

PINKSTONE MINING (PVT) LTD
and
TIMOTHY MATANGI
and
AFRICAN MILLS & MINERALS (PVT) LTD
versus
LAFARGE CEMENT ZIMBABWE LIMITED
and
MINISTER OF MINES AND MINES DEVELOPMENT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 2 & 7 March 2018

Urgent Chamber Application

E. T. Muhlekiwa for the applicants
B. K. Mataruka, with him *G. Ndlovu* for the first respondent
M. Chimombe for the second respondent

ZHOU J: This is an urgent application for an order interdicting the first respondent from carrying on mining operations on the applicant's mineral claims described in the papers as Contrica 9 Registered Number 23331BM; Contrica 21 Registered Number 24482BM; Contrica 45 Registered Number 24866BM; and Contrica 46 Registered Number 24867BM. The order also seeks the barring of the first respondent from coming within two hundred metres of the mining claims referred to above. The terms of the final order, in addition to seeking the interdict as recited above and costs of suit, asks the court to set aside the first respondent's mining claims under Registration numbers 41334BM and 42332BM. The mining claims in dispute in an area falling under the Pfura Rural District Council. The application is opposed by the first respondent. The second applicant through his legal practitioner advised that he would abide by this court's decision. The brief facts upon which the application is founded are as set out below,

The third applicant is the holding company in the first applicant. The first applicant is the holder of the mining claims described above. It registered the claims in 1996. The current certificates of registration and inspection are attached to the applicants' papers. At some point the applicants and first respondent had business dealings involving minerals from those claims. It appears that the agreement was not pursued. The respondent went on to register mining claims over a piece of land which included the claims already registered under the applicants' names. The applicants became aware of the first respondent's intention to carry on mining operations on the claims in dispute on 19 February through an article which appeared in *The Herald* newspaper of 14 February 2018. The first respondent does not dispute that it has registered the claims in dispute. It, however, contests the relief being sought in this application.

The first respondent in its opposing affidavit took the point that the matter should not be heard on an urgent basis. No submissions were made in support of that objection at the hearing. Clearly this is a matter which is urgent. The applicants acted quickly by instituting the instant application within four days after becoming aware of the applicant's claims to the disputed mining claims. Further, if the matter is not dealt with urgently and the applicant ultimately succeeds there will be irreparable prejudice as the first respondent has not stated that it will not proceed with carrying on mining activities on the disputed claims. The fact that it has not yet started carrying on the mining work is not relevant as there is no undertaking that mining activities will not be undertaken pending the determination of the dispute. The matter is therefore urgent.

The second ground of objection which is set out in the opposing affidavit is that the relief sought in the draft order is incompetent because, according to the respondent, it is final in its effect. That submission is incorrect as clearly the relief is being sought pending the determination of this matter on the return date.

On the merits, the relief sought is an interim interdict. The requirements for such an interdict are settled. They are:

- (a) A clear right, or a *prima facie* right though open to some doubt. Where a clear right is established the applicant does not need to establish a well-grounded apprehension of irreparable harm. But where the right is only *prima facie* established, the second requirement must be established, namely,
- (b) That there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and the applicant ultimately succeeds in establishing the right; and

- (c) The balance of convenience favours the granting of interim relief; and
- (d) The applicant has no other satisfactory remedy.

See *Watson v Gilson Enterprises (Pvt) Ltd* 1997 (2) ZLR 318(H).

The applicants have produced the relevant documents to show title in the mining claims in dispute. The certificates of registration of transfer of the claims as well as the inspection certificates show that the applicants hold rights in the claims in question. Their right is therefore clearly established. The respondents have not placed any evidence before the court to contradict the title established by those documents. The first respondent clearly intends to mine on the same claims which are subject to the applicants' rights. The fact that the first respondent has registered claims over the same area does not take away the extant rights of the applicants. It is the policy of the law to give priority the first in title unless there are special reasons. No such special reasons have been shown by the first respondent but, in any event, that is a matter that is better left for a determination on the return date. The first respondent suggested without evidence that the applicants probably failed to maintain their title in the claims as required by s 173 of the Mines and Mineral Act [*Chapter 21:05*]. The second respondent would not have issued the applicants with the documents of title and inspection certificates referred to above if that was the case. Even if the documents were to be taken as only *prima facie* evidence establishing the applicants' rights, it is clear that the fear of irreparable prejudice is properly founded. The first respondent evinces an intention to mine on the claims even though no actual mining activities have commenced. The applicants cannot wait until actual mining starts when there is evidence of an intention to mine on the disputed claims.

In deciding whether the balance of convenience of convenience favours the granting of the interim interdict the court weighs the prejudice to the applicant if the interim relief is not granted against the harm to the respondent if the relief is granted. The present situation is that the first respondent is not carrying on any mining activities on the claims. It is therefore not prejudiced by the granting of the interim relief being sought which is essentially the maintenance of the *status quo*. The first respondent through its legal practitioner suggested in the alternative that an interdict could be granted stopping all mining activity by both parties until the dispute is resolved. Such an order would unduly prejudice the applicant whose title to the claims has not been challenged, let alone set aside.

Mr *Mataruka* for the first respondent submitted that there is an alternative remedy of approaching the Mining Commissioner. The remedy is not an alternative remedy to the interdict being sought in the present case as it does not achieve the same result. It is doubtful that the suggested recourse would afford the applicants the relief of ensuring that the first respondent's employees should not be allowed within two hundred metres of the mining claims.

In the result, the application is granted in terms of the draft provisional order as amended.

Muhlekiwa Legal Practice, applicants' legal practitioners

Gill Godlonton & Gerrans, first respondent's legal practitioners

Civil Division of the Attorney-General's Office, second respondent's legal practitioners