claims. The first respondent argued that the magistrate court order MC-CIV -51-19 has not been set aside and that if the applicant was aggrieved by the decision of the magistrate it should have gone to the magistrate court for relief in terms of Order 23 r 3 or 4 (3) of the Magistrates Court Rules and not to come to the High Court. It fur submitted that the applicant could have relied on s 39 (1) (b) of the Magistrates Court Act [*Chapter 7.10*] for domestic remedies. Reliance was also made on the case of *Base Minerals Zimbabwe (Private) Limited &*

Peter Valentine v Chirosva Minerals (Private) Limited and Chirosva Syndicate and John Richard Needham Groves HH-21-16.

Mr *Hashiti* submitted that even though the magistrate order may have been incorrect the applicant ought to have vacated and complained later. He cited the case of *Econet Wireless (Private) Limited v (1) The Minister of Public Service Labour and Social Welfare (2) The Registrar of Labour (3) National Employment Council for Communications and Allied Services* SC-31-16 at page 6 of the cyclostyled judgment where BHUNU JA had this to say:

“The doctrine of obedience of the law until its lawful invalidation was graphically put across by Lord Radcliffe in *Smith v East Elloe Rural District Council* [1956] AC at 76 when he observed that:

“An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of illegality on its forehead. Unless the necessary procedures are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.”

Other authorities cited were *Midkwe Minerals (Private) Limited v (1) Kwekwe Consolidated Gold Mines (Private) Limited (2) Carslone Enterprises (Private) Limited (3) Deputy Sheriff, Kwekwe* SC-54-13; *Capital Radio (Pvt) Ltd v Minister of Information & Ors (3) in re Ndlovu* 2000 (2) ZLR 289 and *Chikadaya v Chikadaya* 2000 (1) ZLR 343.

In response counsel for the applicant disputed the fact that the applicant was approaching the court with dirty hence because after its conviction the applicant complied with the order of the court because it paid the \$200.00 fine which it was asked to pay. He further disputed that the applicant was debarred from approaching the High Court for reliefs. His argument being that the sections and rules cited by the counsel for the first respondent did not provide effective reliefs. In particular he said if a party is not happy with the decision of the magistrate a party has several options such as having the decision set aside in terms of the rules and sections cited, appeal to the High Court or bring the proceedings on review before the High Court. In casu the applicant decided to bring the matter under review. Authorities cited were *Chikadaya supra*, (1) *Ritenote Printers (Private) Limited (2) John Kanokanga v A. Adam & Company (Private) Limited* SC-26-16. It was submitted that the applicant was exercising a right of lien at the mine claims hence could not be evicted without compensation.

Having heard the arguments by the parties and reading papers filed of record it is undisputed that the first respondent brought an *ex parte* application against the applicant in the magistrate court. It is undisputed that the applicant was not served with the application. It only became aware of the order later and it was apparent to the applicant that the first respondent was keen on enforcing the *ex parte* order despite the fact that the first respondent had been served with an application for review of the order that it wanted to execute. I am convinced that the applicant has a strong case on review because the orders granted by the magistrate appears incompetent regard being heard to the fact that the applicant was not given an opportunity to be heard which breaches the *audi alteram partem* principle. Where rights of an individual are being affected and a final order being given it is desirable in the interest of justice that the party whose rights are to be adversely affected be given an opportunity to be heard. In the present case no special circumstances have been advanced as to why the first respondent opted to approach the court on an *ex parte* basis.

While it is correct that a party whose hands are dirty may not be given an opportunity to be heard, it depends on the nature of the case. To simply say that the applicant was once convicted of trespass on this mining place, hence must not be assisted by the court may be a violation of the party's constitutional rights. The Constitution of Zimbabwe provides in section 85 (2) that:

“The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1)”.

My understanding of the provisions of s 85 of the Constitution is that the fact that a person may have contravened a law does not debar him from approaching a court for relief despite the fact that the courts frown upon people who approach the court for assistance when they have themselves failed to obey the court's orders. The Constitution is the supreme law of the land. Hence to rely on dirty hand principle would be to stretch the law too far in this case given that the applicant complied with the court order and paid the fine imposed on it. Again s 345 of the Mines and Minerals Act provides that:

“Jurisdiction of High Court and mining commissioners

- (1) Except where otherwise provided in this Act, or except where both the complainant and defendant have agreed in writing that the complaint or dispute shall be investigated and decided by the mining commissioner in the first instance, the High Court shall have and exercise original jurisdiction in every civil matter, complaint or dispute arising under this Act and if it appears expedient and

necessary to the Court to refer any matter to a mining commissioner for investigation and report, the Court may make an order to that effect.”

The applicant’s success on review on the allegation that the magistrate did not have jurisdiction to entertain the mining dispute is reasonably arguable and may enjoy some prospects of success given that the Mines and Minerals Act does not have an interpretation of Court to mean magistrates court but specifically gives jurisdiction to the High Court or the Commissioner in the event of a dispute. Therefore, if the first respondent had not exhibited signs that it wanted to execute the order of the magistrate at any cost, the applicant would not have approached this court on an urgent basis. For these reasons there is a real possibility of irreparable harm hence this application will succeed. As to its right to be on the mine claim it is an issue that will be argued on the return date.

IT IS ORDERED THAT

FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms;

1. Any warrant or writ of execution or ejection, issued by second and or third respondent pursuant to and in execution of the court order granted by the court of the magistrate at Chegutu in case number MC-CIV-51-19i hereby set aside.
2. All costs, charges, expenses and damages paid or suffered by the applicant or incurred by the third and fourth respondents on account of the above warrant or writ of ejection or execution shall be paid by the first respondent
3. The first respondent shall bear costs of suit on the legal practitioner and client scale.

INTERIM ORDER SOUGHT

Pending the finalization of this matter an interim order is hereby granted on the following terms:

1. Pending the return date hereof, execution of the order granted by the magistrate court at Chegutu on 12 February 2019 in case number MC-CIV-51-19 be and is hereby stayed and all respondents are simultaneously directed not to carry out the terms of the order.

2. Should execution have been carried out by the time of this order, respondents jointly and severally are ordered to restore applicant into its possession of the mining claims and their location upon service of this order on them.

SERVICE OF ORDER

Applicant's legal practitioners are hereby authorized to serve this provisional order on the respondents.

F M Katsande & Partners, applicant's legal practitioners
Lunga Attorneys, 1st respondent's legal practitioners