

FORBES AND THOMPSON (BULAWAYO) (PVT) LTD
versus
EDSON GUMBO M.P.

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 5-6 July 2017 & 23 August 2017

Civil trial

T Mpfu, for the applicant
R Chingwena, for the defendant

MUREMBA J: The plaintiff issued summons claiming damages in the sum of US\$752 000-00 from the defendant. The claim arises from a temporary closure of the plaintiff's mining operations at its mine, Vubachikwe Mine in Gwanda.

The plaintiff alleges that the closure of the mine was as a result of a report that was malicious or deliberate or reckless, wrongful and false that was made by the defendant to the Acting Provincial Mining Director in the Ministry of Mines in Matebeleland south to the effect that pillar mining was being done unsafely at the plaintiff's mine despite the defendant as a former employee of the plaintiff knowing that the mine had an impeccable safe mining record spanning in excess of three decades back.

From the evidence which was led by the parties during trial it is common cause that the plaintiff was given an order suspending pillar mining at its mine by the Ministry of Mines on 7 January 2015. The suspension was uplifted on 24 February 2015. The defendant who is now a Member of Parliament for Gwanda Central is a former employee of the plaintiff having worked for the plaintiff from 1 January 1985 until 22 November 2014 after he had become a Member of Parliament. During his employment the defendant worked as a Group Metallurgist. It is common cause that after the defendant had lost his employment he was evicted from the company house and from the plaintiff's laboratory. He instituted labour claims against the plaintiff which were dismissed, but there is still an outstanding pension issue between the parties.

The plaintiff alleged in its declaration that when the defendant made the false report to the Ministry of Mines about the plaintiff being involved in unsafe pillar mining he knew that the mining of the pillars would be stopped by the Acting Provincial Mining Director. The plaintiff further averred that the defendant knew or ought to have known that if the plaintiff was ordered to stop mining pillars it could suffer a loss of revenue. The plaintiff further averred that as a result of it being prevented from mining the pillars, the amount of ore it could mine was immediately reduced. As a result of that reduction in mining, it lost production of 400g of gold per day during the aforesaid period. The plaintiff said that this represents a loss of revenue in the sum of US\$752 000-00. This is the amount that the plaintiff is claiming from the defendant.

In his plea the defendant denied making any report to the Acting Provincial Mining Director in any form, written or otherwise. He said that before the Department of Mines and Minerals stopped mining operations of the plaintiff, its personnel went underground to inspect the mining of pillars. It was only after the inspection that it ordered the plaintiff to stop the mining of pillars in the interests of safety until a comprehensive geo-technical report had been produced and considered by the department.

The defendant further averred that even if it is assumed that he made the report as alleged by the plaintiff, such a report cannot be blamed for causing stoppage of operations. If the plaintiff's house was in order, its operations were not going to be stopped. Stoppage was ordered as a result of a professional assessment that was done by the inspectors from the department of Mines and Minerals which means that safety was not guaranteed.

The plaintiff led evidence from two witnesses. The first to testify was Tobias Nyoni, a Mining Inspector of more than 20 years with the Ministry of Mines. He is based in Bulawayo. He testified under judicial compulsion having been subpoenaed by the plaintiff. He said that he was summoned to Mr Dube, the Acting provincial Mining Director's office on 4 January 2015 where he found him with the defendant. Mr Dube briefed him (Tobias) about the issue of mining of pillars that was happening at the plaintiff's mine and the depletion of ore reserves that was happening at that mine. After this briefing by Mr Dube the two then held a discussion with the defendant. The defendant said that he had received a report from the workers at the mine that the plaintiff was mining pillars and that he wanted the department to go and verify those claims. Tobias Nyoni said that as a result of that Mr Dube instructed him to go and conduct an inspection at the mine.

When the defendant testified he did not dispute having met Tobias Nyoni in Mr Dube's office not on 4 January 2015, but maybe on 2 January 2015. What he denied was that he had gone there to make a report against the plaintiff as alleged. His explanation was that the plaintiff's workers at the mine had written a document to him outlining their grievances against the plaintiff's mine management on 20 December 2014. The document was produced as an exhibit and it shows that it was copied to several institutions which include the mine management, labour office, NEC, Ministry of Mines, Ministry of Indigenisation, the plaintiff and the local community. The document is titled "Government Intervention to Vubachikwe Mine situation." The document is unsigned, but it states that it is from all Vubachikwe mine employees.

The defendant said that he had had meetings with these mine workers about their complaints following a recommendation by the resident Minister who had also been served with a copy of the document. The defendant said that on 2 January 2015 he had gone to see Mr Dube, the Acting Provincial Mining Director on another issue which had to do with artisan miners who had asked him to present their documents on their behalf. He said he then took that opportunity to talk about the plaintiff's mine workers' complaints since the same document had been copied to the Ministry of Mines too. He said that he was asking if there was any feedback the Ministry could give. Mr Dube said that he could only give feedback after an inspection of the mine had been done. The defendant said that in making this follow up his intention had only been to bring harmony between the workers and the mine management.

What is pertinent in this matter is that Mr Dube, the Acting Provincial Mining Director, was not called to testify yet he is the very person who ordered that the plaintiff's mine be inspected. Mr Dube is the most crucial person because he is the one who knows what prompted him to order that inspection. He is the person who could have told this court whether or not he was acting solely on the basis of a report that he had received from the defendant in ordering the inspection. The defendant denied having made the report and said that in talking to Mr Dube he was only making a follow up on the letter or document of complainant the plaintiff's mine workers had written to him. The plaintiff did not lead any evidence which shows that the defendant made the report it alleges he made. The evidence of Tobias Nyoni is not helpful on that aspect because when he was called to Mr Dube's office he found the defendant already there. The discussions between Mr Dube and the defendant had already commenced. Tobias Nyoni was not privy to what the two had discussed prior to

him being called. He would not know how that discussion commenced between the two. Only Mr Dube could have told the court how the defendant introduced this issue and whether or not he said it as a report against the plaintiff or like the defendant said, he was asking for a feedback on the letter that was written by the plaintiff's mine workers. The plaintiff did not prove on a balance of probabilities that the defendant actually made a report against it in the manner it alleges to the Acting Provincial Mining Director, Mr Dube. The evidence of Mr Dube would have cleared this issue very well. There was no explanation which was given for his failure to testify by the plaintiff.

It is common cause that Tobias Nyoni, upon the instructions or orders of Mr Dube went to Vubachikwe Mine in the company of Leonard Mutilimanja an engineer and carried out an inspection on 5 January 2015. On 6 January 2015 he (Tobias Nyoni) wrote a letter to the defendant about the inspection that he had carried out at the plaintiff's mine. The letter was produced as an exhibit. It was not an adverse report against the plaintiff. It only states that the mine was facing some frequent machinery breakdowns, shortage of mining consumables and cash flow. He concluded and recommended that the mine needed re-capitalisation in order to develop and prolong its life. Tobias Nyoni did not recommend that the mine be closed. The report was not adverse, yet despite this report, Mr Dube the Acting Provincial Mining Director of Matebeleland South wrote a letter on 7 January 2015 to the plaintiff's Mine Manager ordering it to stop mining pillars with immediate effect. The letter of suspension was produced as an exhibit. It states that the inspection which had been carried out had established that the mine was mining pillars. In the letter Mr Dube said,

“You are required to submit an application for mining pillars accompanied by a comprehensive Geo-Technical Report. Mining of pillars will only resume after considerations of the Geo-Technical Report by this office.

You are hereby ordered to stop mining pillars with immediate effect.

Please comply with the above in the interest of safety.”

The above clearly shows that the closure of the plaintiff's mine was necessitated not by a report that had been made against the plaintiff, but by the inspection that had been done at the mine by the Ministry of Mines personnel. It also shows that closure was necessitated by the fact that the plaintiff's mine had embarked on pillar mining without making the necessary application which was supposed to be accompanied by a comprehensive Geo-Technical Report for consideration by the Ministry of Mines. The letter shows that this requirement had to be complied with in the interests of safety. It appears to me from a reading of this letter

that there was a procedural requirement that the plaintiff's mine had not complied with before embarking on pillar mining. So at the end of the day, whether or not the defendant reported the plaintiff does not matter since the report is not what caused the closure, but the inspection that was subsequently carried out at the mine. The inspection was the proximate cause of the closure.

The letter of 24 February 2015 by Mr Dube lifting the suspension is also pertinent. It says,

“Following discussions held with your mine management and subsequent reports received which included the Geo-Technical results report, this office is satisfied that you can continue with the pre-2005 mining method.....

This office therefore lifts the suspension of your mining method but with the following conditions:

1. The mine should submit quarterly ground monitoring reports and progress of mining.
2. Inspectors of mines will also do inspection visits quarterly.
3. Any ground changes should be reported to this office immediately.”

The letters of Mr Dube speak for themselves. The lifting of the suspension was necessitated by compliance with the mining requirements the plaintiff had eventually done. From the contents of the letters, it cannot be said that Mr Dube was influenced by the defendant to order the closure of the mine. The plaintiff did not lead any evidence which shows that Mr Dube acted on the influence of the defendant to close the mine. If this is what happened then the plaintiff made an omission by not leading evidence from Mr Dube. In the absence of evidence explaining why and under what circumstances Mr Dube ordered the closure of the plaintiff's mine against the background of a favourable report Tobias Nyoni had given, this court cannot make an assumption that the plaintiff's mine was closed at the instance of the defendant having exerted pressure on Mr Dube. Only Mr Dube could have explained his actions. Most importantly what the plaintiff failed to show to the court is how the Ministry of Mines operates when it is seized with a report against the operations of a mine. Does it instantly and automatically order operations to stop at the mine even after receiving a report which is not adverse to the mine after an inspection has been carried out or there are other considerations that it makes? The plaintiff not having dealt with this issue, the court is left to conclude that the closure of the mine was necessitated by what Mr Dube had considered after receiving the inspection report from Tobias Nyoni.

In the result, it cannot be said that whatever loss the plaintiff suffered as a result of its mine's closure was occasioned because of the report the defendant made. It was not proved

that he made the report. However, even if he made it, that does not change anything. The result is the same.

Consequently, it be and is hereby ordered that the plaintiff's claim is dismissed with costs.

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Mangwana & partners, defendant's legal practitioners