

MIDKWE MINERALS (PVT) LTD  
versus  
SHAKESPEAR ZIKI  
and  
VAVURIGA MINING SYNDICATE  
and  
IMPAMESSA SYNDICATE

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 13 September 2013

### **Urgent Chamber Application**

*N. Mashizha* for the applicant  
*S. Mahuni* for the respondent

ZHOU J: This matter came before me as an urgent chamber application for an interdict. After hearing argument from the legal practitioners representing the parties I dismissed the application with costs and gave brief reasons for the decision. I indicated that my written reasons could be availed upon request by any of the parties to the matter. The applicant has noted an appeal against my judgment. The following are the reasons for the judgment.

The instant urgent chamber application was for a provisional order the terms of which are set out in the draft thereof as follows:

**“INTERIM RELIEF SOUGHT**

- (a) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be and are hereby interdicted from disturbing applicant’s operations at Chaka Gold Plant and its mining claims.
- (b) In the event that the applicant’s custody, possession and control had been disturbed by the respondents, the respondents are hereby ordered to restore applicant’s peaceful possession and control of Chaka Gold Plant and its mining claims.

**FINAL ORDER SOUGHT**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be and are hereby permanently interdicted from disturbing the applicant’s operations at Chaka Plant and its running claims.
2. Costs of suit on an attorney and client scale shall be borne by the respondents jointly and severally the one paying the other to be absolved.

**SERVICE OF THE ORDER**

The Sheriff or the Zimbabwe Republic Police be and are hereby authorised to serve this order.”

The basis upon which the applicant sought the relief set out above was that it was in control of Chaka Plant mine and that its control and occupation of the mine had been interfered with by the respondents. In the founding affidavit the applicant stated that on Monday 9 September 2013 the first respondent in the company of some other persons “who are members of the second and third respondents” attended at Chaka Plant intending to disturb the applicant’s mining operations.

The papers constituting the application are inelegantly prepared. There is not a single document annexed to the applicant’s founding papers to substantiate the applicant’s claim to occupation of the property in dispute or to support the applicant’s claim that it was carrying on mining operations at the property. What emerged from the argument was that, in fact, the Court in Case No. HB 224/12 determined that the applicant had no right to the property to which the instant application relates. The applicant appealed to the Supreme Court against the judgment in HB 224/12. His appeal was dismissed with costs by the Supreme Court on 2 September 2013. A copy of the Supreme Court order which was given in Case No. SC 358/12 was produced at the hearing. The order shows that the applicant’s appeal was dismissed with costs on a legal practitioner and client scale. On 5 September 2013 the applicant noted an appeal to the Constitutional Court against the Supreme Court judgment.

The terms of the provisional order set out in the draft order show very little effort to comply even with the form of a provisional order as set out in Form 29C which is contained in the rules of court. Further, what is stated as “Interim relief sought” is, in fact, a final order. Apart from the use of the word “permanently” in paragraph 1 of the “Final Order Sought”, the relief is basically the same which is sought in paragraph (a) of the “Interim Relief Sought”. This court has held that it is undesirable for parties to seek final relief under the guise of interim relief. In the case of *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188(H) at 193A-D that point was emphasised:

“The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day.”

*In casu* the “interim” relief being sought was the same as in the terms of the final order sought. Once the applicant gets relief interdicting the respondents from interfering with

the mining operations as claimed in the draft order then the applicant had no incentive to seek the confirmation or discharge of the provisional order as the provisional would have given him all that he wants which is control of the mine. It is also noted that in the last paragraph of the draft provisional order relating to service the applicant asks the court to authorise the Sheriff or the Zimbabwe Republic Police to be authorised to serve the order. Service of orders is the Sheriff's responsibility for which no court order is required. The affidavit does not set out any facts upon which the court could be invited to authorize service of its order by the Zimbabwe Republic Police.

The above defects taken together with the applicant's case on the merits invalidates the applicant's claims. The requirements for an interim interdict, if what is being sought by the applicants was to be treated as such, are:

1. that the right which is sought to be protected is clear; or
2. that (a) if it is not clear, it is *prima facie* established, though open to some doubt; and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right;
3. that the balance of convenience favours the granting of interim relief; and
4. the absence of any other satisfactory remedy.

See *Nyambi & Ors v Minister of Local Government & Anor* 2012 (1) ZLR 569(H) at 572C-E; *Nyika Investments (Pvt) Ltd v ZIMASCO Holdings (Pvt) Ltd & Ors* 2001 (1) ZLR 212(H) at 213G-214B; *Watson v Gilson Enterprises & Ors* 1997 (2) ZLR 318(H) at 331D-E; *Econet (Pvt) Ltd v Minister of Information* 1997 (1) ZLR 342(H) at 344G-345B.

Whether or not the applicant has a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a matter of evidence. See *Nyambi v Minister of Local Government & Anor*, *supra*, p. 574C. What is required, therefore, is for the applicant to adduce evidence to establish the existence of a right to the property in dispute. The applicant did not place such evidence before this court. The court was furnished with a Supreme Court order which tends to show that the applicant's claim to the property has been rejected by the courts. Also, as pointed out above, there is not a single document produced in evidence by the applicant to establish the basis upon which he claims a right to be on the property. In the founding affidavit the applicant states that it "commenced mining operations at Chaka Gold Plant by virtue of a tribute agreement granted in terms of the Mines and Minerals Act". Proof of that agreement has not been tendered. There was also no proof of

any mining by the applicant. Mr *Mashizha* for the applicant properly conceded that he had “challenges on the facts”. The application therefore clearly fails on that first requirement.

For the above reasons the application could not succeed. It was accordingly dismissed with costs.

*Sachikonye -Ushe*, applicant’s legal practitioners  
*Mutatu & Partners*, respondents’ legal practitioners