SHINGIRAI MUCHINAPO
versus
G. DADIRAI (N.O.)
and
EDWICK DZAPASI
and
THE MINISTER OF MINES AND MINING DEVELOPMENT
and
THE OFFICER COMMANDING ZIMBABWE REPUBLIC POLICE, CID MINERALS, FLORA AND FAUNA UNIT, MASHONALAND EAST

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 5 February & 30 April 2024

Urgent Chamber Application

A S Madzima, for the applicant
P Chibanda, for the 1st, 3rd and 4th respondents
N T Tsarwe, for the 2nd respondent

MANYANGADZE J: This is an urgent chamber application for an interdict, in which the applicant seeks the following relief:

> **"<u>TERMS OF THE FINAL ORDER SOUGHT</u>**
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
> 1. The 1st, 2nd and 4th Respondents together with their employees and/or agents and/or assignees are hereby interdicted from interfering with and/or or carrying out mining operations at Chifumbi 2 Mine (Registration Number 1688G) pending the finalisation of an application for review filed under Case No. HCH 319/24.
> 2. The 2nd Respondent shall pay costs of this application on an attorney and client scale.
>
> **<u>INTERIM RELIEF GRANTED</u>**
> Pending the determination of this matter and on the return day the Applicant be and is hereby granted the following relief:
> 1. Pending the outcome of this application, the 1st Respondent's order of the 8th of January 2024 suspending the Applicant's mining operations on block of claims named Chifumbi 2 (Registration Number 1688G) and allowing the 2nd Respondent to resume mining operations thereat be and is hereby suspended.
> 2. Pending the outcome of this application, the 2nd Respondent together with her employees and/or assignees and/ or agents be and are hereby interdicted from carrying out mining activities/ operations or interfering with operations at Chifumbi 2 Mine (Registration Number 1688G).

3. Pending the outcome of this application, the 1st and 4th Respondents be and are hereby interdicted from interfering with operations at Chifumbi 2 Mine (Registration Number 1688G).
4. For the avoidance of doubt, pending the outcome of this application, the Applicant be and is hereby allowed to resume mining operations at Chifumbi 2 Mine (Registration Number 1688G)."

The factual background to this matter, briefly outlined, is that the applicant and the second respondent are registered holders of blocks of mining claims in the Mashonaland East Province. The applicant owns claims under the block Chifumbi 2 Mine (Registration No. 1688G). The second respondent owns claims under the block Averum 22 (Registration No. 37918). A dispute arose between the applicant and the second respondent when the latter started mining in an area the applicant claimed was within his registered claims. The dispute was adjudicated upon by the first respondent, resulting in a determination issued on 1 December 2022. In terms of that determination, the second respondent was ordered to confine her operations to her registered block i.e. Averum 22. It was found that this block is approximately 4 km from applicant's block i.e. Chifumbi 2. It was therefore viewed not as a case of encroachment of mines sharing a common boundary, but of the second respondent moving from her mine, about 4 km away, to the applicant's mine.

The order by the first respondent was made after officials of the third respondents made a site visit and verified that the second respondent's registered coordinates were not in line with her ground position, that is, the area where she was actually carrying out her mining operations. The applicant's registered coordinates were found to be consistent with his ground position. Resultantly, the second respondent was ordered out of the applicant's block. She was to confine herself to her registered block.

On 26 May 2023, the second respondent filed an application for condonation of late noting of appeal in this court, under Case Number HCH 3475/23. She intends to appeal against the first respondent's determination of 1 December 2022. That application is pending.

On 8 January 2024, the first respondent made another determination, wherein he issued a notification for the cancellation of applicant's mining licence. On the same day, the first respondent issued an order suspending the applicant's mining operations. Effectively, the first respondent reversed his decision of 1 December 2022.

Aggrieved by this determination, that is, the first respondent's second determination of 8 January 2024, the applicant filed an application for review, which is pending under Case

Number HCH 319/24. The applicant then proceeded to file the instant application, in which he seeks the relief specified above.

In opposing the application, the second respondent raised two points *in limine*. These are that:

a) The matter is not urgent.
b) The matter is improperly before the court as the applicant has not exhausted domestic remedies.

At the hearing of the matter, the second respondent added a third point *in limine*, which is that the draft order is fatally defective, in that the applicant seeks the same relief in the interim order as in the final order.

The second respondent abandoned the first preliminary point, leaving the second and third points for determination. These will now be referred to as the first and second point *in limine*, respectively.

These points need not detain the court. In fact, they were not argued with conviction by the second respondent, going by the terseness of submissions made in respect thereof.

On the first point, the second respondent avers that the applicant has been invited by the first respondent to make submissions, in the notice to cancel his mining licence. He should have allowed that process to go through, instead of rushing to this court for relief. In this regard, Mr *Tsarwe* told the court during oral argument:

> "There is no evidence that the applicant has made those representations. There is no evidence that a determination has been made in respect of those domestic remedies."

In response, the applicant contended, *inter alia*, that an appeal to the Minister against the first respondent's determination does not suspend the operation of that determination. In light of this, the applicant was therefore within his rights to seek a review of this determination in this court, coupled with the urgent relief he is praying for. Reference was made to the case of *Mixnote Investments (Pvt) Ltd* v *Evans Majola & Ors* HB 40/17. The applicant's reference to this case is somewhat out of context. The case is not focused on an appeal to the Minister. It deals with the question of whether a Mining Commissioner can sit in an appellate capacity over his own decision. In this regard, the case is almost on all fours with the instant one.

In that case i.e. the *Mixnote Investments* case, the court granted an interdict in similar circumstances. The applicant had filed an application for a review of the Secretary for Mines's decision to nullify the decision of a Provincial Mining Director. The applicant also

filed an urgent chamber application in which he sought the suspension of mining operations pending the outcome of the review. The court held that such a decision was incompetent, as the Secretary was exercising the powers of a Mining Commissioner the same way the Provincial Mining Director was. It was therefore tantamount to sitting in an appellate capacity over his own determination.

It is significant to note that the urgent interdict was granted on the basis that continuance with mining operations pending the determination of the review was highly prejudicial, since gold was a finite resource and could be depleted. Similarly, the applicant *in casu* has had his mining operations halted, with the 2nd respondent being allowed to carry out mining operations instead. There is nothing that prevents the applicant from seeking urgent relief from this court, the same way the applicant in the *Mixnote Investments* case did.

In the circumstances, I find no merit in the preliminary point relating to domestic remedies. The notice to cancel the applicant's licence was simultaneously issued with a highly prejudicial order halting the applicant's mining activities, whilst allowing the second respondent's mining activities. This point *in limine* is accordingly dismissed.

The second preliminary point is on the propriety of the draft order. The second respondent avers that the applicant is seeking, on an interim basis, the same relief he is seeking in the final order. The second respondent is particularly concerned that the applicant, apart from interdicting second respondent from carrying out mining activities on the disputed claim, also wants to be allowed to resume mining operations pending determination of the review application.

The applicant contends that the relief he seeks is only interim, pending the return day. The final relief will be granted pending the outcome of the review matter. Thus, the relief sought is not the same. The applicant further contends that a draft order can be amended and should not vitiate the application. Reference was made to the case of *Shaillon Chiswa* v *Maxess Marketing (Pvt) Ltd & Ors* HH 116/20. I am persuaded by the latter argument. A draft order is simply that – a draft order. It becomes an order of the court when the court grants it, with or without amendments. A draft order contains relief that the applicant is praying for. After considering all the submissions, the court may or may not grant the relief prayed for. If it grants the relief, such relief may or may not be in the form expressed in the draft order. The resultant order is what the court considers appropriate, having regard to the facts of the matter and the applicable law. In this regard, I fully associate myself with the

sentiments expressed by KWENDA J in *Shaillon* v *Maxess*, (*supra*). The learned judge stated, at p 4 of the cyclostyled judgment:

> "This court has the power to amend a draft provisional order where it does not properly capture the appropriate remedy merited and articulated in the founding affidavit. **(see rule 240 of the High Court rules, 1971)**
>
> ***240. Granting of Order***
>
> '(1) At the conclusion of the hearing or thereafter, the court may refuse the application or may grant the order applied for, including a provisional order, or any variation of such order or provisional order, whether or not general or other relief has been asked for, and may make such order as to costs as it thinks fit.
> [Sub rule amended by SI 25 of 1993 and SI 33 of 1996]
> (2) Where the court grants a provisional order under sub rule (1), rule 247 shall apply, *mutatis mutandis*, to the provisional order as though it were granted following a chamber application.'"

The rule the judge relied on, rule 240 of the High Court Rules, 1971, is equivalent to rule 59 (27) of the High Court Rules, 2021. Thus, a draft order is not cast in stone. It is subject to what the court finally grants as an appropriate order, which then becomes the binding order of the court.

In the circumstances, I am unable to uphold the second preliminary point and it is accordingly dismissed.

I must now deal with the merits of the application.

The relief sought in this matter is that of an interim interdict. The requirements for such relief were set out in the case of *Airfield Investment (Pvt) Ltd* v *Minister of Lands and Ors* 2004 (1) ZLR 511 (S). They can be summarised as follows:

(a) The right which is the subject matter of the main action the applicant seeks to protect by means of an interim relief is clear or if not clear, is *prima facie.*
established though open to some doubt.

(b) There is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right.

(c) The balance of convenience favours the granting of the interim relief.

(d) The applicant has no other satisfactory remedy.

First and foremost, the applicant *in casu* avers that he has established a *prima facie* right to the relief he seeks, being the relief of an interdict. In this regard, he points to the certificate of registration he has for the mine in question. Further to that, he refers to the first respondent's decision of 1 December 2022, in terms of which he was confirmed the rightful owner of the mine.

The applicant also avers that he will suffer irreparable harm if the interdict is not granted. He says so because the second respondent continues to mine on the disputed claims even though the matter is pending in this court. The applicant points out that gold is a finite resource, which will be depleted to his prejudice. He contends that the balance of convenience is in his favour. There is no prejudice if second respondent is confined to her claims at Averum 22 Mine and leave him on his claims at Chifumbi 2 Mine. The applicant further contends that he has bright prospects of success on the pending review application. This is so because the irregularities in first respondent's second decision of 8 January make the decision unsustainable at law.

In countering the applicant's averments, the second respondent has focused mainly on the prospects of success. She contends that she is in fact the one who has been mining on the block of claims in question. She asserts that she brought in the applicant as a partner, on her mine. It is in fact the applicant who is trying to evict her from her mine. She contends that if anyone is to suffer prejudice, it is her. She claims that it is the applicant who is depleting gold resources from her mine. The case, according to her, turns on a finding on prospects of success, *which have a significant bearing on the balance of convenience*. This position is clearly reflected in the following remarks, made on her behalf by Mr *Tsarwe* during oral argument:

> "The prospects of success have a direct bearing on the balance of convenience and whether the court should grant this application."

After making these remarks, Mr *Tsarwe* then proceeded to demonstrate the demerits in applicant's case. To begin with, he contends that the assertion by the applicant that he has not been given audience is fallacious. This is so because the applicant was invited to make representations by the Secretary in the notice to cancel his mining licence. So, applicant cannot allege that his *prima facie* right to the mine was violated by the second respondent, when due process was followed.

The other major argument the second respondent advances is that it is not correct that the first respondent was *functus officio* when he made the decision of 8 January 2024, which suspended the applicant's mining operations. She contends that that decision was not made by the first respondent, but by the Secretary. This, it appears, is the gravamen of second respondent's opposition to the application. It was expressed during oral submissions by Mr *Tsarwe* in the following terms:

> "The first decision of 1 December 2022 was made by the Provincial Mining Director. But when we come to the decision of 8 January 2024, it was not made by the Provincial Mining Director. The decision of 8 January 2024 was made by the Permanent Secretary Mines…So we are not talking about the Provincial Mining Director reviewing his earlier decision. We have the Permanent Secretary correcting an earlier communication by the Provincial Mining Director."

It is in this context that the second respondent vehemently contends that the pending review application, on which the application for an interdict is predicated, has no prospects of success at all. Consequently, the present application for an interdict is completely devoid of merit and should be dismissed.

I am unable to uphold this contention. It is fundamentally flawed at law.

The roles of the Provincial Mining Director, the Provincial Mining Commissioner and the Permanent Secretary need to be properly understood when these officials make decisions affecting the rights of individuals and corporate entities carrying out the business of mining. In resolving disputes impacting on such rights, they do so in a judicial or quasi-judicial capacity. It is in the Mining Commissioner that this judicial function is reposed. It is however significant to note that this function is also exercised by the Secretary and the Provincial Mining Director. This clearly implies that it is essentially the same office performing this quasi-judicial function. In that capacity, it makes decisions that are legally binding on the parties concerned. It therefore cannot reverse its own decisions. It means that the Secretary, having delegated this judicial function to the Provincial Mining Director, cannot sit in an appellate capacity over the decision made by the latter. It is a decision emanating from the same office or tribunal. It must go to a higher judicial authority, in this case the High Court.

This is precisely the situation that was clarified by MATHONSI J (as he then was) in *Mixnote Investments (Pvt) Ltd* v *Evans Majola & Ors* (*supra*). That case is almost on all fours with the instant one in all material respects. The Provincial Mining Director made a determination resolving the dispute between the applicant and the first respondent. That determination confined the first respondent to her mining location, preventing her from encroaching onto the applicant's mining location. The Secretary, purportedly exercising appellate jurisdiction over the Provincial Mining Director, reversed that decision, thus allowing the first respondent to carry out her mining operations on the disputed claims. The learned judge made the following pertinent observations, at p 3 of the cyclostyled judgment:

> "To say that the decision on appeal is shocking would be an understatement. It defies logic bearing in mind that the survey commissioned by the 2nd respondent had confirmed that there was not boundary dispute between the parties and therefore there was no need for the applicant to adjust its boundaries. What the survey had shown was that the 1st respondent had

"abandoned" her own Sally 5 Mine claim and was mining the applicant's shaft at Ettrick Mine. That notwithstanding the Secretary decided to invoke the provisions of s 58 of the Mines and Minerals Act [*Chapter 21:05*] on impeachment of title which applies to a mining location which has been registered for a period of 2 years. The facts did not suggest that the 1st respondent had registered the claims which were already registered by the applicant.

> Even more shocking is where the Secretary derived appellate jurisdiction over such mining dispute which would have been resolved by the 2nd respondent. Aggrieved by that turn of events, the applicant filed a review application in this court in HC 3062/16 arguing that the purported annulment of the Director's decision was incompetent among other grounds. The review application is yet to be determined by this court."

As already indicated, this is the same situation obtaining in the present matter. The second respondent is relying on a decision made by the Secretary, which nullified the decision made by the Provincial Mining Director. The decision made by the Provincial Mining Director was arrived at after a ground survey done by technical experts from the third respondent's office. The procedure is legally untenable as it is tantamount to a court exercising appellate or review powers over its own decision. In this regard, the learned judge went on to state, at p 4 – 6:

> "In essence what the 2nd respondent is saying is that whoever is the mining commissioner has a second bite at the cherry as it were. If the mining commissioner is the Permanent Secretary, it means that he has delegated his functions as such to the Provincial Mining Director who now adjudicates over mining disputes in terms of the Act, obviously on behalf of the real commissioner. After the director has determined the matter exercising the powers reposed to the commissioner by the Act, the same commissioner who has delegated his powers to the director is still able to sit as an appeal court and determine the matter again. The question which arises is: In terms of what law is the commissioner entitled to act in that way?"

Section 341 which the second respondent relies upon in making this strange argument provides:

> '341 Administration of Ministry
> (1) The Secretary shall be and is hereby vested with authority generally to supervise and regulate the proper and effective carrying out of this Act by mining commissioners or other officers of the Public Service duly appointed thereto, and to give all such orders, directions or instructions as may be necessary.
> (2) The Secretary may at his discretion assume all or any of the powers, duties and functions by this Act vested in any mining commissioner, and may lawfully perform all such acts and do all such things as a mining commissioner may perform or do, and is further empowered in his discretion to authorize the correction of any error in the administration or in the carrying out of the provisions of this Act, or to perform any other lawful act which may be necessary to give due effect to its provisions.
> (3) The Secretary may exercise such of the powers by this Act vested in the Minister as may be delegated to him by the Minister.

No matter what rule of statutory interpretation one employs they cannot, by any stretch of the imagination, come up with the meaning which the second respondent has sought to assign to

this provision. There is no way it could be understood to mean that the Secretary is the Mining Commissioner. While the Secretary is empowered to perform the functions of a mining commissioner at his own discretion, it cannot be said that he or she is a mining commissioner. The Secretary supervises and regulates the functions of the mining commissioner but there is nowhere in the Act where it says that he has appellate jurisdiction over the court of the mining commissioner.

In any event if the Secretary elects to perform the functions of a mining commissioner his or her powers remain governed by the Act. In other words he shall deal with a dispute referred to him or her exercising judicial powers of a mining commissioner provided for in s 346 of the Act. He would have to hold a court in the mining district of the mining commissioner appointed for that district and abide by that provision.

It therefore means that s 361 of the Act applies to any decision made by the Secretary sitting as a court of the mining commissioner. That section provides:

> 'Any party who is aggrieved by any decision of a mining commissioner's court under this Act may appeal against such decision to the High Court, and that court may make such order as it deems fit on such appeal.

Clearly therefore an appeal against the decision of the mining commissioner does not lie in the office of the Secretary but to the High Court. The second respondent heard and determined the dispute of the parties as a mining commissioner. It was therefore incompetent to advise the parties to appeal to the Secretary who clearly has no appellate jurisdiction. This provision has been a subject of a number of judicial pronouncements. See *Muzuva* v *Simbi*; *Simbi* v *Muzuva* 2011 (2) ZLR 319 (H); *Rock Chemical Fillers (Pvt) Ltd* v *Bridge Resources (Pvt) Ltd & Ors* 2014 (1) ZLR 30 (H); *Nyamupinga* v *Muzanywa & Ors* HB 275-16.

In terms of the current provisions of the Act no appeal lies to the Secretary of Mines from a decision of a mining commissioner. Any purported appeal to the Secretary is therefore a nullity and a determination made by the Secretary exercising appellate jurisdiction which he or she does not have is equally a nullity.'"

I have made extensive reference to this case as it deals, in all material respects, with the issues raised by the second respondent *in casu*. I fully associate myself with the approach adopted in that case. The learned judge succinctly and comprehensively dealt with the question of the role of the Secretary and the Provincial Mining Director when they exercise the powers of the Mining Commissioner. It is essentially the same authority deciding in a judicial capacity. It cannot therefore reverse its own decision. It is *functus officio* in relation to decisions made in that capacity.

It seems to me that the second respondent is conflating the roles of the Secretary and the Provincial Mining Director in their executive or administrative capacity on the one hand, and in their judicial or quasi-judicial capacity on the other hand. These are distinct roles which should not be mixed up. The administrative role is what constitutes much of the two Government bureaucrats' work. It involves the day-to-day supervision of the operations of the Ministry concerned. In this capacity, the Secretary can deal with, and correct errors made by the Provincial Mining Director, which errors would be of an administrative nature. Once the Provincial Mining Director makes a decision of a judicial nature, the appropriate recourse

is an appeal or application for review in the High Court. It cannot be administratively corrected, as the Secretary purported to do *in casu*. This is the anomaly which the applicant seeks to rectify through the pending review application.

In the circumstances, it cannot be said that the application for review lacks merit. To the contrary, it has bright prospects of success. In view of this, the probabilities in this matter lie heavily in favour of granting the interim relief sought. In granting the applicant relief in the Mixnote Investments case, (*supra*), the court had this to say, at p 6 of the cyclostyled judgment:

> "In my view, the applicant has an arguable case on review. If the 1st respondent is allowed to continue extracting gold from the mine the applicant will suffer prejudice if the matter is eventually decided in its favour. The solution is to stop all mining activities there until the review application is determined.
>
> Accordingly the provisional order is hereby granted in terms of the amended draft."

However, as indicated under the point *in limine* on the propriety of the draft order, the court may grant such an order with or without variation. What the applicant wants is essentially a stay of execution of the impugned determination of 8 January 2024. The effect of such stay is to confine the two parties to their respective block of claims, the *status quo ante* the determination of the 8th of January 2024. This will be the position until the return day, when the provisional order will either be discharged or confirmed on such terms as the judge seized with the matter considers appropriate.

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

1. **<u>TERMS OF THE FINAL ORDER SOUGHT</u>**

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

1. The first, second and fourth respondents together with their employees and/or agents and/or assignees are hereby interdicted from interfering with and/or or carrying out mining operations at Chifumbi 2 Mine (Registration Number 1688G) pending the finalisation of an application for review filed under Case Number HCH 319/24.
2. The second respondent shall pay costs of this application on an attorney and client scale.

2. **<u>INTERIM RELIEF GRANTED</u>**

Pending the determination of this matter and on the return day the applicant be and is hereby granted the following relief:

1. Execution of the first respondent's order of the 8th of January 2024 be and is hereby suspended.
2. The second respondent together with her employees and/or assignees and/or agents be and are hereby interdicted from carrying out mining activities and/or operations or interfering with operations at Chifumbi 2 Mine (Registration Number 1688G).

Farai & Associates Law Chambers, applicant's legal practitioners
Tapiwa & Associates, second respondent's legal practitioners
Civil Division Attorney General's Office, first, third and fourth respondents' legal practitioners