

CRG QUARRIES (PVT) LTD

versus

THE PROVINCIAL MINING DIRECTOR MASHONALAND EAST PROVINCE N.O

and

THE PERMANENT SECRETARY-MINISTRY OF MINES AND MINING
DEVELOPMENT

and

NATURAL STONE EXPORT COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE

DUBE J

HARARE, 20 October 2020 & 5 November 2020

Opposed Application

M Muzaza, for the applicant

C. Chitekuteku, for the 1st & 2nd respondents

No appearance for the third respondent

DUBE J

[1] After hearing argument in this application, I dismissed the applicant's application for a mandamus to compel the first and second respondents to release all documents pertaining to a mining claim.

[2] The background to this application is as follows. The applicant is the holder of a mining block in Motoko. The first respondent is the Provincial Mining Director in the Ministry of Mines and Mining Development. The second respondent is the Secretary of the Ministry of Mines and Mining Development and the third responded a company with an interest in this matter.

[3] The applicant's application is based on the following facts. Sometime ago, it pegged a portion of a claim which previously belonged to an entity known as QTTS in claim number 27 214BM which it forfeited on a date unknown to it. Sometime in 2018, the third respondent lodged a complaint with the first respondent in terms of which it reported beacons which

allegedly over pegged its claim under 24342BM. The first respondents made a determination in terms of which it ordered the applicant to adjust its boundaries of ME 517BM in such a manner as to avoid over pegging part of 24342BM. The applicant was ordered to stop mining activities in the area.

[4] Sometime in February 2019 the third respondent wrote a letter to it in terms of which it claimed compensation for material mined in the disputed area. The applicant, believing that the disputed area was not over pegged and belonged to QQTS before it was forfeited, instructed its legal practitioners to approach the first respondent's office in a bid to peruse the record belonging to QQTS. It wants to obtain all relevant documents relating to the forfeiture of the claim belonging to QQTS in order to assert its rights.

[5] The applicant has written to the first respondent and made several calls requesting the documents which are necessary for the protection of the applicant's mining rights. The third respondent has lodged a claim for damages, which claim the applicant believes is unfounded. To enable it to challenge the claim, it will need to put together evidence in the form of documents which are held by the first respondent to prove that the ground was open to prospecting when it pegged its claim. The documents will enable the applicant to prove that when it pegged ME 517BM, the ground was open to prospecting as it had been forfeited. The information contained in the record is necessary for the protection of the applicant's mining rights. The documents will aid the resolution of the dispute between the applicant and the third respondent. The applicant has no option but to approach this court seeking an order compelling the first and second respondents to release the documents.

[6] The applicant submitted as follows. It has not received a favourable response. The first respondent stated that he would need to check for the documents at their head office. Its rights in the disputed area are being compromised as its operations have been stopped. It has become clear to it that the first respondent has no intention to release the documents which constitute a public record and are necessary for the protection of the applicant's mining rights and enable it to approach the courts for resolution of its dispute with the third respondent.

[7] It has a right of access to any information held by the State or its agencies in terms of s62 (1) of the Constitution of Zimbabwe and that by withholding the record of claim 27214 BM, the first respondent is denying the applicant an opportunity to interrogate the information held in the record in order to protect its rights to claim number ME 517BM.

[8] It has shown a clear right to the relief sought, has a well-grounded apprehension of irreparable harm if the application is not granted as its activities have been stopped and is losing

revenue as a result. The balance of convenience favours the granting of the order sought and there is no other remedy than to approach this court to compel the respondents to release the documents.

[9] The third respondent did not defend the application. The first and second respondents submitted as follows. The respondents are not opposed to the request for the release of any documents. The applicant was never denied access to any documents. The respondents are not in custody of the documents. At the time that the block in question was forfeited, it used to fall under the Harare Mining District whose head office was in Harare. Harare Mining District then comprised of Mashonaland Central, Mashonaland East and West. When the new provinces were created, there was a lot of movement as the provinces were decentralised and a lot of information was misplaced as the new provincial offices relocated. The province has tried to locate the information in vain. The first and second respondents have tried checking and failed to locate the information and are not in a position to comply with the relief sought.

[10] The issue is whether the applicant has shown an entitlement to the order sought. *G. Feltoe, A Guide to Administrative and Local Government Law in Zimbabwe*, 2007, defines a mandamus as follows;

“This remedy can be used to require an administrative authority to perform a mandatory statutory duty imposed upon it that it is wrongly refusing to perform, or to require the authority to correct the effects of its unlawful administrative action.”

A mandamus or mandatory interdict as it is commonly known is a judicial remedy that compels a respondent to perform an act which it is at law obliged to perform. It is usually resorted to in cases where parties seek to compel a government department, administrative body or its agent to take action or refrain from performing a particular act whose performance at law it has an obligation. The mandamus has its origins in the English courts in the 17th century. It is now widely used.

[11] A mandamus is granted where the requisites of a prohibitory interdict are established. See *Setlogelo v Setlogelo* 1914 AD 221; *Tribac (Pvt) Ltd v TMB* 1996(2) ZLR 52(S). An applicant for relief of a mandamus must show the following;

- (a) a clear or definite right
- (b) that the respondent has a duty to perform the act requested
- (c) absence of similar protection by other ordinary remedy

[12] It must be shown that the other party refused to act in fulfilment of some right. Courts will not grant relief of a mandamus where there is an adequate alternative remedy available to

the applicant. The applicant must exhaust administrative or other legal remedies available to him before he approaches the court for a mandamus. Relief of a mandamus is an extra ordinary remedy and should be resorted to only in exceptional circumstances. The mandamus is purely in the discretion of the court and such discretion should be exercised only where the mandamus serves a useful purpose.

[13] A party seeking an order to compel another party to release documents to him must tell the court why the other party should be compelled to release the documents. He must show that he made attempts to obtain the documents from the other party before he lodged the application. He cannot decide to just simply approach the court without having made any effort to engage the other party with a view to obtain the documents. In his application, he must plead that he requested the other party to release the documents to him and the other party failed to comply with the request. Details of the efforts made to obtain the documents ought to be included in his pleadings.

[14] Where the documents sought are identifiable, they should be clearly identified. It is critical for an applicant for an order compelling release of documents to be able to say with certainty what documents he wants released to him.

[15] The applicant seems to be clear on what documents it wants released to it but omitted through oversight to give details of the documents. The applicant in its draft order seeks the release of all documents pertaining to claim number 27214. Reference to documents sought to be released is found in paragraph 12 of the applicant's founding affidavit. The paragraph makes it very clear that the applicant wanted its legal practitioners to peruse the record belonging to QQTs and obtain all relevant information. I understood reference to the record to refer to the file with information on QQTs. It was not very clear whether the applicant seeks release of the file to it or just the relevant documents. If it is the actual or relevant documents that are required to be released, they are not known as they were not particularised. When this anomaly was highlighted to the applicant's legal practitioner, he sought an amendment of the draft order and the founding affidavit but abandoned the application midway. The concession was proper.

[16] An affidavit like all other pleadings can be amended or portions of it struck out or averments added to it. A founding affidavit is a sworn statement founding an application and is signed by its maker before a commissioner of oaths. The contents of an affidavit may only be varied by the deponent to it. He does this by way of filing a further affidavit in terms of r235 with the leave of the court. A legal practitioner representing a party, not being the deponent to an affidavit cannot amend it or seek to have portions struck out of it. It was inappropriate for

the applicant's legal practitioner to stand up in court and seek to amend his client's founding affidavit or strike out a paragraph from it.

[17] An application stands or falls by the averments made in its founding affidavit. It is futile for an applicant to seek to amend a draft order in the absence of averments in the founding affidavit that support the amendments sought to be made. The amendments sought to be made in the draft order should be in tandem with the applicant's case as pleaded in the founding affidavit.

[18] The applicant must identify the documents and show that the documents are important to him and in that sense, he must tell the court why he needs the documents and wants the other party to be compelled to release the documents. He must show that the documents he wants released are important or relevant for the purpose for which he requires them. Where he intends to use the documents in pending litigation, he must give details of the litigation between the parties and say how the documents will aid him in his case. It is good enough to generalise and simply ask the court for any documents in the other party's possession. He must not be involved in a fishing expedition. He must know what documents he wants released.

[19] It must be shown that the documents are in the possession of the other party who has been unwilling to release them. A party, whose requests for release of documents have fallen on deaf ears, is entitled to file an application, with the court to compel the release of the documents.

[20] The applicant has asked the court to compel the respondents to release documents that are said to be missing and misplaced. In the case of *Tladi v Minister of Police and Ors* (1195/2014) [2017] ZANWHC 28 (4 May 2017), the court dealt with a case for discovery of documents. The respondents' position was that the documents were missing or misplaced. The court considered the explanation of the respondents and held that the explanation furnished by the respondents that the docket was missing and how the documents were misplaced acceptable. The court held that the missing documents would not hinder the applicant in the presentation of his case. Further, that the applicant was requesting for an order which would be impossible to implement and dismissed the application.

[21] Although this case was about discovery of documents, the principles applied in resolving this dispute come in handy in the resolution of disputes involving failure to accede to a request to produce documents. Where an opponent in an application to compel release of documents claims that the documents are not in his possession because he has misplaced them or are

missing, he in turn, is required to plead this fact. Where this defence is raised, two other considerations come into play. They are,

- (a) the explanation regarding the missing documents
- (b) whether if the court grants the order sought, it will be capable of enforcement.

[22] The explanation for the failure to produce the documents requested must be genuine and acceptable. It must be shown that the documents are necessary for the purpose for which they are required. Courts will not make orders compelling production of documents that are unavailable to the other party. Acceding to such requests would amount to an exercise of futility as such an order is not enforceable. Essentially therefore, courts should not be pressured to grant orders for production of documents that are unavailable to the other party.

[23] The right of access to information is a fundamental right enshrined in s 62 (1) of the Constitution of Zimbabwe. The same right is amplified in the Freedom of Information Act [*Chapter 10:33*] which gives effect to this constitutional right and obliges a public body in control of information to release it. The right to access to information is not absolute and is limited to matters that are in the public domain and any limitations that may be imposed by law. The applicant has a right of access to information and to official records. A government functionary has no right to decline to make available upon request, public information that is available to it and is in its custody. This is specially so where the person seeking access to the documents has rights and interests in the documents.

[24] *In casu*, the documents are required for the protection of the applicant's rights and will enable it to exercise its legal rights and defend the damages claim. The respondents have an obligation at law to provide information to the public regarding documents they have in their possession.

[25] The applicant requested the respondents for the file pertaining to QQTS or documents therefrom. It has made attempts to obtain the documents from the respondents. While it may be accepted that the documents required, may be important and necessary to enable the applicant to defend the claim pending, the documents have unfortunately not been positively identified. It is discomforting for the court to compel release of documents that the court itself has no knowledge of. Such an order would be vague, inappropriate and unenforceable.

[26] The applicant's predicament is that it has not shown that the documents it requires are in the possession of the respondents and that the respondents have been unwilling to release them. The respondents, although unsure of the actual documents being requested, have been highly cooperative. Their explanation is that the file relating to QQTS was misplaced due to the

administrative changes and movements that took place. This assertion was not disputed. The respondents are not opposed to the request for documents but are constrained in that they do not have the documents at their disposal and are unable to produce them. They have looked for the file and failed to locate it. The suggestion that the respondents be given time to locate the documents made during the hearing was turned down by the applicant. The appearance is that the respondents are genuine when they say that they misplaced the documents. I am not convinced that the respondents have the file readily available to them and are deliberately withholding information from the applicant. I find therefore that the explanation given by the respondents that the file related to the claim is missing and how the file got misplaced is plausible. The explanation is acceptable and reasonable.

[27] The request for release of documents cannot be complied with. The order sought if granted, would be impossible to implement. No useful purpose will be served by an order that is impossible to implement, where it is very clear that the documents are unavailable and cannot be delivered to the other party. The order sought is incapable of enforcement. The applicant not shown any entitlement to the order sought. Consequently, I make the following order,

The application is dismissed with costs.

Wintertons, applicant's legal practitioners

Civil Division of the Attorney General's Office, 1st & 2nd respondents' legal practitioners