

QUARRYING ENTERPRISES (PRIVATE) LIMITED  
versus  
SOUTHERN GRANITE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
MANZUNZU J  
HARARE, 18 & 20 December, 2018

### **Urgent Chamber Application**

*Advocate T. Mpofo with G. Ndlovu & H. Muza, for the applicant*  
*S. Moyo with B. Mahuni & M K Mafo, for the respondent*

MANZUNZU J: This is a chamber application in which the applicant seeks relief in the following terms:

#### **“TERMS OF FINAL ORDER SOUGHT**

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

1. The provisional order herein be and is hereby confirmed.
2. The respondent, its employees and all those claiming occupation of the boundaries falling within applicant’s claim number 26736BM be and are hereby ordered to vacate from the boundaries of the claim within five (5) days of this order.
3. In the event of the respondent failing to vacate in terms of paragraph 2 herein, then the Sheriff or his lawful deputy be and is hereby authorised to evict the respondent and all those claiming occupation through from the boundaries of claim 26736BM.
4. The respondent’s mining operation on applicant’s claim, claim number 26736BM be and have hereby declared to be unlawful.
5. The respondent to meet costs of this application on a legal practitioner and client scale.

#### **INTERIM RELIEF GRANTED**

Pending the determination of this matter, it be and is hereby ordered that:

1. The respondent be and is hereby ordered to cease mining operations from the boundaries of claim number 26736BM, or cancelled claim number 32675BM.
2. The respondent be and is hereby ordered to refrain from selling, exporting or in any way dealing with granite mined from applicant's claim number 26736BM, or cancelled claim number 32675BM.
3. The respondent, its employees, agents and all those acting through it be and are hereby ordered to refrain from all mining operations on the boundaries of claim number 26736BM, or cancelled claim number 32675BM.

#### SERVICE OF PROVISIONAL ORDER

This provisional order shall be served upon the respondents by service on the respondents directly or upon their legal practitioners by the applicant's legal practitioners or a duly authorised agent.”

The application is opposed with the respondent raising a preliminary point that the application is not urgent.

At the hearing, with the concurrence of both Advocate *T Mpofo* for the applicant and Mr *S Moyo* for the respondent, I allowed them to argue both the issue of urgency and the merits of the application. This was on the understanding that the court will then determine the issue of urgency first and if the matter is found to be urgent then proceed to decide on the merits.

#### BACKGROUND

Both parties are juristic, being registered companies which are into the business of mining granite mineral. Their conflict is in respect to the mining location. It is not in dispute that applicant is the registered holder of claim number 26736BM and the respondent owned claim number 32675BM before its disputed cancellation by the Minister of Mines. Following a dispute over the boundaries of these two claims there was intervention by the Acting Provincial Mining Director, Mashonaland East based in Marondera, who wrote a letter on 4 April 2018 to the respondent. The letter was copied to the applicant. I reproduce the contents of the letter hereunder;

“4 April 2018

SOUTHERN GRANITE /ILFORD SERVICES (PVT) LTD  
Attention Mr Heraldo.F. Lamounier

**REF: NOTICE OF INTENTION TO CANCEL CERTIFICATE OF REGISTRATION  
NUMBER 32675BM FOR SOUTHERN GRANITE/ILFORD SERVICES**

Following a complaint from Quarrying enterprises that there is an over pegging on their claim registration number 26736BM, this office invited the disputants to the office to discuss the alleged issue of over pegging with yourselves and with the help of the surveyors in this office. It was discovered indeed that the blocks are over pegging each other on the public map. It was also discovered that Quarrying Enterprises were the prior pegger.

In view of the above this office intends to cancel certificate of registration number for southern Granite in terms of section 50 subsection (2) of the Mines and Minerals Act Chapter 21:05. The reason being that when the block was registered the area was not open to prospecting and pegging thus section 31 of the Mines and Minerals Act was violated.

If you are aggrieved by this determination you may appeal to the Minister of Mines within 30 days of receipt of this letter.

Your cooperation in this matter will be greatly appreciated.

Mrs G. Chacha, Acting Provincial Mining Director-Mash East  
For Secretary of Mines and Mining Development  
cc Quarrying Enterprises”

The respondent started mining at the disputed location in 2014 a position it claims was known to the applicant. While the respondent disputes that there was a hearing before the Provincial Mining Director her letter says the parties were heard before a decision was taken to cancel the certificate of registration for the respondent. The letter ended with the advice to the parties of their right of appeal against the decision to the Minister of Mines.

Indeed on 25 April 2018 an appeal against the decision of the Provincial Mining Director was lodged with the Minister of Mines. The applicant also made submissions to the Minister in respect of the appeal on 31 May 2018.

While the appeal was pending before the Minister of Mines, the applicant filed an application before the Mining Commissioner for an injunction in terms of s 354 of the Mines and Minerals Act [*Chapter 21:05*].

In the application before the Mining Commissioner the applicant sought an order in the following terms:

“1. An injunction against the respondent and in favour of the applicant be and is hereby granted in the following terms:

- 1.1 That the respondent be and is hereby interdicted from prospecting, extracting, mining and or removing any granite mineral, or ore, or any other substance that it is currently mining on claim numbers 267336 BM and 32675 BM pending determination of the appeal currently before the Minister of Mines and Mining Development.
- 1.2 That the respondent pays the applicant's costs in the events that it opposes this application."

The relief sought before the Mining Commissioner in substance is more or less the same relief which is being prayed for in the present application.

On 6 December 2018 in a written letter to the respondent the Minister of Mines communicated his decision on the result of the appeal. The same was copied to the applicant. The letter ended with a sentence; "The certificate of registration for Southern Granites (Pvt) Ltd's Mutuwi Mine Registration Number 32675 BM is therefore cancelled."

On 4 December 2018 the Provincial Mining Director wrote a letter to the applicant communicating the Minister's decision. The letter was not copied to the respondent and it was written earlier than the date when the Minister communicated his decision. The letter carried with it an obvious error to say certificate registration number 26736BM was cancelled when it is clear from the Minister's decision that what was cancelled was certificate registration number 32675 BM. The letter further went on to say "Southern Granite (Pvt) ltd should, with immediate effect, stop all mining activities within the boundaries of Mutuwi 5, and remove all mining equipment."

Obviously, this was not part of the Minister's decision of the appeal. The error for the cancelled certificate of registration as *per* Provincial Mining Director's letter of 4 December 2018 was corrected by the Minister's letter of 6 December 2018.

Having said all this, the question is, is the matter urgent such as to warrant its hearing on urgency.

#### URGENCY

The respondent content that the matter is not urgent. The applicant maintained it was urgent.

The test for urgency is settled. In *Kuvarega v Registrar General & Anor*, 1998 (1) ZLR 188 at 193 F CHATIKOBO J (as he then was), may his soul rest in peace, had this to say: "what

constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules.”

In *Boniface Denenga & Anor v Ecobank Zimbabwe (Pvt) Ltd & 2 Others* HH 177-14 MAWADZE J identified a common thread in the case which dealt with the issue of urgency. At p 4 of the cyclostyled judgment he stated thus;

- “The general thread which runs through all these cases is that a matter is urgent if,
- (a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought.
  - (b) There is no other alternative remedy.
  - (c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good and sufficient reason for such a delay.
  - (d) The relief sought should be of an interim nature and proper at law.”

The question is, when did the need to act arise. The applicant says the need to act arose when the decision of the Minister was made on 6 December 2018, and moreso that the act of taking the Minister’s decision for review does not have the effect to suspend it. Neither does an appeal against the decision of Provincial Mining Director suspend his decision.

Mr *Moyo* argued that the need to act arose on 4 April 2018 when the Provincial Mining Director expressed an intention to cancel. The facts and circumstances of this matter are clear that the need to act arose on 4 April 2018. The applicant genuinely believed that the decision of the Provincial Mining Director of 4 April 2018 had the effect to render the mining operations of the respondent illegal. This is clear from the action taken on 25 June 2018 when an application was filed with the Mining Commissioner to interdict respondent from operating. That application, Advocate *Mpofu* advised, could not proceed as the Mining Commissioner felt an appeal had to go through first. But that did not remove the belief from the applicant that the operations by the respondent were illegal and must be arrested. There was nothing to stop the applicant to file an urgent application as soon as it realized that the respondent had not stopped operations following the decision of 4 April 2018 by the Provincial Mining Director. The applicant knew an appeal by the respondent did not have the effect to suspend the decision of the Provincial Mining Director. And applicant knew the application for injunction before the Mining Commissioner was not going to proceed before the outcome of the appeal. To then say the outcome of an appeal is the one which

justifies this application as urgent is not correct. The situation which called for the need to act was there before the appeal and the applicant sat on its laurels. To wake up now from a deep slumber claim urgency is what CHATIKOBO J described as “urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules.”

This matter cannot be allowed to cross the bridge at a privileged speed, it does not deserve to jump the queue.

Consequently;

It is ordered that

1. The matter is not urgent and is struck off the roll of urgent matters with costs.

*Gill Godlonton & Gerrans*, applicant’s legal practitioners  
*Messrs Scanlen & Holderness*, respondent’s legal practitioners