

SD MINING SYNDICATE
versus
NGONIDZASHE NYEVERA
and
THE PROVINCIAL MINING DIRECTOR
(MASHONALAND WEST PROVINCE) N.O
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
MINISTER OF LANDS, AGRICULTURE
AND RURAL SETTLEMENT N.O

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 30 December, 2021 and 12 January 2022

Urgent Chamber Application

Mr *S. Ushewekunze*, for the applicant
Mr *A. Masango*, for the 1st respondent
Mr *L.T. Muradzikwa*, for the 2nd, 3rd and 4th respondents

DEME J: The applicant approached this court on an urgent basis seeking the relief for leave to execute judgment pending appeal. In particular, the draft order for the applicant reads as follows:

- “1. Application for leave to execute an order pending appeal is hereby granted;
2. The order granted in the applicant’s favour under HC 6560/21 shall be operational pending determination of 1st respondent’s appeal in SC 460/21;
and
3. The 1st respondent shall bear costs of suit on attorney-client scale.”

I will start by giving the summary of the case. On 24 November 2021, the applicant obtained, before this court, provisional order in its favour. The provisional order had the following terms of interim order:

- “1. The 1st respondent, his agents, employees and/or assignees be and are hereby interdicted from:
 - 1.1 Interfering with, or disrupting, the applicant’s or Applicant’s agents’ mining operations at Trafalgar “A” mine Battlefields, Kadoma, Registered No. 2461 (hereinafter called Trafalgar Mine).
 - 1.2 removing or processing any gold ore from, or carrying out any mining or other activity that interferes with the applicant’s use and occupation of, Trafalgar Mine.

2. Costs shall be in the cause.”

On 26 November 2021, the 1st respondent noted an appeal against the decision of 24 November 2021. The appeal is still pending. The 1st respondent’s grounds of appeal are as follows:

- “1. The court *a quo* misdirected itself in fact and in law in finding that 1st respondent had established a *prima facie* right yet there were material disputes of facts regarding the location of 1st respondent and the appellant’s mining location which were incapable of resolution on the papers and it was an appropriate case to refer to 2nd respondent in terms of s 345(1) of Mines and Minerals Act [*Chapter 21:05*].
2. The court *a quo* erred and misdirected itself in failing to give regard to the appellant’s prospecting licence map and diagram placed before it showing the location of 1st respondent’s claim where he had restricted his prospecting activities which put serious doubt on the assertions that the appellant was carrying out illegal activities at Trafalgar “A” Mine Battlefields.
3. The court *a quo* acted injudiciously and erroneously in fact and at law in finding without evidence that the appellant was carrying out illegal mining activities on 1st respondent’s mine yet 1st respondent had not attached any map, diagram or co-ordinates to show the exact location of its mining location since both the appellants and 1st respondents have mining rights at Trafalgar farm.
4. The court *a quo* erred in finding without evidence that there were no other satisfactory remedies available to 1st respondent yet the syndicate had not utilised the provisions of the Mines and Minerals Act to redress any claims.”

The applicant and Geodynamics (Pvt) Ltd entered into a tribute agreement where the latter granted mining rights to the applicant over Trafalgar Mine “A”. The tribute agreement is valid for three years with effect from 1 May 2020. The applicant has attached the copy of the tribute agreement to the present application and to case number HC 6560/21 which was appealed against by the 1st respondent. On the other hand, the 1st respondent is claiming to have prospecting rights over his farming area being Plot 93, Trafalgar Farm.

In its founding affidavit, the applicant averred that the 1st respondent has revived his conduct which interferes with its mining rights at the mine. According to the applicant, the 1st respondent is also blocking the agents of the applicant from accessing the mine by erecting fence at the mine. The applicant further alleged that the 1st respondent is still removing gold ore from Trafalgar Mine for processing.

On the other hand, the 1st respondent challenged the applicant to prove such facts. He highlighted that the applicant is supposed to attach supporting affidavit to support facts alleged. However, the 1st respondent did not react to the issue of blocking access to mine through the erection of fence which was raised by the applicant in its founding affidavit.

The 1st respondent raised a point *in limine* to the effect that the present application is not urgent. According to 1st respondent's submissions, the applicant was served with the copy of the appeal under case No. SC 460-21 on 29 November 2021 and took no action until 20 December 2021 when the Applicant chose to file this present matter. On the other hand, the applicant explained that the delay was caused by the need to finalise another litigation under case no. HC 6944/21 where the applicant was fighting for its rights against Phillimon Ndushu which involved the same mining area. The dispute was finalised, by consent, on 8 December 2021. Only after this was the applicant able to pursue the present application according to the submissions made on behalf of the applicant.

On a balance of probability, I am of the considered view that the applicant's explanation for the delay is reasonable. There was no excessive delay in approaching this court. In the case of *Nzara v Tsanyau and Others*¹, the court held that a delay of eighteen days does not amount to inordinate delay.

In the case of *Kuvarega v Registrar General and Another*², the court held that:

“What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is urgent if at the time the need to act arise, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.”

The applicant has explained why it failed to file the present application as highlighted above. I am of the considered view that the explanation offered by the applicant in its founding affidavit in para. 29 meets the test specified in the case of *Kuvarega v Registrar and Anor* (*supra*). Paragraph 29 of the applicant's Founding Affidavit reads as follows:

“The Applicant would have approached this court a bit earlier than it has done. The explanation is it was held back by a conduct of one Phillimon Ndushu who has also been interfering with the Applicant's mining operations at the same Trafalgar Mine, prompting the applicant to again file an urgent chamber application under HC 6944-21 on 2 December 2021. The said urgent chamber application was granted with the consent of all parties therein on 8 December 2021.”

Consequently, I dismiss the point *in limine* raised by the 1st respondent for the reasons highlighted above.

¹ 2014 (1) ZLR 674 (H).

² 1998 (1) ZLR 188 (H).

I will now shift my attention to the merits of the present application. Mr *Ushewekunze* submitted that the 1st respondent's documentation, the Prospecting Licence, Prospecting Notice and the Registration Notice are suspicious as they do not have the stamps of the 2nd respondent. The applicant's counsel also submitted that the documents relied upon by the 1st respondent (Prospecting Notice and Registration Notice) bear the same date, that is to say 26 July 2021 while the Prospecting Licence is not dated. The applicant submitted that he made repeated efforts to request, from the 1st respondent, for the original copies of the documentation without success.

The 1st respondent failed to explain the irregularities noted on his documentation. In the result, I find it extremely difficult to believe that the prospecting documentation in possession of the 1st respondent was issued by the 2nd respondent. Thus, the documents cannot be regarded as legal documents for want of regularisation. It is the 1st respondent's obligation to tender the appropriate documentation whenever he is called upon or challenged to produce such documentation. The same documents were also filed in case number HC 6560/21 and had the same irregularities. In light of this, I am of the considered view that the 1st respondent has no prospecting rights or any other mining rights requiring protection by the court for want of legal documents.

On the other hand, the applicant has produced the tribute agreement which confers mining rights upon the applicant. The 1st respondent has not challenged the tribute agreement. Rather, he is raising the issue of boundary dispute. For the court to entertain the boundary dispute, he is expected to produce legal mining documents. One cannot talk about boundary disputes in mining when one party does not have mining documents. If all parties are in possession of mining document, then it would make sense to entertain the issue of boundary dispute.

After noting an appeal against the decision of 24 November 2021, the 1st respondent went on to file another application with this court under case number HC 7393/21 where the 2nd, 3rd and 4th respondents have been cited as the respondents. Geodynamics (Pvt) Ltd was also cited in that application. The application seeks to compel the 3rd and 4th respondents to carry out physical visit at the disputed site. Despite the fact that the applicant has got substantial interest, the 1st respondent did not cite it as one of the respondents. On being asked why the 1st respondent omitted citing the applicant in HC 7393/21, the 1st respondent's counsel submitted

that the applicant will be represented by Geodynamics (Pvt) Ltd as it is the holder of the mining certificate for the applicant's mining area. I find this explanation unsatisfactory. This leaves me with more questions than answers. One would then wonder whether the 1st respondent has got the burning desire or appetite of bringing the present mining dispute between himself and the applicant to finality. From the beginning of the dispute between the applicant and the 1st respondent, Geodynamics (Pvt) Ltd has not been party to the proceedings. I am of the considered view that the 1st respondent's conduct by so doing can be best described as the desire to abuse court process.

In the case of *Old Mutual Life Assurance Company (Pvt) Ltd v Makgatho*³, the court summarised the key issues for consideration when dealing with the present application as follows:

- “1. An appellant has an absolute right to appeal and test the correctness of the decision of the lower court before he or she is called upon to satisfy the judgment appealed against.
2. Execution of the judgment of the lower court before the determination of the appeal will negate the absolute right that the appellant has and is generally not permissible.
3. Where, however, the appellant brings the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment notwithstanding the absolute right to appeal resting in the appellant.
4. In exercising its discretion, the court has regard to the considerations suggested by CORBETT JA in *South Cape Corporations (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545.
5. Where the judgment sounds in money and the successful party offers security *de restituendo* and the appellant has no prospects of success on appeal, the court may exercise its discretion against the appellant's absolute right to appeal.
6. An application for leave to execute pending appeal cannot be determined solely on the basis that the appellant has no prospects of success on appeal, especially where the whole object of the appeal is defeated if execution were to proceed (see *Woodnov Edwards and Another* 1966 RLR 335.”

Given that the 1st respondent failed to produce prospecting documents issued and stamped by the 2nd respondent on two occasions, firstly under case number HC 6560/21 and in the present application, I find it difficult to imagine the prospects of success on appeal. The 1st

³ HH 39-07.

respondent noted the appeal purely to abuse court process. The 1st respondent was not motivated by the *bona fide* intention to test the correctness of the decision of 24 November 2021 when he noted his appeal. The 1st respondent behaviour, in the circumstances, is intended to buy time or harass the applicant.

In the case of *South Cape Corporation (Pty) Ltd v engineering Management Services (Pty) Ltd*⁴, cited with approval in the case of *Old Mutual Life Assurance (Pvt) Ltd v Macgatho (supra)*, the court held that:

“In exercising this discretion (to grant leave to execute pending appeal), the court should, in my view, determine what is just and equitable in all the circumstances, and in doing so, would normally have regard, *inter alia*, to the following factors:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute was were to be granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute was refused;
- (3) the prospects of success on appeal, including more particularly the question of whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time or harass the other party; and
- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.”

Having highlighted the 1st respondent’s conduct above, it is pertinent to emphasise that the granting of the present application is just and equitable in the circumstances. The applicant is in the mining business. If the present application is not granted, this will result in irreparable prejudice or harm to the applicant’s mining business given the conduct of the 1st respondent. The balance of convenience favours the applicant who is in possession of mining documents while the 1st respondent has failed to produce the legal documents for prospecting business. The 1st respondent will not suffer any prejudice as he has failed, on two occasions, to tender approved prospecting documents before the court.

The 1st respondent’s counsel submitted that the present application is incompetent at law as it is not crafted as the provisional order. He also submitted that the order has a final effect. In response, the applicant’s counsel referred me to the case of *Jonga v Chabata*⁵. He also submitted that the contemplated order does not need to have the return day as doing so would create multiplicity of cases before this court.

⁴ 1977 (3) SA 534(A) at 545

⁵ HH276-17.

In the case of *Jonga v Chabata (supra)*, the court held that:

“The wording of an order is within the discretion of the court.”

I fully associate myself with the court’s sentiments in the case of *Jonga v Chabata (supra)*. Application for leave to execute judgment pending appeal has got its sunset clause in the form of the hearing day of the appeal. Having a return day in applications of this nature is unnecessary as parties will have no business to do on the return day other than the hearing day of the appeal. No party can pray for the confirmation or discharge of the provisional order on the return day before the hearing of the appeal as doing so would make the appeal purely academic. It is rather prudent to wait for the outcome of the appeal. Thus, the appeal noted by the 1st respondent under case number SC 460/21 has the capacity to bring finality to litigation between the applicant and the 1st respondent and thus will act as the return day of the present application.

The applicant has prayed for costs on an attorney and client scale. I find no justification in this prayer. The 1st respondent has got the right to lodge an appeal. It may not be appropriate to order costs on a punitive scale. However, it may be justified to order the 1st respondent to bear the costs of this application on an ordinary scale. Such costs are just and equitable in the circumstances.

Consequently, it is ordered as follows:

- (a) Application for leave to execute an order pending appeal is hereby granted.
- (b) The order granted in the applicant’s favour under HC 6560/21 shall be operational pending determination of the 1st respondent’s appeal in SC 460/21.
- (c) The 1st respondent shall bear costs of suit.

Ushewekunze Law Chambers, applicant’s legal practitioners
Muronda Malinga, first respondent’s legal practitioners
Civil Division, second, third and fourth respondents’ legal practitioners