DALIAN TIANCHENG MINERAL RESOURCES
[PRIVATE] LIMITED
and
ZHIQIANG GAO
versus
BAOQUAN HUANG

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 30 May, 13 June, 24 June & 12 July 2022

Urgent Chamber Application

Ms *R Mabwe*, for applicants
Mr *T Tabana*, for the respondent

MUCHAWA J: On 24 June 2022, I dismissed the applicants' application for interim relief with costs. They have written requesting the reasons for that order. This is it, starting with a background to the matter.

This is an urgent chamber application in which the applicants sought the following interim order,

> **"INTERIM RELIEF GRANTED**
> Pending final determination of this matter or the conclusion of the application in HC 2480/20 and HC 2940/20, the applicants are granted the following relief:
> 1) The respondent, personally or through his agents, or anyone claiming rights or title through them are interdicted and restrained from preventing the applicants and/or their duly appointed employee, contractors and/or agents, from accessing first applicant's Gubudu Mines at Mahgura, Chinhoyi for purposes of conducting the maintenance work on the shaft and machinery. Failing which, the Sheriff of the High Court, with the assistance of the Zimbabwe Republic Police shall take all necessary steps to grant access to the applicants, and herein their duly appointed employee, contractor and/or agents.
> 2) The second applicant shall be responsible for the cost and expenses incurred by the maintenance work."

The terms of the final order sought were;

> "That you now show cause to this Honorable Court why a Final Order should not be made on the following terms:
> 1) Pending determination of HC 2480/20 and HC 2940/20, the respondent be and is hereby ordered not to prevent the applicants and its authorized employees, contractors and agents from conducting mining or other business operations at the first applicant's mining location known as Gubudu 1-3 registered as 40850 BM, 40855 BM and 40856 BM.
> 2) The respondent be and is hereby to pay costs of suit on a client-attorney scale."

It was advised that there was a typographical error in referring to case HC 2940/20 instead of HC 2492/20 in the draft orders.

The first applicant, a duly registered company, is the holder of copper mining rights for the mining claims known as Gubudu 1-3 whose registration numbers are set out above. The second applicant claims to be the majority shareholder with 66% shareholding in the first applicant. The respondent is said to be the biological elder brother of Baoming Huang, the minority shareholder who holds 34% shares in the first applicant. There is a pending shareholding and directorship dispute between the parties under case numbers HC 2480/20 and HC 2492/20, amongst others. It is also submitted that there has been no mining activity at the mine since sometime in 2021 and each of the parties has some security guards at the mine for purposes of safeguarding the first applicant's assets.

What has spurred the applicants to approach the court is a report allegedly received on 21 May 2022 to the effect that the water in the two shafts of the mine has exceeded risk level and that this signals the high possibility of the collapsing of the shafts and that there is need to extract the water and reinforce the underground structure. A failure to do this urgently is alleged to pose a significant and real risk of injury, even loss of life, damage to plant and machinery in use at the mine.

The respondent raised four points in *limine* in opposition to this application. Only three were persisted with. These were that; the matter was not urgent, the relief sought was incompetent and the certificate of urgency was defective. In a judgment delivered on 3 June 2022, I found no merit in all the points in *limine* and dismissed them. The application for a provisional order was then set down for hearing on 13 June 2022. The parties agreed to defer the hearing pending a joint visit to the mine with a technical expert on 20 June 2022 to assess the need for maintenance work on the mine as prayed for by the applicant.

A report was duly filed by the Inspector of Mines and Explosives who had duly attended at the mine in the company of the parties and their legal practitioners. The expert sought to ascertain whether there is need for the applicant to do maintenance work and dewater the underground workings of the mine. The following were the findings of the expert;

- There are 2 vertical rectangular shafts at the mine.
- Each shaft is shattered with concrete lining

- The shafts are equipped with headgears, small hoists with wire ropes attached to the cage conveyances.
- The shafts are equipped with steel dewatering pipes.
- There was no appointed mine manager at the mine
- There were no hoists drivers to operate the hoists for underground inspection
- Water levels in the shafts could not be ascertained from the surface

The report proceeds to discuss the issue at hand before making recommendations. The key point made is that for any mine, where mining operations have been temporarily suspended, for whatever reason and there is need to re-enter the underground operations in future, there is need to put the mine on care and maintenance. This involves underground dewatering work to prevent the mine from flooding, damage to the underground mine services and equipment. If this is not done, it was stated that flooding of the underground workings will result in deterioration of ground support and weakening ground integrity through seepage in passive rock. Section 42 (1) of the Mining (Management and Safety) Regulations SI 109 of 1990 was referred to for the assertion that every mine is bound by law to appoint a mine manager who shall appoint a reasonable crew to assist him carry out operations as set out in s 3(1) and (2) of SI 109 of 1990.

The report concludes by recommending that a competent mine manager be appointed by their office and in turn he appoints a crew of competent persons to assist him in executing his duties including putting the mine on care and maintenance and dewatering.

In support of the granting of the interim relief, bolstered by the expert report, *Ms Mabwe* submitted that the need for care and maintenance including dewatering, is backed up by a Statutory Instrument. She sought to amend the draft order. I have emboldened the amendments sought so that it reads as follows;

"INTERIM RELIEF GRANTED

Pending **the return date**, the applicants are granted the following relief: (My emphasis)

1. The respondent, personally or through his agents, or anyone claiming rights or title through them are interdicted and restrained from preventing the applicants and/or their duly appointed employee, contractors and/or agents, from accessing 1st applicant's Gubudu Mines at Mahgura, Chinhoyi for purposes of conducting the maintenance work on the shaft and machinery. Failing which, the Sheriff of the High Court, with the assistance of the Zimbabwe Republic Police shall take all necessary steps to grant access to the applicants, and herein their duly appointed employee, contractor and/or agents.

2. The 2nd applicant shall be responsible for the cost and expenses incurred by the maintenance work.
3. **The respondent is interdicted from preventing applicants and their duly appointed agents from appointing relevant personnel to carry out maintenance work"(My emphasis)"**

The terms of the final order sought are;

"That you now show cause to this Honorable Court why a Final Order should not be made on the following terms:

1. Pending determination of HC 2480/20 and HC 2940/20, the respondent be and is hereby ordered not to prevent the applicants and their authorized employees, contractors and agents from **carrying out maintenance work in compliance with SI 109 of 1990** at the 1st applicant's mining location known as Gubudu 1-3 registered as 40850 BM, 40855 BM and 40856 BM.

3) The respondent be and is hereby to pay costs of suit on a client-attorney scale."

Furthermore, *Ms Mabwe* submitted that the modalities for appointment of a mine manager can be done once the interim relief is granted. She submitted that the applicants in fact have a mine manager who has been moved to the security department since there is no work. The argument about the need for maintenance work was said to fall on the return day.

Reliance was placed on r 60 (8) to argue that where papers have been placed before a judge, the judge can ask for any further relevant information to assist in the resolution of the matter. The expert report was said to be such information which should weigh in favour of the applicants.

Mr Tabana submitted that the applicants now want to build their case as they go on the strength of the expert report yet their initial case was that the water has reached risk levels as observed by a security personnel from the surface, something the expert debunked. The issue of whether a mining manager exists was said to have been dealt with by the expert who said there was no mine manager and the applicants can not submit on this outside the founding affidavit. SI 109/90 was never pleaded, it was contended. What the applicants were doing was said to be tantamount to filing another urgent application within another one. This was alleged to be unfair as the respondent had filed a notice of opposition in respect of what was pleaded and not the supplementary submissions. The proposed amendments to the draft order are said not to be backed by the founding affidavit.

Ms Mabwe submitted that the applicant's case is made in pp 14 to 16 of the founding affidavit. The applicants allege that they have a prima facie right to litigate and that the balance of convenience favours the granting of the relief sought as if not granted, and no urgent maintenance work is conducted, the applicants stand to suffer irreparable harm due to likely collapse of the

mine leading to loss of assets. It is also stated that there is no alternative relief available to the applicants. It was argued that these factors had not been controverted and the relief must be granted.

It is trite that a matter stands or falls on its founding affidavit. See *Mangwiza* v *Ziumbe NO & Anor* 2000 (2) ZLR 489 (SC). The applicant's assertion that water in the applicant's shafts had exceeded risk levels was debunked by the expert report which stated that such water levels could not be ascertained from the surface. The issue of care and maintenance regulated by SI 109 of 1990 was not pleaded. The founding affidavit before me could not support the amended relief sought. That was the basis for the dismissal of this application.

Rusinahama-Rabvukwa Attorneys, applicants' Legal Practitioners
Tabana & Marwa, Respondent's Legal Practitioners