

REUBEN MARUMAHOKO
and
EDWARD CHIMEDZA
and
NEVER CHIROWAPASI
versus
PROVINCIAL MINING DIRECTOR FOR MASHONALAND WEST (N.O)
and
OFFICER IN CHARGE THE ZIMBABWE REPUBLIC POLICE (N.O)

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 December 2014 and 6 January 2015

Urgent chamber application

I. Ndudzo, for the applicants
Mrs C. Garise-Nheta, for the respondents

MUREMBA J: On 6 January 2015 I delivered an *ex tempore* judgment in this matter. I have now been asked for the written reasons thereof and these are they.

This was an urgent chamber application for an interdict against the respondents. The applicants wanted the respondents barred from interfering with their mining activities.

The history of this case is as follows. The applicants collectively formed a mining syndicate by the name Crevixs Mining Syndicate. The syndicate was issued with a prospecting licence by the Ministry of Mines on 25 October 2014.

On 4 November 2014 after having completed all the necessary procedures, the syndicate applied to the first respondent for a certificate of registration to mine a base block measuring 25 hectares situated at Pitlochry Estates in Hurungwe Rural District in Mashonaland West Province. Two other syndicates, namely Value James Mining Syndicate and Chando Kupisa Mining Syndicate also submitted competing applications for mining rights in respect of the same base block.

Of the three applications it is the applicants' application which was successful. The first respondent passed a verdict that Crevixs Mining Syndicate be awarded the certificate of registration as it was the only one that had followed all the necessary procedures and had all the necessary documentation. In that verdict the first respondent made a pronouncement that the two other applications had been rejected. This verdict was communicated to all the three competing applicants by way of a letter dated 3 December 2014. The same letter was copied to the Permanent Secretary, Legal Advisor, ZRP Karoi (second respondent) and CID Minerals Chinhoyi/ Karoi.

Having been disgruntled with the verdict of the first respondent Chando Kupisa Mining Syndicate proceeded to lodge an appeal with the Minister of Mines and Mining Development on 4 December 2014. The appeal is in the form of a letter which is addressed to the Minister. Following the letter of appeal, the first respondent on 5 December 2014 wrote a letter to the second respondent instructing him to enforce a suspension of mining activities in the area of contest until a determination had been made by the Minister.

It is the suspension order which prompted the present application by the applicants. In their application the applicants indicated that it is this verdict by the first respondent which fully entitled them to proceed with mining at the said claim. It is the applicants' averment that in terms of the law no appeal lies with the Minister. The Mines and Minerals Act does not provide for such a procedure and as such the purported appeal is a nullity.

The applicants submitted that following the verdict of the first respondent they made significant capital and technical investment on the mining block and had employed a number of people who were now entitled to their remuneration in terms of the labour laws. It was submitted that the decision by the first respondent to suspend all operations has an effect of causing serious irreparable harm to the respondents.

The first respondent filed a notice of opposition before the hearing, but the second respondent did not. At the hearing the second respondent submitted that as the police they would abide by whatever decision would be made by the judge.

In the opposing affidavit the first respondent stated that after having considered the three applications he made a recommendation that the registration for the mining block should be in favour of Crevixs Mining Syndicate. He said that although this was communicated to the contestants by way of the letter dated 3 December 2014 this did not grant the applicants title to mine. The applicants would need a certificate of registration to commence any mining activity. The first respondent further stated that by proceeding to

invest in a project to which title had not yet been granted the applicants took a personal risk which they cannot hold the Ministry of Mines to ransom. However, he made a concession that there is no provision in the Mines and Minerals Act [*Cap 21:05*] which provides for an appeal to the Minister. A further concession was that there is no provision that provides for suspension of operations pending appeal. He stated that this appeal procedure to the Minister is just a standard practice that has been adopted by the Ministry over the years for purposes of expediency and convenience. It had been discovered that the courts would find the matters too technical and refer them back to the Ministry for conclusion. He also stated that it had become the Ministry's policy to stop all mining operations pending appeal in view of the fact that minerals are finite and deplete in quantity by each extraction. Since appeal processes take long it is only fair and just to stop extraction until the appeal is determined in order to avoid prejudicing the appellant in the event that the appellant wins on appeal.

Let me hasten to point out that although the first respondent said his was only a recommendation that Crevixs Mining Syndicate be issued with a certificate of registration he did not say, in the opposing affidavit, to whom he had made that recommendation. He also did not say who had the authority to issue the certificate of registration.

At the hearing Mr *Ndudzo* took issue with the so called recommendation and argued that the first respondent was hiding behind a finger because his letter of 3 December 2014 was categorical that it was a verdict as he used that word. After the word 'verdict' first respondent wrote, "By copy of this letter it is my ruling that Crevixs be awarded their Certificate of Registration and all the others competing on this particular place are hereby rejected."

It was argued on behalf of the first respondent that despite the wording in the letter, the first respondent was not the issuing authority, but the Permanent Secretary of the Ministry. It was also submitted that all the first respondent could do by virtue of his position as the Provincial Mining Director was to recommend. The permanent secretary would exercise his discretion on whether or not to grant the certificate of registration as recommended by the first respondent.

Looking at s 45 (1) of the Mines and Minerals Act [*Cap 21:05*] it is apparent that the person who is vested with the powers to receive applications for registration of mining blocks and issuing the certificates of registration is the Mining Commissioner. So he is the authority who grants mining rights. In terms of s 346 the Mining Commissioner again has the duty to preside over disputes and issue orders. However, in terms of s 341 (2) the Permanent

Secretary can assume the powers of the Mining Commissioner both administratively and judicially. This therefore means that it is either the Mining Commissioner or the Permanent Secretary who can grant mining rights.

Now turning to what transpired in the present case what is apparent is that it is the first respondent who considered the applications for registration even though he is neither a Mining Commissioner nor a Permanent Secretary. Coming to the analysis of the letter dated 3 December 2014 which he wrote after he had considered all the 3 applications I come to the conclusion that he gave a verdict not a recommendation even though he was not the Mining Commissioner. If it was a recommendation the first respondent would have simply indicated so instead of saying it was a verdict. Even the wording of the letter is very clear that this was a ruling which was final. He said, "By copy of this letter it is my ruling that Crevixs be awarded their Certificate of Registration and all the others competing on this particular place are hereby rejected." I believe that if it was a recommendation the wording would have been different. This letter did not sound like there was yet another authority other than the first respondent himself who had the authority to issue the certificate of registration.

What further confirms my finding is the fact that in his opposing affidavit the first respondent failed to mention the authority to whom he had made this recommendation. That the issuing authority was the Permanent Secretary was only mentioned during the hearing after I had asked who this authority was. During the hearing I asked if the so called recommendation had been forwarded to the Permanent Secretary for him to consider whether or not to issue the certificate of registration to Crevixs Mining Syndicate. The first respondent's counsel submitted that that had been done, but failed to produce proof of such correspondence. So it is just the first respondent's word without any tangible proof. This seems to confirm the applicants' counsel's argument that no other authority other than the first respondent was going to issue the certificate of registration.

When Chando Kupisa lodged an appeal, defective as it might be, the first respondent immediately wrote to the police, in particular, the second respondent saying,

"RE: DISPUTE

- (i) Chando Kupisa Mining Syndicate Special Grant Application
 - (ii) Crevixs Mining Syndicate Base Block Application
 - (iii) Value Gems Mining Syndicate Special Grant Application
- Kachichi-Piltochry Estate (Karo)

Following a determination on above arrived at by this office on 3rd December 2014, Chando Kupisa Mining Syndicate has lodged an appeal with the Minister of Mines and Mining Development on 4th December 2014.

The effect of this is that any previous communication(s) is nullified pending determination by Minister's Office.

All operations on the area of contest are therefore suspended pending resolution by Minister's office.

All parties to the dispute are to observe this instruction.

Request is made to ZRP Karoi to ensure enforcement”

This letter says it all. The first respondent had made a determination not a recommendation and he was aware that by virtue of his determination the applicants had commenced operation. He was directing the police to ensure that all operation was suspended pending determination of the appeal by the Minister. This was despite the fact that the applicants had not yet received the certificate of registration which gave them title to carry out mining activities.

At law a person can only appeal against a determination not a recommendation. If no determination had been made by the first respondent there is no way he would have ordered suspension of operations pending appeal. In the first place there would not have been any appeal to talk about.

An analysis of the whole matter brings me to the conclusion that the first respondent made a determination that a certificate of registration should be issued in favour of the applicants' syndicate. The applicants were notified of this determination by way of the letter dated 3 December 2014. Although no certificate of registration had been issued, by virtue of that letter the applicants' syndicate commenced mining activity. It would also appear that the first respondent was aware that the applicants would commence or had already commenced mining activities on the strength of the letter he had written on 3 December 2014, otherwise he would not have written to the second respondent to enforce a suspension of mining activities in the area of contest.

Although the first respondent made a determination as the Provincial Mining Director that the certificate of registration should be awarded to the applicants, the Mines and Mineral's Act makes no mention of the post of a Mining Director. According to the submissions made at the hearing by counsel for the first respondent this is a post which was

created recently within the Ministry after the post of the Mining Commissioner had been abolished, suffice to say no amendments have been made in the Act to this effect. It was submitted that as a result the person who is presently vested with the powers of issuing certificates of registration is the Permanent Secretary. The first respondent only issues certificates of registration if he is delegated authority to do so by the Permanent Secretary. It was said that in the present case he was not given any authority to issue the certificate of registration hence none was issued.

From the submissions made by both parties it is common cause that no appeal lies with the Minister of Mines. Both parties said that in terms of s 361 of the Mines and Minerals Act an appeal lies with the Supreme Court. However, the correct position is that in terms of that section an appeal lies with the High Court. It is therefore correct that the purported appeal by Chando Kupisa is a nullity at law. Consequently, the order to suspend all operations pending appeal is of no force. Besides, the Act does not even say that in the event of an appeal being lodged mining operations are suspended.

The applicants' prayer is that pending the return date the respondents be interdicted from interfering with or suspending their mining activities at Pitlochry Estates. However, as already explained above other than the prospecting licence, the applicants have no certificate of registration which confers them with mining rights. Section 27 (2) makes it clear that a prospecting licence does not confer mining rights.

There is no way the applicants can seek to rely on the letter that was written by the first respondent on 3 December 2014 because an ordinary letter cannot confer mining rights and replace a certificate of registration. That letter never said the applicants now had mining rights. However, it mentioned that the applicants be issued with a certificate of registration. So the applicants should have insisted on the issuance of that certificate before they commenced mining. These are people who had obtained a prospecting licence before and had now applied for a certificate of registration. So they knew that it was a requirement of the law to have a certificate of registration before they could start mining activities. That they went on to commence preparatory work in anticipation of the issuance of the certificate of registration is a personal risk they took and cannot blame anyone other than themselves. It is not for me to say who was supposed to issue the certificate of registration under the circumstances, but even if it was the first respondent who had that duty since he is the one who had considered the applications and had made a determination, the fact remains that he had not yet issued them with one. So they did not have any mining rights as yet. The least the

applicants should have done was to insist on being issued with a certificate of registration before they commenced any mining work.

For an interim interdict to be granted the applicants need to show that

- (a) They have a *prima facie* right.
- (b) There is a well-grounded apprehension of irreparable harm if the relief is not granted.
- (c) The balance of convenience favours the granting of an interim interdict and
- (d) They have no other satisfactory remedy. See *Universal Merchant Bank of Zimbabwe v The Zimbabwe Independent and Another* 2000 (1) ZLR 234 (HC).

In the absence of a certificate of registration the applicants have not shown that they have *locus standi* to make this application for an interdict. They have no *prima facie* right to carry out mining activities or even to start mining preparations. So they cannot be entitled to the relief they are seeking.

The application is therefore dismissed with costs.

Mutamangira and Associates, applicant's legal practitioners
Civil Division Attorney General's Office, respondents' legal practitioners