

Judgment No. HB 19/06
Case No. HC 1890/05
X Ref HC 1585/04 & HC 3794/04

SHELLAR NDHLOVU

Versus

DICKSON MUKUNGURUTSE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 OCTOBER 2005 AND 16 MARCH 2006

M Nzarayapenga for the applicant
T C Masawi with Ms Mapanzure for the respondent

Urgent Chamber Application

NDOU J: The applicant and the respondent have had a long standing mining claim dispute which culminated in several court proceedings. Most recently the respondent obtained an *ex parte* order which interdicts the applicant, *inter alia*, from “coming to and or carrying out mining activities at a claim situated in the district of Kadoma known as claim number 2774 BIG BEN 11”. The applicant after being served with this order, instead of filing opposing papers brought this application seeking, *inter alia*, the setting aside of the provisional order in HC 1585/05 on the basis that it does relate to his claims being BIG BEN 2 registration number 14526 and BIG BEN 3 registration number 14427 in the District of Kadoma. If the order in HC 1585/05 refers to a different claim then this application is unnecessary. But the problem is that the respondent avers that the area where he is carrying out his mining operations in BIG BEN 11 (number 2774) yet the applicant’s position is that the same area

is part of BIG BEN 2 and BIG BEN 3 supra. The respondent registered his mine some

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seven years prior to the applicant who only registered in March 2005. The applicant's case is supported by the Mining Commissioner. The respondent protested by appealing to the Minister of Mines. The latter confirmed the Mining Commissioner's determination. The respondent has challenged the Minister's decision by filing an application for review under case number HC 1586/05. The Mining Commissioner, in his wisdom, has decided not to oppose the application for review. The problem is that the effect of this application is the reversal of the order in HC 1585/05. But has the applicant adopted the correct procedure? Since the applicant has not stated the rule under which she is acting one can only assume the intention is Rule 449. Generally, this court, after making the order in HC 1585/05 has become *functus officio* and may not make further orders not sought in the papers that set out and define this before the court unless the parties agree otherwise – *Firestone SA (Pty) Ltd v Gentirco AG* 1977(4) SA 298 (A); *First National Bank of SA Ltd v Jurgens & Ors* 1993 (1) SA 245 (W) and *Young Blood Investments (Pvt) Ltd v Spearhead (Pvt) Ltd & Ors* HB-57-05. Rule 449 provides an exception to his general rule. In my view, rescission in terms of Rule 449 may be appropriate in an *ex parte* application in which a wrong order has been prayed for or

granted as a result of error on the part of the applicant – *Ditshigo v Motor Vehicles Assurance Fund & Anor* 1983 (1) SA 838 (T). In other words, a judgment or order is final and unalterable save in the exceptional circumstances dealt with under Rule 449 – *Ex parte Nel* 1957(1) SA 216 (D). What the applicant *in casu* is seeking is the expeditious

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resolution of the boundary dispute in the parties' mining claims in order to prevent commercial prejudice. The option of suing for damages is available to her when the dispute is finally brought to rest. The applicant has not averred why this remedy cannot repair any damage suffered. Whether the mining claim is depleted by the day is immaterial as long as the applicant has access to a claim for damages. There is no allegations in the papers that the respondent will not be in a position to satisfy such a claim in the event of the dispute being decided in favour of the applicant. The applicant filed her notice of opposition to case number HC 1585/05 on the same date that she filed the current application. The procedure she has adopted here is wrong. She should have simply approached the court for anticipation of the return date or for the discharge of the provisional order granted under case number HC 1585/05. I am not seized with the latter matter but the parties are advised to seriously examine whether the boundary dispute can be resolved on the papers even if the court adopts a robust approach. Rather than

burden the court with a multiplicity of *ex parte* applications the parties may wish to expeditiously resolve the dispute by consenting to the referral of the matter to trial.

Coming back this application I have highlighted its shortcomings above.

Accordingly, I dismiss the application with costs.

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