RIOZIM LIMITED
versus
FALCON RESOURCES (PRIVATE) LIMITED
and
RUSUNUNGUKO NKULULEKO (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 29 June 2018, 2, 3 & 11 July 2018

Urgent Chamber Application

T. Manjengwa, for the applicant
G. Dzitiro, for the respondent

WAMAMBO J: This is an urgent chamber application for leave to execute pending appeal. The background of the matter is that after the applicant applied for an interim interdict on an urgent basis he obtained it on 15 June 2018 under HC 5212/18. The effect of the order of 15 June is to restrain the respondents from conducting mining activities on Wendale 13 Block registered under Certificate no. 18007 BM, situated at Darwendale. The said claim is registered under the name of the applicant.

The respondents appealed against the order granted on 15 June 2018, effectively suspending it. This has resulted in this application for leave to execute pending appeal.

The respondents have filed opposing papers and raised a number of points *in limine.* The points *in limine* are however a repetition of the same raised and dealt with in case HC 5212/18.

For the sake of progress and in light of the ultimate decision to be made the points *in limine* become of little or no significance.

In *Mr Dish (Pvt) Ltd* v *Broadcasting Authority of Zimbabwe and O. Muganyura* HH 666/17 when dealing with a similar application to the instant one HUNGWE J set out the relevant principles at p 1 as follows:

> "In the ordinary course of events, in terms of our common law, the noting of an appeal suspends the execution of a judgment or the operation of an order, unless the court otherwise directs. See Herbstein & Van Winsen, *The Civil Practice of the Superior Courts*, 3rd ed, p 718. This general rule may be departed from in a proper case.

The principles which a court will apply in coming to a decision were set out by CORBETT JA in *South Cape Corporation (Pty Ltd* v *Engineering Management Services (Pty) Ltd* 1997 (3) SA 534 (AD) at 545E.in the following terms:

> "In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstance 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 (respondent in the application) if leave to execute 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 were to be refused.
>
> (3) The prospects of success on appeal, including more particularly the question as to 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."

Also see *Dabengwa and Others* v *Minister of Home Affair* 1982 (1) ZLR 223 (H) at 225, *Arches (Pvt) Ltd* v *Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 155 *Zdeco (Pvt) Ltd* v *Commercial College* (1980) (Pvt) Ltd 1991 (2) ZLR 61 (H) at 63.

In *Engen Petroleum (Pvt) Ltd* v *Infrastructure Development Bank of Zimbabwe* HH 270/17 MAFUSIRE J said:

> "The application for leave to execute pending appeal is premised on the principle that the court has an inherent power to control its own process. Thus, in the exercise of its wide discretion, it can order a stay of execution of its judgment. But it can also direct that the judgment be carried into execution. The overriding principle is real and substantial justice see *Santam Insurance Company Limited* v *Paget* (2) 1981 ZLR 132 at pp 134-135."

The facts of the main case HC 5212/18 from which this case emanates concerns Wendale 43 mining claim being claimed by both applicant and respondents but where the court made an interim order to stop respondents from mining on the said claim.

I closely considered the factors as spelt out in *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* (*supra*) and related cases.

On the potentially of irreparable harm it appears that applicants who already have an interim order in their favour will not enjoy the financial benefits accruing from the mining of the chrome ore if the application is not granted in their favour.

On the other hand for the respondents there is the potentiality that if the Supreme Court ultimately find in their favour they would have abandoned their on-going operations and financial harm would naturally follow as well.

I also note that s 43 (1) (d) of the High Court Act [*Chapter 7:06*] allows a few exceptional circumstances where leave to appeal from a judge of the High Court or Supreme Court is not required. One of three exceptions is where an interdict is granted or refused such as in the instant case.

On the prospects of success this basically entails reconsidering the arguments raised under HC 5212/18. I found in the earlier case (HC 5212/18) that the fact that the Minister of Mines was not a party to the proceedings was not fatal to the application.

However the Minister's relevance is clearly important in the resolution of the issues. To that end this factor just swings the balance in favour of the respondents in this application.

In the result the application is dismissed.

Wintertons, applicant's legal practitioners
Mutumbwa, Mugabe and Partners, respondent's legal practitioners