OPTIMAX MINING RESOURCES (PVT) LTD
versus
NCD COAL MINES (PVT) LTD
and
NEXT GEN POWER (PVT) LTD
and
MINERALS MARKETING CORPORATION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 17 & 18 August 2021

Urgent Chamber Application

B Chipadza, for the applicant
W. Chagwiza, for the 1st respondent
T. Chinyoka, for the 2nd respondent
T. E. Gumbo, for the 3rd respondent

ZHOU J: This is an urgent chamber application for an order interdicting the first and second respondents from occupying, excavating, drilling, removing, transporting, processing, or exporting about five million tonnes of iron ore fines stockpile situate at Mkwakwe Railway Siding in the Buchwa area of the Midlands Province. The applicant also asks that the third respondent be barred from issuing any export permit in respect of the said iron ore. The applicant claims ownership of the iron ore in question.

The application is opposed by the first and second respondents. Third respondent advised through counsel that it does not oppose the application.

The background to the dispute is as follows. The applicant purchased the five million tonnes of iron ore fines at an auction conducted by the Sheriff of the High Court. Its title to the ore is confirmed by the Sheriff in a letter dated 27 February 2017 as well as the letter by Tante's Auctioneers dated 14 December 2016 and a third letter written by the Secretary for Industry, Commerce and Enterprise Development dated 6 August 2018. A receipt issued by the Auctioneers

dated 26 November 2016 shows that the applicant paid a sum of $125 235 for the five million metric tonnes iron ore raw dump. In a development unconnected to the applicant's acquisition of the iron ore, the first and second respondents concluded an agreement titled "Agreement of sale of iron ore and joint venture agreement for mining iron ore at Buchwa Mine, Mberengwa." Pursuant to this agreement the second respondent started to remove the ore which the applicant had purchased from the Sheriff's sale in execution as explained earlier on.

Then first respondent wants the application to be dismissed in relation to it on the grounds that it never authorized the second respondent to remove the applicant's iron ore. According to the first respondent, the applicant's ore falls outside the area to which its agreement with the second respondent relates, hence there was no reason for second respondent to get to where the ore is located. First respondent accuses the second respondent of abusing the agreement and, also, the prospecting licence which is not included in the agreement but which, in any event, does not entitle it or the holders thereof to remove the applicant's ore. First respondent makes the alternative claim for costs against the second respondent in the event that the application is granted.

The question of costs is irrelevant at this stage as it will be determined on the return date. What is being sought at this juncture is a provisional order.

The second respondent has, in addition to contesting the application on the merits, raised some objections *in limine*. These objections are that

1. the first respondent's papers are not opposing papers and must be struck out;
2. the matter is not urgent;
3. the relief sought against the third respondent is incompetent;
4. there is no well-founded apprehension of irreparable harm because there is nothing happening on the ground at the present moment;
5. applicant has not established a clear right; and
6. there is material non-joinder of interested parties (which is incorrectly referred to as misjoinder in the second respondent's opposing affidavit).

The questions of whether there is a clear right established and whether the applicant has shown a well-grounded apprehension of irreparable harm pertain to the merits of the application. Their raising as points *in limine* is misplaced, and shows the worrying tendency by litigants to raise

unnecessary objections *in limine*, a tendency which the courts have warned against in many judgments.

In respect of urgency, the grounds advanced in the founding affidavit were, abandoned or not persisted with. In argument, second the urgent hearing of the matter was challenged on the basis that second respondent stopped its activities at the contested site when it was temporarily stopped during the hearing of an urgent chamber application filed earlier on by the applicant under Case No. HC 4037/21. This application was struck off on the basis that it had not been properly filed. Second respondent states that since then it has not resumed any activity. It further states that there is a pending dispute between it and the first respondent which means that it cannot resume the mining activities until that dispute is resolved. These are not sound grounds for contesting the urgent hearing of the matter. The temporary order issued pending determination of Case No. HC 4037/21 lapsed when that application was struck off. In the absence of any other order the second respondent could still resume its activities which the earlier application sought to stop, and which the instant application seeks to prevent. The pending dispute between the first respondent and the second respondent does not have the effect of interdicting the mining activities on the disputed dump. In any event, the applicant has no control over how and when that dispute will be resolved since it is not a party thereto. The objection that the matter is not urgent is therefore without merit and is dismissed.

As for whether the first respondent's papers must be struck out, clearly the first respondent is opposing the application. The fact that in opposing the application the first respondent shifts the blame to the second respondent does not make its opposing affidavit a document which supports the application. First respondent has not stated that it consents to the order being granted in terms of the draft thereof. This objection is therefore equally meritless and must fail.

The objection to the relief being sought against the third respondent is without merit for two reasons. Firstly, the third respondent has said it does not opposed the application. The second respondent has no mandate to oppose the application on behalf of the third respondent. Secondly, the relief clearly only pertains to the disputed iron ore. It must be understood in the contest of the application as a whole. For these reasons the objection is dismissed.

The non-joinder of NCD Coal Mining and Aurora Resources MMDCC is not material. There is no relief which is being sought against these two entities. They also have no legal interest

in the subject matter of the relief. In any event, the High Court Rules, 2021, in r 32(11), provide, as did the old rules in r 87(1), that no cause or matter shall be defeated by reason of the misjoinder or non-joind3er of any party. The court in this instance can determine the issues in dispute so far as they affect the rights and interest of the persons who are parties to the instant application. For these reasons, the objection based on non-joinder is dismissed.

On the merits, the requirements for an interim interdict are settled. These are:

1. That the right which is sought to be protected is clear; or
2. (a) if it is not clear, it is *prima facie* established, thought 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 *Econet (Pvt) Ltd* v *Minister of Information* 1997(1) ZLR 342(H) at 344 G-345B; *Watson v Gilson Enterprises & Ors 1997(2)* ZLR 318(H) AT 331 D-E; *Nyika Investments (Pvt) Ltd* v *ZIMASCO Holdings (Pvt) Ltd & Ors* 2001(1) ZLR 212(H) at 213 G-214 B.

This court has held that whether there is a right in existance is a question of substantive law; whether that right is clearly or only *prima facie* established is a question of evidence. In this case, it is not in dispute, and the applicant has adduced documentary evidence to prove, that it has ownership right in the iron ore which is the subject of this application. The second respondent, which suggests that its agreement with the first respondent also gives it title to the same ore has not shown (a) how the applicant lost its ownership of the ore and (b) how the first respondent would have acquired any title to that ore which would enable it to pass ownership thereof to the second respondent. In the face of the clear evidence of the first respondent that it never acquired title and that its agreement with the second respondent does not cover the area where the ore is located and that particular dump, the second respondent's claim to the ore is clearly vaxatious. The applicant has therefore established a clear right to the ore.

Even if one was to say that the right to the ore is only prima facie established, there is a well-grounded apprehension of irreparable harm. The second respondent has previously tried to or probably did, remove the ore or part of it. It is common cause that second respondent was working on removing that ore prior to the filing of case no. HC 4037/21. The second respondent has not

undertaken that it will not remove the ore. Instead, it makes the unconvincing submission that since it was stopped by interim order during the hearing of HC 4037/21 it has not resumed activity on the dump. That is not an unequivocal undertaking to refrain from removing the ore. The fact that the second respondent is presently engaged in a dispute with the first respondent is equally not a guarantee that it would not remove the ore in the absence of an order of court.

The balance of convenience favours the granting of the relief because the respondent would suffer no irreparable prejudice if the interdict being sought is granted even if the applicant ultimately fails to prove its right to the iron ore in question. On the other hand, the applicant would be irremediably prejudiced if the interdict is not granted and the ore is removed and exported.

The respondents have not shown that there is any alternative remedy which would preserve the iron ore pending determination of the parties' right to it. If anything, whatever final order would be granted in favour of the applicant would be a *brutum fulmen* if the interim relief is not granted and the applicant ultimately succeeds in establishing its ownership of the iron ore.

The first respondent wants to be excused from the relief sought on the basis that its agreement with the second respondent and it is prospecting licence and special grant have been abused by the second respondent. The very fact that its agreement and documents are being used to access the applicant's iron ore makes it an interested party. Those documents have not been repossessed form the second respondent. Whether or not it is to blame for the conduct of the second respondent is a matter that will be relevant only in relation to the question of costs. The relief, subject to a few amendments to the draft provisional order, can therefore be competently granted against the first respondent and the other two respondents.

In the result, the provisional order is granted in terms of the draft thereof.

B Chipadza Law Chambers, applicant's legal practitioners
Kwenda & Chagwiza, 1st respondent's legal practitioners
Gunje Legal Practice, 2nd respondent's legal practitioners
Chinawa Law Chambers, 3rd respondent's legal practitioners