

HB 316-18
HC 3098/18
XREF HC 2631/18, HC 1839/18
XREF HC 1421/18 & HC 629/18

WEST NICHOLSON YOUTH IN MINING ASSOCIATION
versus
MPUMELELO NYONI
and
PAUL GWANANGARA
and
NATSAI FAITH NCUBE
and
PROVINCIAL MINING DIRECTOR MATABELELAND SOUTH N.O
and
THE OFFICER IN CHARGE- WEST NICHOLSON N.O

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 28 NOVEMBER 2018 AND 6 DECEMBER 2018

Urgent Chamber Application

Mrs *P Gustavo* with *S Nkomo* for the applicant
Z Ncube for the 1st, 2nd & 3rd respondents
P Taruberekera for the 4th & 5th respondents

MAKONESE J: The West Nicholson Youth in Mining Association was established with the objective to empower the youth and create employment in the community of West Nicholson. One of the stated objectives of the association is the promotion of safe mining to ensure that ethical mining conditions are maintained. What began as a noble project has now led to several disputes which have spilled into the courts.

This is an urgent chamber application for the following relief:

“INTERIM RELIEF

Pending the return day applicant is granted the following relief:

1. 4th respondent subject to compliance with statutory requirements be and is

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hereby ordered to provide applicant's representatives with all relevant documents to enable applicant's members to carry out mining activities at West Nicholson B Mine within 24 hours of service of this order.

2. The 5th respondent be and is hereby ordered to release the gold ore stored at West Nicholson Police Station to the applicant's representative being Mhlaba Nkomo.

TERMS OF FINAL ORDER SOUGHT

3. 1st, 2nd and 3rd respondents are barred from unlawful interference with mining activities of the applicant.
4. 1st, 2nd and 3rd respondents to bear the costs of suit on an attorney and client scale."

The application is opposed by the respondents who have raised a number of preliminary points. I shall deal with these points *in limine*.

Urgency

The respondents contend that the matter is not urgent and that the certificate of urgency is a regurgitation of the urgent chamber application. The applicant avers in the founding affidavit that on the 5th October 2018 an application was made to the 4th respondent seeking permits for the movement of gold ore. On the 5th November 2018 the 4th respondent declined to issue the permits and indicated their office awaited the outcome of an Application for a Declaratur filed in this court. The applicant avers that due to the stance taken by 4th respondent the gold ore piled at Nicholson B Mine exposes them to serious risk of theft of the ore. Further certain individuals aligned to the respondents have attempted to steal the gold ore. It is my view that the matter is urgent and the prevailing situation where gold ore is mined and kept in the open presents a security risk moreso, given the fact that there is a raging dispute between the parties..

Failure to disclose material facts

The respondents contend that the applicant deliberately chose to leave out pertinent issues regarding the dispute. In particular respondents allege that applicant ought to have disclosed that there was an abortive meeting held on 28th August 2018 which had been arranged for the parties to meet at the office of the 4th respondent. It is also contended by the respondents that the

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applicant failed to disclose the fact that a similar application was filed under case number HC 2180/18 on the 9th August 2018 but later withdrawn. The applicant argued that there was no relevance in disclosing the abortive meeting because it never in fact took place. The applicant infact stated that the meetings called by the respondents are simply meant to delay the finalization of the matter. The desperation of the applicant is reflected in a letter addressed to the 4th respondent on 5th October 2018 in the following terms:

“We act for and on behalf of West Nicholson Youth in Mining Association, please note our interest.

As per your request on the 4th instant, we have attached herewith documents to facilitate with issuing of licensing permit to enable our clients to resume normal operations.

Kindly find attached herewith documents for your perusal and information to enable you to prepare the relevant licences and permits.

- (i) judgment by Justice Takuva*
- (ii) Confirmation of the Provisional Order*
- (iii) Tribute Agreement*
- (iv) Copy of Constitution of West Nicholson Youth in Mining Association.*

Then, we further attach the following documents for comprehensive insight to the legal position of the matter from other relevant parties:

- (i) Two letters from Mesrss Web Low and Barry legal practitioner who represent Farvic Consolidated Mines (Pvt) Ltd clearly stating that they abide by the court decision which was eventually in favour of client.*
- (ii) A Judgment by Justice Mabhikwa clearly rebuking the application by Mpumelelo Nyoni and 6 others, which he then dismissed.*

Emphasis must be placed on the fact that the recent court application for a Declaratur by Mpumelelo Nyoni and 6 others does not stop or suspend the mining operations by the Association, and in any event, there is a binding court order allowing the Association to resume mining operations. Further the current application under case number 2631/18 does not seek the stopping of the mining operations.

We hope this meets your requirements to furnish ours with relevant prospecting licences and permits to ensure that normal operations resume at Nicholson B Mine ---.

*Yours faithfully
 Joel Pincus and Wolhuter.”*

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It is clear from this correspondence that the applicant did not fail to disclose all the material facts relevant to the matter. I do not think the objective of the applicant was to hide any information regarding the background of the matter.

Apparent falsehoods

The applicant argues that the matter is urgent in that there was an attempt by agents of the respondents to steal the gold ore. In their response the respondents unwittingly confirm that they are signatories to the Tribute Agreement and that therefore they would not steal gold ore they are authorized at law to transport and dispose of in terms of the law. It would seem that the respondents have indeed made such attempts to remove the gold ore as they consider themselves to be entitled to it. There is no basis for alleging that this application is based on falsehoods.

I am satisfied that the *points in limine* raised on behalf of the respondents have no merit have simply been raised to create doubt and confusion in the mind of the court.

Merits

The requirements for an interim interdict have been stated and restated in several cases. In *LF Boshoff Investments (Pty) Ltd v Cape Town (Municipality) Ltd* 1969 (2) SA 256 (C) CORBETT J at p267 B-D, set out the standard test as follows:

- “Briefly, these requisites are that the applicant for such temporary relief must show-*
- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established though open to some doubt;*
 - (b) that if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and that he ultimately succeeds in establishing his right;*
 - (c) that the balance of convenience favours the granting of interim relief, and*
 - (d) that the applicant has no other satisfactory remedy.”*

See also: *Nyika Investments (Pvt) Ltd v Zimasco Holdings (Pvt) Ltd & Others* 2001 (1) ZLR 212 and *Zesa Staff Pension Fund v Mushambadzi* SC 57/02.

On the facts of this application the applicant has established a *prima facie* right. The applicant has entered into valid tribute to mine and exploit gold ore. There is no dispute that the

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applicant is entitled to exercise its mining rights. The respondents have judgments entered against them that remain extant. The 4th respondent has taken the view that it ought to wait for the resolution of an application for a declaratur filed on behalf of the respondents. The view held by the 4th respondent is rather strange in that the court has pronounced itself on the applicant's rights. There is therefore no reason to withhold the issuance of the relevant permit to the applicant to enable it to carry on with mining activities. I have already indicated in this judgment that it is not appropriate for gold ore to be extracted from the ground and then stockpile it. This creates an unnecessary security risk. Irreparable harm has been demonstrated by the attempts to steal and dispose of the gold ore by respondents or their agents. The balance of convenience is clearly in favour of the applicant.

In the circumstances, the requirements for interim relief are satisfied. I would grant the order sought as prayed in the Draft Order.

Joel Pincus, Konson, applicant's legal practitioners
Ncube and Partners, 1st, 2nd, 3rd respondents' legal practitioners
Civil Division, Attorney General's Office, 4th & 5th respondents' legal practitioners