HB 255-17
HC 2064-17
XREF HC 2850-16

DUMISANI VINCENT SIBANDA
and
NQOBIZITHA SIBANDA
versus
SUSAN AND VIRIMAYI SYNDICATE
and
G AND S MINING (PVT) LTD
and
MINISTER OF MINES AND MINING
DEVELOPMENT N.O
and
THE ACTING PROVINCIAL MINING DIRECTOR
MATEBELELAND SOUTH PROVINCE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 AUGUST AND 24 AUGUST 2017

Urgent Chamber Application

V Majoko for the applicants
P Mvundla for the 1st respondent
L Dube for the 3rd and 4th respondents

MATHONSI J: This is one of several mining disputes finding their way to this court with alarming frequency of late which is an indictment on the conduct of business at the offices of Provincial Mining Directors dotted around the country. A mining block by the name Zulu 8 located in Fort Rixon in the Insiza District of Matabeleland South was pegged and registered with the Ministry of Mines by the two applicants operating under the style Dumisani and Nqobizitha Sibanda syndicate, on 26 April 2012 and they were issued with Certificate of registration number 46972.

The applicants say they immediately commenced mining operations on the 10 Gold Reef Claims an activity which they blissfully undertook without any hassles until 7 August 2015 when the Acting Mining Director for Matabeleland South advised them by letter to cease all mining

operations with immediate effect. In that letter notice was given to the applicants in terms of s50 (1) (a) and (b) of the Mines and Minerals Act [Chapter 21:05] of the intention to cancel the applicants' registration certificate with effect from 30 September 2015 on the ground that there were two co-existing claims bearing the name Zulu 8 situated in Fort Rixon.

The first was Zulu 8 registration number 46972 belonging to the present applicants in whose docket the details of the pegger, his or her address and the identity of an approved prospector were missing. The Provincial Mining Director also alluded to material alterations in the official documents. The second was Zulu 8 registration number 36794 which the Director stated had been repegged by the applicants when the claim was pegged in 1995 and was extant at the time of the applicants' repegging in 2012.

By letter dated 24 August 2015 the applicants appealed against the s50 notice as they had been advised by the notice itself which read in relevant part:

> "You have the right to appeal against the cancellation to the Minister of Mines and Mining Development, in writing, through this office, at any time before 30 September 2015." (The underlining is mine)

In their appeal the applicants complained that the Director was now turning against them when he or she had allowed them to remain in their comfort zone for three years after the registration of their claim without noticing any irregularity in the registration during which time they enjoyed peaceful and indeed fruitful mining operations. They said in part which I find quite disturbing indeed;

> "We wish to appeal against the decision of Provincial Mining Director Matabeleland South Province on the following grounds. The investigations by his office reveals *(sic)* that his office directly contributed to the dilemma that he is now trying to rectify by cancelling our certificate and handing the Mine to Mike Stone, after three years of no disturbances in our operations. We learnt from his letter that there were registration papers which were not properly completed, during the registration in which his administration section failed to properly check the forms prior to the issue of certificate of registration. What surprises us is that his office to keep quiet about this matter for three years of our registration and operations. It is actually our self *(sic)* that initiated the investigations he is talking about, after we highlighted to him that the mine Zulu 8 (46972) was being simultaneously tributed and sold to Susan Nyamiwa between 10-11 November 2014, under unclear circumstances by one of her administrators, which led to a police case at Gwanda Minerals Unit being filed. We challenged this leading to a meeting that was held at his office at our instigation, where (there) was Mr Stone of G

and S Pvt Mining Limited for three years (*sic*). During the meeting Zulu 8 (36794) failed to produce any single document to prove that Zulu 8 (36794) was indeed actual current as the director supports (*sic)*."

If there is any grain of truth in any of these allegations being leveled against the office of the fourth respondent there is little wonder that the first respondent now claims that according to their investigations at the office of the third respondent the letter of appeal never reached that office although it is date stamped by the fourth respondent 24 August 2015 as acknowledgment of lodgment of the appeal. It would be recalled that the fourth respondent directed the applicants to lodge the appeal through his or her office. The allegations of impropriety at that office especially when a mining claim was registered and allowed to flourish for three years only to be cut off in preference of a competitor under extremely unclear circumstances, cannot be ignored. This is particularly so when even the appeal noted lawfully and within the time prescribed, is said to have vanished without reaching the office of the Minister. It is an appeal which remains undetermined and in limbo for almost two years. Quite a worrying state of affairs.

Meanwhile the applicants complain that, although the intention to cancel their certificate was appealed within the time allowed, the first respondent has been found conducting mining operations at the disputed site and was never ordered to cease such operations pending resolution of the mining dispute. Ordinarily an appeal suspends the decision appealed against unless there is a specific provision to the contrary. In addition, in this case, other than the notice of intent to cancel, there appears to be no cancellation at all. According to the applicants, it was only fortuitous that they discovered that the first respondent is mining on the disputed claims when they recently paid a visit while pursuing the fate of their appeal.

Against that background, they have made this application seeking the following interim relief:

"<u>INTERIM RELIEF GRANTED</u>
Pending final determination of this application it is ordered that:

3. All mining activities at Zulu 8 be and are hereby suspended pending the determination of the appeal noted by 1st and 2nd applicants against the cancellation of Certificate of Registration No 46972.
4. 4th respondent will ensure that no mining activity of whatever nature is carried out by the 1st and/or 2nd respondents on Zulu 8 and to this end will, on the strength of

> this order enlist the services of the Zimbabwe Republic Police to assist in giving effect to this order."

According to the applicants minerals being finite in nature the gold deposits may be dissipated before the dispute is resolved if the first respondent is allowed to continue. The application is opposed by the first respondent. Ms *Mvundla* for the 1st respondent has taken issue with the urgency of the matter because the applicants have always known that the 1st respondent is mining the claims for quite some time but did not see the need to act now. In any event, even assuming that the applicants became aware of those mining activities on 10 July 2017 when they raised the issue by letter of that date addressed to the first respondent's legal practitioners, they should have acted then when the need to act arose. They cannot expect to be heard on an urgent basis when they only filed the application on 4 August 2017, a sign that they did not treat the matter as urgent themselves.

The first leg of the first respondent's challenge on urgency relating to the allegation that the applicants must have known when they were barred from conducting mining activities in August 2015 that the first respondent had not been barred and should have acted then, ignores an important point. It is that according to the applicants they were ordered to cease operations not because there was a fight between them and the first respondent but because of the notice of intent to cancel their certificate. The applicants say they only got to know about the conduct sought to be interdicted recently when they paid a visit.

The second leg of the challenge on urgency relating to failure to act from 10 July 2017 until the filing of this urgent application on 4 August 2017 is one of those made for the sake of appearing to have a point *in limine*. What the first respondent is saying is that the delay of twenty-two days is inordinate. I do not agree. Nobody has ever said that litigants are expected to drop everything they are doing and devote all their time to filing an urgent application even when the conduct complained of is far from being a calamity.

What is expected of a litigant is to bring their case to court within a reasonable time and in my view a delay of twenty-two days is indeed a reasonable time especially given that legal services are expensive. Legal practitioners who file these applications on behalf of litigants have their own conditions for taking up a brief which the courts cannot ignore. Where the litigant has

been able to summon resources, engage a legal practitioner and bring their matter to court within such a period of time, there is no basis for denying them audience.

On the merits of the matter the first respondent's opposition is clearly a red herring. It has stated that it is the "proper occupier of Zulu 8" while at the same time admitting that there is a court order issued by this court in HC 2850/16, a case wherein the 1st respondent herein sued other parties in terms of which the court directed the fourth respondent to commission a survey of Zulu 8 and Zulu 15 in order to establish the boundaries. In its opposing affidavit first respondent does not deny that it has not served that court order on the fourth respondent meaning that it has not prosecuted the matter at all, content to continue mining on Zulu 8 because the court order prohibits its eviction therefrom. Of course Ms *Mvundla* submitted that the court order has finally been served presumably in anticipation of the point taken by the applicant.

The first respondent argues further that because the applicants' certificate was cancelled, they have no right to mine on Zulu 8 and therefore have failed to show a *prima facie* right to the relief that they seek. They have also insinuated that they are not mining on Zulu 8 but on Zulu 15 because the boundaries between the two have not been surveyed. This sharply contradicts paragraph 6 of the opposing affidavit of Susan Nyamwiwa which categorically states that "1st respondent is the proper occupier of Zulu 8."

In my view, the applicants' case is a simple one. It is that they have been operating on Zulu 8 mine by virtue of a lawfully granted certificate of registration. They were given a notice to cancel their certificate which they appealed against in accordance with the provisions of the Act. While the appeal is pending the first respondent is plundering the gold deposits located on a claim that they registered. Therein lies the applicants' *prima facie* right to prevent further exploitation of the mineral deposits until the appeal has been determined. What is indisputable is the existence of a mining dispute between the parties. It is conventional in such disputes to stop the mining activities of the disputants until the resolution of the dispute.

I also agree with Mr *Majoko* for the applicants that minerals are finite and can easily run out at any time. While damages may be a remedy, such a remedy is illusory in a situation involving small scale, hand to mouth miners whose resources may well be modest. Therefore

the balance of convenience would seem to favour termination of mining until the matter is resolved.

I have not lost sight of the fact that this matter appears to have been badly handled by the fourth respondent who allowed the applicants to register a claim and to mine them for three years before divesting them of those claims and giving them to some other syndicate under unclear circumstances. Having done that, the fourth respondent's office appears to have handled the issue of the applicants' appeal in a far from satisfactory manner resulting in the appeal remaining outstanding for almost two years. In addition there has been very serious allegations of impropriety made against that office which raise serious concerns about the fate of the appeal.

Mr *Dube* for the third and fourth respondent submitted that they were not opposed to the application before allowing Mr *Maruziva*, an official from the Ministry of Mines, an opportunity to address my concerns about the manner in which they handled the dispute. Mr *Maruziva* stated that at no point did they cancel the registration certificate of the applicants. The matter ended at the stage of notice to cancel which notice was appealed against, thereby confirming my finding that there was never a cancellation.

On the allegations of impropriety made against the fourth respondent's office, Mr *Maruziva* was ambivalent, stating that they will probably be discussed at the hearing of the appeal. He however said that those allegations may be investigated internally. Regarding the inordinate delay in determining the appeal, Mr *Maruziva* was tongue-tied. He however assured the court that the Minister is finally seized with the appeal and that a decision will be taken soon. None of that is satisfactory at all especially as a small-scale mining syndicate has been made to wait for such a lengthy period for a resolution of what appears to be a simple dispute. These are people whose livelihood has been badly affected by a dispute not of their making at all.

Perhaps it is time that the Ministry of Mines seriously looks into the bottlenecks which starkly appear in the offices of Provincial Mining Directors and find ways of reforming them. As it is Dispute Resolution Committees have been set up in the provinces and one would expect that these would expedite the settlement of disputes in provinces in a speedy and transparent manner. But what has happened is that so many of these mining disputes continue to clog this court's system. It is unacceptable. There can be no excuse for instance for a Provincial Mining

Director sitting on an appeal for two years without forwarding it to the Minister thereby eroding public confidence and trust. The appeal should be channeled to the Minister with speed.

Meanwhile I am satisfied that mining operations at Zulu 8 must be stopped.

In the result, the provisional order is hereby granted.

Majoko and Majoko, applicants' legal practitioners
Mutuso, Taruvinga & Mhiribidi, 1st & 2nd respondents' legal practitioners