THE MINISTER OF MINES AND MINING DEVELOPMENT N.O.
versus
FALCON GOLD ZIMBABWE LIMITED
and
NYAMAZANE GOLD (PVT) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 27 & 30 June 2023

Urgent Chamber Application

C Chitekuteku, with him *L Muvengeranwa*, for the applicant
B K Mataruka, with him *G Ndlovu* and *A Ndlovu*, for the first and second respondents

ZHOU J: This is an urgent chamber application for an order interdicting the respondents from conducting mining operations on the disputed mines described in the papers as Antelope East 2, Antelope 9, Antelope East Extension, Antelope East Extension 2, Antelope East, Antelope 2, 3, 4, 5, and 6, and Antelope 11. The interdict is being sought pending determination of a Supreme Court appeal filed under Case No. SC 398/22.

The application is opposed by both respondents.

The material facts which are largely common cause are as follows: the first respondent was the holder of certificates of registration in respect of the mining claims referred to above. The said mining claims were given to the second respondent to work on to in terms of a tribute agreement between the two respondents. The second respondent is thus carrying on mining at the claims. In April 2022 the applicant cancelled the first respondent's certificates in respect of the claims, placing reliance on the provisions of s 400 (1) of the Mines and Minerals Act [*Chapter 21:05*]. The two respondents approached this court by way of court application challenging the applicant's decision to cancel the certificates under Case No. HC 2952/22. The application was dismissed on 10 August 2022. On 15 August 2022, the respondents noted an appeal to the Supreme Court

against the judgment in HC 2952/22. The appeal was filed under Case No. HC 398/22. The judgment in the Supreme Court appeal has not yet been delivered but the parties advised that the appeal has since been argued. In response to the filing of the notice of appeal the applicant filed a chamber application for leave to execute the judgment in HC 2952/22 pending the determination of the appeal noted against it. The application was filed under Case No. HC 6416/22. The application was dismissed in default of the applicant, properly so because there was no judgment in his favour which the applicant could possibly have sought to execute upon.

Applicant states that the respondents had advised that they were not carrying on any mining activities. This was in response to the applicant's claim that the respondents were actually carrying on mining activities and that they were not declaring the output from such activities. Applicant commissioned an investigation following which a report was produced showing, among other things, that there was mining taking place at the mine and, also, that the milling plant was operational and milling ores from some of the claims.

In opposition, the respondents objected *in limine* to consideration of the merits of the application on the grounds that (a) the certificate of urgency is invalid by reason of having been done and signed by a legal practitioner from the Civil Division of the Attorney-General's Office; and (b) the matter was, in any event not urgent. The objection based on the ground that the applicant had approached the court with dirty hands was not persisted with. On the merits, the respondents stated that they only commenced the actual mining in May 2023. They produced Returns on Output and Disposals forms for the period from which they commenced mining, as well as the returns for the period prior to the commissioning of the plant. The respondents also produced labour returns. The documents produced and the averments made in connection therewith were meant to show that the respondents were rendering the returns in respect of output.

I heard argument on both the objections *in limine* and the substantive merits of the matter and advised that my determination on the preliminary objections would inform whether or not I would proceed to consider the merits of the application. In other words, if any of the objections *in limine* was upheld then the merits would not be considered.

The certificate of urgency

The respondents' objection to the certificate of urgency is that it was executed by a legal practitioner from the Civil Division of the Attorney-General's Office which division represents

the applicant and all other Government ministries and departments. Reliance was placed on the case of *Chafanza v Edgars Stores Ltd & Another* 2005 (1) ZLR 299(H), wherein the court (per CHEDA J, with the concurrence of NDOU J) held that it was improper for a legal practitioner to execute a certificate of urgency in respect of a matter that was being handled by the law firm in which he or she worked. The reasoning in the *Chafanza* case, *supra*, has not been followed in some judgments of this court, and conclusions to the contrary have been reached in this court, see *Route Toute BV & Ors* v *Sunspun Bananas (Pvt) Ltd & Anor* 2010 (1) ZLR 117(H) at 120B; *Mudekunye & Ors* v *Mudekunye & Ors* 2010 (2) ZLR 225 (H) at 229C-F; and *Pascoe* v *Minister of Lands & Rural Resettlement & Ors* 2017 (1) ZLR 215 (H) at 218H – 219E. For the same reasons, articulated in these cases, and more, I am unable to accept the approach in the *Chafanza* case as the correct exposition of the law. The *Chafanza* case transposed the principles that apply to the commissioning of affidavits to the execution of a certificate of urgency in the absence of a proper basis for their application. In the case of attestation of affidavits, the commissioner of oaths who has an interest is precluded by the explicit provisions of the law, see s 2 (1) of the Justices of Peace and Commissioners of Oaths (General) Regulations (SI 183 of 1998) as read with s 8 of the Justices of the Peace and Commissioners of Oaths Act [*Chapter 7:09*], and the comments thereon in *Hughber Petroleum (Pvt) Ltd & Anor* v *Brent Oil Africa (Pty) Ltd* 2014 (1) ZLR 200(H) at 203B-F. There is no such prohibition in respect of the preparation and signing of a certificate of urgency.

But there is an additional dimension on the basis of which the objection would still fail. It is that legal practitioners in the Civil Division of the Attorney-General's Office have no "interest" in the matters that they handle for Government institutions or officials such as would apply in the case of a private firm of attorneys. The mere fact that they are employed in the public sector does not create such an interest much the same way as judges and magistrates who are in the public sector have no interest in such cases in a sense that would preclude them from dealing with cases involving state institutions and officials. See *Tryness Kabiti* v *Director-General CIO* HH 332– 23.

For the above reasons, the objection that the certificate of urgency is invalid is dismissed.

Whether the application is not urgent

The respondents' second ground of objection is that the matter is not urgent. The respondents postulate three possible dates when, in their contention, the need for the applicant to

act arose. The first date alleged is 20 July 2022 when the applicant wrote a letter to the respondents ordering them to cease mining operations. The second asserted date is 15 August 2022 which was when the applicant filed an application for leave to execute under Case No. HC 6416/22. Finally, the respondents refer to their notice of 16 January 2023 in terms of which they notified the applicant of their intention to commence operations at the site.

The applicant submits that the need to act arose on or about 13 June 2023. This was after it had received information that the respondents were conducting mining operations at the mines notwithstanding previous assertions that no such mining was underway. Following receipt of that information the applicant instituted an investigation which resulted in the report that confirmed that indeed the respondents were mining at the disputed sites. The respondents have also confirmed that they are carrying on mining activities at the claims, and have been conducting such activities from May 2023.

A matter is urgent if it cannot wait to be dealt with as an ordinary court application, see *Pickering* v *Zimbabwe Newspapers (1980) (Ltd* 1991 (1) ZLR 71(H) at 93E. The court invokes an objective approach to the question of urgency by considering each case on its own peculiar facts and circumstances. The exercise entails assessing whether, if the matter is dealt with as an ordinary court application, the relief being sought might be rendered nugatory or ineffectual either because the circumstances which the relief seeks to deal with would have mutated in a way that renders it useless or because of the risk of perverse conduct which would defeat that relief. *Triple C Pigs & Anor* v *Commissioner-General ZRA* 2007 (1) ZLR 27(H) at 30E-F; *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 232(H) at 243E-H.

In casu, the application seeks to stop the carrying on of mining activities in circumstances where the respondents' certificates have been cancelled. Prior to 13 June 2023 the applicant may have had a belief but had no evidence to substantiate it, that the respondents were carrying on mining operations. The respondents themselves had denied carrying on mining operations then. It was only around 13 June that the fact was confirmed by the investigating team through its report. The respondents confirm that they only started carrying on the mining activities towards the end of May 2023. This means that prior to this date or, more particularly, to the date that the applicant established the fact, it would not have been prudent for the applicant to act. It would have acted upon a mere suspicion or belief not backed by facts if it had done so. The letter of 5 January 2023

was not a declaration by the respondents that they would be carrying on mining activities. It was an expression of intent. The letter actually shows that the respondents anticipated a response from the applicant giving them the green light to proceed with the proposed mining, hence the statement: "Trust this will meet your favourable consideration." The respondents do not explain when they felt that they owed no obligation to seek the leave of the applicant to go ahead with the mining notwithstanding the cancellation of their certificates. The application for leave to execute was not proof of when the need to act arose, particularly as the respondents consistently denied that they were mining and the applicant had no evidence to prove otherwise. Likewise, the instruction of 20 July 2022 was based on information which obviously was not based by the proved facts which appeared after 13 June 2023.

Thus the need to act did not arise until the fact that the respondents were carrying on mining operations was established.

The issue of the prejudice to be suffered arises from the fact of carrying on mining activities without the requisite papers. The statement that the respondents were not rendering output returns does not depart from the mischief which the relief is directed to redress. Carrying on mining without certificates is on its own prejudicial to the rights of the regulator to control mining in the country.

Accordingly, the matter satisfies the requirements for an urgent hearing. The objection to its urgent hearing is therefore dismissed.

The merits

What is being sought is essentially an interim interdict. The requirements for such an interdict are settled. They are:

(1) That the right which is sought to be protected is clear; or
(2) That (a) if it is not clear, it is *prima facie* established, though 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 rights;
(3) That the balance of convenience favours the granting of interim relief; and
(4) The absence of any other satisfactory remedy.

See *Nyika Investments (Pvt) Ltd* v *ZIMASCO Holdings (Pvt) Ltd & Ors* 2001 (1) ZLR 212(H) at 213G-214B; *Watson* v *Gilson Emterprises & Ors* 1997 (2) ZLR 318(H) at 331D-E; *Econet (Pvt) Ltd* v *Minister of Information* 1997 (1) ZLR 342(H) at 344G-345B.

Whether the applicant has a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a question of evidence. *Nyambi & Ors* v *Minister of Local Government & Anor* 2012 (1) ZLR 559(H) at 574C.

Further, where a clear right is proved the applicant for an interim interdict need not show that he or she will suffer irreparable harm if the interdict is not granted. The applicant is required to show only that injury has been committed or that there is a reasonable apprehension that an injury will be committed, see *Nyika Investments (Pvt) Ltd v ZIMASCO HOLDINGS (PVT) LTD & ORS, supra,* p. 214B-D; *Nyambi & Ors* v *Minister of Local Government & Anor supra,* p. 572F.

The respondents' counsel made no meaningful submissions in respect of the issue of the right, understandably because the applicant is the authority who is responsible for the administration of the Mines and Minerals Act [*Chapter 21:05*], and has the authority to issue and cancel title to mining claims. He exercised that right. The challenge to the exercise of the right failed. While an appeal against a judgment has the effect of suspending the operation of the judgment appealed against, such an appeal does not prior to its determination nullify the judgment. In other words, what is suspended is merely the operation or execution of the judgment. The judgment itself remains extant unless it is set aside on appeal. More significantly in the context of the present case, the judgment in question conferred no rights upon the applicant which would be suspended by the noting of an appeal against it. The judgment merely dismissed the respondents' challenge to the cancellation of the certificates. The dismissal of the respondents' application means that the cancellation of the certificates remains extant. It was not disturbed by the outcome of the judgment; neither was it affected by the noting of the appeal. This means that the applicant has a clear right in relation to the mining claims in question. Given that the applicant has proved and the respondents have confirmed that they are carrying on mining operations, the injury has not only been shown to have been committed, it is continuing. As shown by the authorities, there is no need to show irreparable harm or the risk thereof. This renders misplaced the submission made on behalf of the respondent which focused predominantly on the issue of the risk of irreparable harm.

To the extent that the pending Supreme Court appeal may be taken as imposing doubt upon the applicant's right and/or resulting in the right being *prima facie* established, the facts still reveal not just a well-grounded apprehension of irreparable harm but the injury itself arising from the

continued mining that is ongoing. Respondents are of the mistaken view that because they are rendering the output and labour returns and are selling the gold to Fidelity Printers then there is no prejudice occasioned to the applicant by their conduct. The prejudice is occasioned by the continued mining on claims over which the respondents have no title. The prejudice is irreparable because once mined the mineral is exhausted. If the respondents' appeal is dismissed yet they have continued mining the applicant will not be able to recover the minerals that they would have extracted.

It was submitted on behalf of the respondents that the applicant has an alternative remedy, because if the respondents fail to produce the returns it can impose a fine. The alternative remedy must be satisfactory in the sense of achieving the desired result. A fine, even if subsequently imposed, does not have the effect of stopping the respondents from carrying on the mining operations. There is therefore no alternative remedy to the injunction that is being sought herein.

In considering the balance of convenience the court must weigh the prejudice to the applicant if the interim relief is refused against the harm to the respondents if the relief is granted. *Knox d'Arcy Ltd* v *Jamieson* 1966 (4) SA 348(A) at 361D-F; *Cambridge Plan AG* v *Moor* 1987 (4) SA 821(D) at 847H-848G. If the interim relief is not granted and the applicant ultimately succeeds in having the respondents' Supreme Court appeal dismissed the applicant will be irremediably prejudiced because the depleted gold ore will not be restored. The respondents submitted that if the interdict is granted the persons that they employ will be out of employment. That prejudice, if it is suffered, is not to the respondents. Further, the respondents stated that the actual mining only started about a month ago in May, which means that the stopping of the mining pending the determination of the Supreme Court appeal has no far-reaching implications for those employees who are involved in the mining. After all, the interdict is only temporary, such that if the respondents succeed in the appeal then they can continue to conduct their mining operations.

The draft order

The final order sought on the return date seeks a permanent interdict which is not connected to the pending Supreme Court appeal. It should be sought pending the determination of the appeal in Case No. SC 398/22. The reference to the Supreme Court appeal under the interim relief is misplaced. In a provisional order interim relief is granted pending the return date. The appropriate

form, Form 26A, should guide litigants and legal practitioners on the drafting of the terms of a provisional order.

The applicant is also not entitled to claim costs under interim relief. These will be determined on the return date.

Disposition

In the result, the provisional order is granted in the following terms:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The respondents are interdicted from carrying on mining operations at Antelope East 2, Antelope 9, Antelope East Extension, Antelope East Extension 2, Antelope East, Antelope 2, 3, 4, 5 and 6, and Antelope 11 pending determination of the Supreme Court appeal filed under Case No. SC 398/22.

2. The respondents shall pay the costs.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief –

1. That the respondents forthwith stop carrying on mining operations at the mining claims known as Antelope East 2, Antelope 9, Antelope East Extension, Antelope East Extension 2, Antelope East, Antelope 2, 3, 4, 5 and 6, and Antelope 11.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioners or their employees are granted leave to serve a copy of this provisional order on the respondents at the address of their legal practitioners.

Civil Division of the Attorney-General's Office, applicant's legal practitioners
Gill Godlonton & Gerrans, respondents' legal practitioners