DYNAMIC MINING SYNDICATE

versus

ZIMASCO (PVT) LTD.

And

ENELY MUZENDA

And

BUSYWORK DUBE

And

PROVINCIAL MINING DIRECTOR FOR THE MIDLANDS PROVINCE

And

THE OFFICER IN CHARGE, LALAPANZI POLICE STATION

And

THE OFFICER IN CHARGE, CID MINERALS

HIGH COURT OF ZIMBABWE
MAWADZE J,
MASVINGO, 5 APRIL, 2018

Urgent Chamber Application

C Mhuka for the applicant
Ms P. Takaendesa for 1st – 3rd respondents
T. Undenge for 4th – 6th respondents

MAWADZE J: This urgent chamber application for a provisional interdict is anchored on an appeal filed with this court on 22 March 2018.

The applicant is a mining syndicate involved in chrome mining in the Lalapanzi area in Gweru.

The 1st respondent ZIMASCO (Pvt) Ltd is a duly registered company in terms of the laws of Zimbabwe and also involved in the mining of chrome.

The 2nd and 3rd respondents are individuals contracted by the 1st respondent to engage in chrome mining on behalf of the 1st respondent at the disputed chrome mining claims known as Mackenzies 11 in Lalapanzi.

The 4th respondent the Provincial Mining Director for Midlands Province, the 5th respondent the Officer in Charge of Lalapanzi Police Station and the 6th respondent the Officer in Charge CID Minerals are cited in their official capacities and for the purpose of ensuring that the provisional order, if granted, is complied with.

The facts giving rise to this urgent chamber application are largely common cause. They can be summarised as follows;

A dispute has arisen between the applicant and the 1st respondent in relation to the chrome mining claims known as Mackenzies 11 in Lalapanzi near Gweru. Both the applicant and the 1st respondent are holders of certificates of registration in respect of the said mining claims issued by the 4th respondent. The dispute is centred on over pegging by either party.

The said dispute was referred to the 4th respondent for adjudication sitting as a Mining Commissioner's Court. On 19 January 2018 the 4th respondent pronounced its ruling in favour of the 1st respondent. A finding was made that the applicant had violated s 177 of the Mines and Minerals Act [*Cap 21:05*] [The Act]. As a result, the 4th respondent proposed as a penalty to cancel the applicant's certificate of registration in accordance with the provisions of s 50 of the said Act. The applicant was further advised to appeal to the Minister of Mines and Mines Development if it so wished within the prescribed period against the penalty proposed. The applicant did not take that advise.

The applicant irked by the decision of the 4th respondent appealed to this court on 22 March 2018. It is the applicant's contention now that despite the noting of this appeal against the 4th respondent's decision the 1st respondent through the 2nd and 3rd respondents has continued mining activities at the disputed claims. The applicant on the other hand has

suspended all its mining activities at the disputed claims pending the determination of the appeal. This has not been disputed by the respondents, especially the 1st to 3rd respondents.

The applicant contends that it is still the registered owner of the disputed claims known as Mackenzies 11 Lalapanzi and that the continued mining activities by the 1st respondent through the 2nd and 3rd respondents is prejudicial to its interests as the chrome deposits would be depleted or exhausted before the pending appeal is finalised. This would render the outcome of the appeal an exercise in futility. This is what has caused the applicant to approach this court through the urgent chamber book seeking a temporary interdict pointing out that it has no other remedy. At the commencement of the hearing both *Ms Takandesa* for the 1st to 3rd respondents and *Mr Undenge* for the 4th to 6th respondents took points *in limine*.

I now revert to the points *in limine*.

Mr Undenge raised the point that this matter is not urgent. He submitted that the ruling by the 4th respondent was served on the applicant on 19 January 2018 and that the applicant only noted the appeal against that ruling some two months later on 22 March 2018. He reasoned that the applicant did not treat this matter as urgent and has not bothered to explain in its founding affidavit the reason for this apparent inordinate delay. Consequently, he argued that the applicant cannot be allowed to jump the queue as it were as it did not treat the matter as urgent.

What constitutes urgency in matters of this nature is now settled in our law and should not really detain this court too much. The *locus classicus* is the case of *Kuvarega* v *Registrar General & Anor.* 1998 (1) ZLR 188 at 193 (H) see also *Grifford* v *Mazarire & Ors* 2007 (2) ZLR 131 at 134 – 135 A (H) and *Boniface Denenga & Anor*. v *Ecobank (Pvt) Ltd. and 2 Ors* HH 117/14.

I understand the applicant's contention to be that what has triggered this urgent chamber application is the 1st respondent's actions through the 2nd and 3rd respondents to continue mining activities at the disputed area after the applicant has noted an appeal to this court on 22 March 2018. It is trite that generally the noting of an appeal suspends the order appealed against. It logically follows that what triggered the urgency in this matter is the noting of an appeal by the applicant. Put differently, the urgency in this matter arose after applicant noted the appeal and not before. The applicant stated that it only became aware of the 1st respondent's

adverse activities on 25 March 2018 and proceeded to file this application on 3 April 2018. That delay cannot be said to be inordinate. Indeed, *Mr Undenge* could not continue with this argument and grudgingly accepted that the point *in limine* he had raised had not been properly taken. Even his colleague *Ms Takaendesa* for the 1st to 3rd respondents was clearly unwilling to fight in *Mr Undenge's* corner on this point.

The point *in limine* raised by *Mr Undenge* is clearly untenable in the circumstances. It is improperly taken and cannot succeed.

Ms Takaendesa for the 1st to 3rd respondents raised two points *in limine* which I now proceed to deal with.

The first point *in limine* taken by *Ms Takaendesa* is that the appeal upon which this urgent chamber application is predicated was lodged to the wrong forum. She submitted that the 4th respondent had acted in terms of s 50 of the Act hence the applicant could only competently note an appeal to the Minister of Mines and Mines Development and not the High Court. She further argued that the relief sought by the applicant cannot be granted in the circumstances.

I am not persuaded by this reasoning. A proper reading of the applicant's notice and grounds of appeal shows that the grounds of appeal show that the grounds of appeal are not solely restricted to the proposed cancellation of the applicant's certificate of registration as provided for in s 50 of the Act. The applicant raises four grounds of appeal which include *inter alia* the failure by the 4th respondent to properly adduce relevant evidence, the failure to properly assess the evidence placed before the 4th respondent, arriving at a wrong finding of fact and prescribing an improper penalty. Clearly the grounds of appeal are not solely predicated or restricted to the provisions of s 50 of the Act which relates to the proposed cancellation of the applicant's certificate of registration. My perception is that the applicant has noted an appeal in terms of s 361 of the Act which provides as follows;

> "*361. Appeal from Mining Commissioner's Court to High Court*
>
> *Any party who is aggrieved by any decision of a Mining Commissioner's Court under this Act may appeal against such <u>decision</u> to the High Court, and that court may make such order as it deems fit on such appeal*." (my emphasis)

The applicant's appeal is therefore in respect of the 4th respondent's decision on a number of issues and not necessarily on the issue relating to the proposed cancellation of the applicant's certificate of registration for which an appeal would lie to the Minister of Mines and Mines Development. It is my finding that the applicant's appeal is properly before this court and the point *in limine* taken in this respect lacks merit.

The second point *in limine* raised by *Ms Takaendesa* for the 1st to 3rd respondents is that the applicant's appeal to this court was noted out of time. She submitted that no application for condonation for late noting of the appeal has been made nor granted. She argued that on this basis alone the applicant's case should be dismissed.

In support of this argument *Ms Takaendesa* relied on s 360 of the Act which provides as follows;

> "*360. Magistrates Court procedure to be observed in Mining Commissioner's Court.*
>
> *Save as otherwise provided in this Act, the procedure to be observed by a Mining Commissioner's Court and fees chargeable in respect of any proceedings therein shall, so far as practicable, be in accordance with the law and rules governing procedure and fees in civil cases in the Magistrates Court.*"

Ms Takaendesa further submitted that that the appeal against the decision of the Mining Commissioner's Court to the High Court should necessarily be governed by the Magistrates Court (Civil Rules) 1980. In that vein she argued rather convincingly that in terms of Order 31 Rule 2(1)(a) of the Magistrates Court (Civil) Rules 1980 the applicant should have noted this appeal within 21 days from the date applicant was served with the 4th respondent's ruling which is on 19 January 2018. Instead the appeal was only noted on 22 March, 2018 well outside the *dias induciae* of 21 days. *Ms Takaendesa* therefore contended that the applicant's purported appeal is invalid and that in the absence of such a valid appeal applicant cannot be granted the relief sought.

Despite the aromatic scent exuded from *Ms Takaendesa's* argument, my appetite is not aroused by such an argument.

It is incorrect to say that an appeal noted in terms of s 361 of the Act is governed by the provisions of s 360 of the same Act. To my mind s 360 of the Act simply deals with the procedure the Mining Commissioner's Court should observe during hearings related to disputes and the fees chargeable. It does not provide for what happens *ipso facto* such hearings. It does not provide for the period within which an aggrieved party should note an appeal to the High Court. It is s 361 of the Act which deals with the appeals to the High Court against the

decision of the Mining Commissioner's Court. Further s 361 of the Act is silent on the time within which such an appeal should be made. The inference I can draw is that such an appeal should simply be noted within a reasonable time. In my view what amounts to a reasonable time depends on the circumstances of each case and the court should be guided by the interests of justice and fairness. I am therefore inclined to dismiss the second point *in limine* taken by *Ms Takaendesa*.

I now turn to the merits of the application.

The law in relation to temporary interdicts is again well settled. The requirements of an interdict are as follows;

(i) a *prima facie* right, even if it is open to same doubt

(ii) a well-grounded apprehension of irreparable harm if relief sought is not granted

(iii) that the balance of convenience favours the granting of the interim interdict

(iv) that there is no other satisfactory remedy

(v) that there are reasonable prospects of success in the merits of the main case

See *Setlogelo* v *Setlogelo* 1914 AD 221, *Universal Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent & Another* 2000 (1) ZLR 234 (H).

The above requirements in my view are applied conjunctively and not disjunctively.

I now proceed to apply these requirements to the facts of this case.

The applicant has a *prima facie* right on account of the fact that it has a certificate of registration issued by the 4th respondent in respect of the disputed mining claim. It matters not that such a *prima facie* right is now open to some doubt as the 4th respondent has expressed an intention to cancel the certificate of registration.

It has not been refuted by 1st to 3rd respondent that mining activities are continuing at the disputed mining claims despite the noting of an appeal by the applicant. Mineral resources like chrome are a finite resource hence the applicant's apprehension of irreparable harm is well grounded.

What other remedy would the applicant have in the circumstances in order to stop the activities of the 1st to 3rd respondents after noting the appeal? None. The only remedy available to the applicant is to stop the mining operations through the interim interdict.

It cannot be said that the applicant's prospects of success in the merits of the main case are not reasonable. All what the applicant has to show is that they have an arguable case on appeal or a fighting chance. It matters not if applicant is subsequently knocked out in the last

rounds of the fight. The question really is whether the appeal is simply a hopeless one, not whether the applicant has an unassailable case on appeal.

This court is mindful of the fact that it is not siting as an appeal court. I should therefore simply have a glancing view of the grounds of appeal to assess the applicant's prospects of success on appeal.

As per the grounds of appeal the nature of the evidence relied upon by the 4th respondent in making the decision which is being impugned by the applicant is an issue clearly articulated by the applicant. The applicant further submits that such evidence was also not properly assessed. While I admit that where there is a dispute relating to over pegging the only remedy available would be to cancel the certificate of registration of one of the competing parties and that *in casu* the 4th respondent has religiously adhered to the procedure relating to cancellation of such certificate of registration as provided for in s 50 of the Act, I still hold the view that the applicant has an arguable case on the other grounds of appeal which relate to the inadequacy of evidence adduced and assessment of such evidence. Those issues are food for the appeal court to chew and digest not this court.

In the circumstances the balance of convenience would favour the halting of all mining activities at the disputed area until all remedies available are exhausted. I would not hesitate therefore to state that this is classic case for granting an interim interdict. I am amazed why the 1st to 3rd respondents strenuously opposed this application. I am left asking myself whether miners at times lose their senses as soon as they go underground as it were.

In the result the application for an interim interdict is granted as amended.

Kwande Legal Practitioners, applicant's legal practitioners
Danziger & Partners, 1st – 3rd respondent's legal practitioners
Civil Division of the Attorney General's office, legal practitioners for 4th to 6th respondents.