TICHARWA MUREHWA
and
KINGSTONE MUDONHI
versus
AARON SHANJE
and
MINISTER OF MINES & MINERAL DEVELOPMENT
N.O
and
ACTING MINING DIRECTOR MANICALAND
PROVINCE N.O

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 26 July 2017

Urgent Chamber Application

GRJ Sithole, for the applicant
Machaya, for the 1st respondent
M Gezera, 2nd and 3rd respondents

FOROMA J: This is an urgent chamber application in terms of which first applicant seeks the following relief per provisional order:-

TERMS OF FINAL ORDER SOUGHT

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

1. The respondents and all those acting through them be and are hereby barred from implementing second and third respondents' decision of the 23rd of May 2017 against the applicants and accessing the applicants' mining area pending the finalization of the review application filed by applicants under case no. HC 5172/17.

2. Pending finalization of the review application under HC 5172/17 respondents are interdicted from repositioning the beacons on applicants mine situate at Odzi 12 situate on Fernicarry Extension approximately MNE of Old Odzi Mine.
3. Respondent to pay costs of suit on an attorney and client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter or the return date applicants are granted the following relief:

1. Pending the return date respondents and all those acting through them be and are hereby interdicted from implementing the determination of the 2nd and 3rd respondents handed down on 23 May 2017.
2. First respondent is interdicted or barred from taking occupation of or accessing any part or portion of Odzi 12 situate on Femicarry Extension approximately 800 m N.E of Old Odzi Mine.

First and second applicants as well as first respondent are gold miners in the Odzi area and they were involved in a boundary dispute in or about December 2014. Each of them owns some mining claim as follows:

First applicant – G 3385
second applicant G 3445 and
first respondent G 1243.

As a result of a boundary dispute which the parties agreed to refer to the Acting Provincial Mining Director Manicaland a determination was made dated 23 December 2014. The operative part of the determination by J Makandwa the Acting Provincial Mining Director Mutare reads as follows – "As a result of careful consideration of all information gathered it was determined that Ticharwa Murehwa is the rightful owner of the area in dispute. Therefore he should be allowed to enjoy his full mining rights over his mining block Ref N O G 3385 registered on 14th August 2010 situated approximately 800 metres north east of old Odzi Mine. Also the shaft which was of dispute between Shanje and Murehwa is in neither of the two blocks on the ground.

The decision is based on the fact that Shanje and Mudonhi are subsequent peggers. Shanje's block G 1243 was pegged on 22109/2005 and Mudonhi's block G3445 was pegged on 11/11/2010.

J Makandwa – Acting Provincial Mining Director

This determination although copied to each of the three parties to the dispute i.e first and second applicants and first respondent the first respondent claims that he was never served with the determination and only saw it in the first week of July 2016.

The applicants and in particular first applicant complains that on 23 May 2017 second and third respondents passed a decision in terms of which the Minister adjusted the boundaries of the disputing miners pursuant to a challenge of J. Makandwa's determination by first respondent. The first applicant complains that he was not invited to attend the proceedings at which a decision was reached to adjust the boundaries / pegs. The effect of the movement of pegs and beacons is that first respondent has taken over first applicant's mining operations on which he claims to have invested heavily since 2010. The area involves a portion which is the most productive and has shafts drilled to about 100 metres with machinery worth hundreds of thousands of dollars. In response to the decision of the second and third respondent which severely prejudiced him. Applicant filed an application for a review of the second respondents decision and his grounds of review are listed as:

(1) The first and second respondents (second and third respondents *in casu*) made the decision aforesaid without the necessary jurisdiction to entertain the matter. The determination is also ultra vires the enabling legislation. The decision is a nullity and void as it was done by a body not entitled to make it at law.

(2) The decision of first and second respondents is irrational and motivated by bias and malice as it was made without hearing the applicant and other interested parties and without providing any reasons for the determination .

It is apparent from a perusal of the determination by J. Makandwa dated 23 December 2014 that the dispute between applicant and the first respondent and second applicant was in favour of the applicant. It is also clear that in terms of the decision of the Minister of Mines and Mining Development dated 23 May 2017 the first respondent was awarded the disputed area thus

effectively rescinding the determination in favour of the applicant. Clearly the same office has rendered two conflicting decisions on the same boundary dispute involving the same parties.

The first respondent has opposed the applicant's urgent application seeking to argue that the applicant has no case on review and that the Minister's decision is legally correct thus the claim in dispute was correctly awarded to the first respondent.

The applicant's application for review /is not before me for determination and it is not competent for me to express a view on the applicant's prospects of success on it. I however need to express a preliminary view as that is the basis of the existence or otherwise of a *prima facie* right on first applicant's part.

It is pertinent to note that the said application has validly been filed in this court and its existence is a relevant consideration for purposes of determining whether the conditions for the grant of an interim interdict have been established.

The conditions that have to be established for an applicant to justify the court granting an interim interdict were spelt out in the case of *Setlogelo* v *Setlogelo* 1914 AD 221 as (i) a clear right, (ii) an injury actually committed or reasonably apprehended (iii) the absence of similar protection by any ordinary remedy. The fourth requirement has generally been referred to as (iv) the balance of convenience.

It is trite that in all cases involving an application for an interim interdict the court has a discretion whether or not to grant the application which discretion must be exercised judicially. This means that the discretion is exercised particularly upon a consideration of the probabilities of success of the applicant in the application. The existence of a decision in favour of first applicant by Mr Makandwa set aside by second and third respondents establish a clear right. The reversal of the decision of Makandwa establishes an injury actually committed and not apprehended especially if such reversal was made in applicant's absence and without applicant's knowledge.

In determining which way the court should exercise its discretion the court has a duty to weigh the prejudice that the applicant will suffer in the interim interdict is not granted against the prejudice to the respondent.

The fact of this application tip the scales in favour of the applicant. The applicant is already engaged in mining in the area in dispute where he has sunk considerable investments by

way of mining shafts and developments including equipment. The applicant has everything to lose where as it would appear the first respondent will not suffer any loss if the interim interdict is granted to the applicant as he has not yet started mining in the disputed area. The first respondent's loss if any would be the gold ore underground which the applicant will mine if any is found. Currently the first respondent is not carrying out any mining activity in the area where the respondent complains that the applicant has encroached on. The first respondent's interest is in his desire to maintain correct boundaries of the parties respective mining claims. It is my view that any gold mined pending resolution of the dispute can be compensated for should first respondent be victorious as the applicant in his own interest will need to keep a record of the yield from the mining activity.

The applicant has accordingly established that it is likely to suffer greater prejudice than any that the first respondent might suffer.

It is axiomatic that even where the requirements for a temporary interdict appear to be present an interim interdict remains a discretionary remedy and the exercise of the discretion ordinarily is influenced by the balance of convenience which itself is not any less affected by the court's finding on who as between the parties is to suffer greater prejudice.

The first respondent argued forcefully that the applicant has no prospects of success on review in any event as it is common cause that the first respondent is the prior pegger who has statutory protection in terms of s 177 (3) of the Mines and Minerals Act. The decision on review in this matter is not necessarily dependant on the interpretation of the provision of the Act as infact there is no dispute in that regard.

The applicant's application for review is based on the grounds *inter alia* that the decision interfering with his rights was arrived at irregularly in that he was not given a chance to be heard in support of his position in contravention a cardinal principle of natural justice namely *audi alteram partem* principle. The first respondent argues that the applicant was afforded an opportunity to defend his claims. In support of this contention the first respondent argues that the applicant was represented by his sons at the hearing by the second respondent and third respondent. The first respondent alleges that the applicant was also represented by one Golden Chiwanda and his manager Mr Siera. Clearly the applicant did not attend the hearing and it is not clear whether the alleged applicant's representatives who attended the alleged meetings had

applicant's mandate. The applicant's review application is therefore not one entirely devoid of merit.

Considering that there are 2 conflicting decisions by the same office (Acting Provincial Mining Director Manicaland) the applicant deserved to be heard before his interest could be exposed to ruin.

It is not within my power to decide on the application for review as that application is not before me. However the applicant's case is founded on it and to a limited extent I can have regard to it. I accordingly find that the balance of convenience favours the grant of the interim interdict. After all this is only a provisional order which sooner the parties will have an opportunity to fully argue on the return day. In the circumstances l grant the first applicant the provisional order as prayed save that there shall be no order as to costs.

I accordingly grant provisional order as prayed save that there shall be no order as to costs.

Mvere Chikamhi & Mareanadzo, applicants' legal practitioners
Mahaya & Association, 1st respondents' legal practitioners
Civil Division of the AG's Office, 2nd and 3rd respondents' legal practitioners