S. D MINING SYNDICATE
and
NGONIDZASHE NYEVERA
and
THE PROVINCIAL MINING DIRECTOR (MASHONALAND)
WEST PROVINCE) N.O.
and
THE MINISTER OF MINES AND MINING DEVELOPMENT
NO.
and
THE MINISTER OF LANDS, AGRICULTURE AND
RURAL RESETTLEMENT (N.O.)

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 23 November, 2021 & 22 March 2022

Urgent Chamber Application

Mr S Ushewokunze, for the applicant
Mr A Masango, for the 1st respondent
Civil Division, for the 2nd, 3rd and 4th respondents

MUNGWARI J**:** The applicant approached this court on an urgent basis seeking the following relief:

- Terms of the final order sought

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

  1. The provisional order be and is hereby confirmed into a final order;
  2. The Applicant has exclusive mining rights over Trafalgar 'A' Mine Battlefields, Kadoma, Registered No. 2461 (hereinafter called 'Trafalgar Mine') in terms of its extant tribute agreement with Geodynamics (Pvt) Ltd dated 1 May 2020.
  3. The first Respondent has no mining or other rights over Trafalgar Mine.
  4. The first respondent and anyone claiming occupation through him vacate Trafalgar Mine forthwith.

5. The first Respondent pay costs of suit at attorney and client scale.

- Terms of interim relief sought

It be and is hereby ordered that pending the confirmation or discharge of the Provisional Order:

1. The first respondent, his agents, employees and/or assignees be and are hereby interdicted from:
   1.1 Interfering with, or disrupting, the Applicant's or Applicant's agents' mining operations at Trafalgar 'A' mine Battlefields, Kadoma, Registered No. 2461 (hereinafter called 'Trafalgar Mine');

   1.2 Removing or processing any gold ore from or carrying out any mining or other activity that interferes with the Applicant's use and occupation of, Trafalgar Mine.
2. Costs shall be in cause.

On 1 May 2021, the applicant and Geodynamics (Pvt) Ltd entered into a tribute agreement where the latter granted mining rights to the applicant over a mining location known as Trafalgar Mine 'A' (hereinafter called Trafalgar mine). The agreement was valid for 3 years. It was a term of the agreement that the applicant would enjoy exclusive mining rights at the location throughout the subsistence of the arrangement. In the year following the signing of the tribute agreement, the applicant carried out mining activities without incident. Around 8 or 9 November 2021 the peaceful operations at the mine fell into jeopardy. The first respondent and some brigands disrupted mining activities at Trafalgar Mine.

The applicant alleged that the incidents of violence and damage to property at the mining location resulted from first respondent's claims that the location of the mine interfered with his farming rights conferred by the offer letter which he possessed. On that basis, the applicant threatened David Jeri one of the applicant syndicate's members. It was further alleged that applicant's motor vehicle tyres were deflated. A member of its security team was assaulted with an iron bar by one of the marauders hired by first respondent. The applicant reported these incidents to the police. The assailants were summonsed to appear in the criminal courts at Kadoma under court reference number BF 2651/21.

In furtherance of the disturbances and in a bid to demonstrate effective control of the location, the first respondent erected a fence around the mining area. He did not only commence mining at the location but also started processing the gold ore which the applicant had already extracted. He went as far setting up a milling plant which included the installation of a machine referred to as a hammer mill and a compressor. To cap it all he hired several people to work the mine.

Applicant now contends that the first respondent is unrelenting even in the face of the police reports and criminal charges which are pending at the courts. On one hand, the illegal mining activities continue unabated whilst on the other the first respondent has increased his threats to unleash more violence on anyone who resists. Against this background, the applicant says it now harbours the apprehension that because of the actions of 8 & 9 November 2021 and subsequent threats first respondent will not stop his illegal invasion of its mine and fulfil his threats of violence.

The applicant argues that it has been left with no alternative but to approach this court seeking a prohibitory interdict to safeguard its interests, the safety of its personnel and assets as well as maintain the status quo ante.

In opposing the application, the first respondent argued that he holds prospecting rights over his farming area on Plot 93, Trafalgar Farm. He filed an opposing affidavit in which he did not deny having sunk 2 mining shafts on the plot. He further did not deny installing mining equipment thereat. He contended that he holds both farming and mining rights over the plot where Trafalgar Mine is situated. The issue, so he argued, between him and the applicant is nothing but a boundary dispute. That dispute, in his view, ought to be referred to second, third and fourth respondents for resolution. Those respondents are the relevant authorities vested with authority to resolve such disputes.

On their part, the second, third and fourth respondents through *Mr Machingauta* from the Civil Division of the Attorney-General's office chose not to file any opposing papers. During the hearing they all indicated that they were not opposed to the relief being sought and would therefore abide by the court's decision.

The applicant and the first respondent remained as the main protagonists.

Preliminary objections

In opposing the application, the first respondent raised 3 grounds of objection. These were not specifically pleaded as such. The court had to sift them from the melee which signified the first respondent's papers. They are the following.

1. That applicant has no *locus standi*
2. Non joinder
3. That the application is not urgent

I turn to deal with the issues seriatim.

1. <u>That applicant has no *locus standi*</u>

The first respondent argued that the deponent of the founding affidavit one David Jeri had no authority to represent the applicant because he was not nominated for that purpose. In his argument, the applicant had not attached any evidence that the applicant had undertaken the process of nominating the said David Jeri to represent it. It rendered David Jeri's founding affidavit a nullity. In essence, so the argument went the applicant had no authority to sue.

This is an issue which the courts have previously dealt with. Its resolution should therefore not detain the court for longer than necessary. Clearly the first respondent argues from an ill-informed basis. As held by this court in the case of *IBI Mineral Resources (Pvt) Ltd* v *Time of Hope Mining Syndicate and Others HH 85/22* Rule 11 of The High Court Rules, 2021 clothes syndicates with the authority to sue and be sued in their own names as if they were juristic persons. What is critical however is that the object of the rule is simply to ensure procedural convenience. It is not intended to bestow corporate status on associations, syndicates and like bodies. Those remain unincorporated entities. The rule provides as follows:

> ***11. Proceedings by or against firms and associations***
>
> (1) In this rule— "associate" in relation to—
>
> (a) A trust, means a trustee;
>
> (b) An association other than a trust, means a member of the association;
>
> "association" means any unincorporated body of persons, and includes a partnership, a syndicate, a club or any other association of persons;
>
> (c) …
>
> "Plaintiff" and "defendant" include applicant and respondent; "sue" and "sued" are used in relation to actions and applications;"

It needs no emphasis that the rule envisages the applicant as an association. That a syndicate remains without corporate status means it does not require a resolution allowing it to sue and be sued in its own name. Essentially it simply means the constituent members of the syndicate can sue using the syndicate's name. ZHOU J put this beyond doubt in the case *Roselex Mining Syndicate* v *D Gari & Ors* HH680/20 at p. when he held that:

> "The second ground of objection pertaining to the authority from Roselex Mining (Pvt) Ltd also fails because the syndicate, not being a juristic persona, requires no resolution. This is so because in essence it is the associates suing in its name."

In *casu,* David Jeri the deponent of the founding affidavit did not need any resolution from the syndicate. He could as he did sue in the name of the syndicate. The applicant correctly argued further that regardless of the position of the law on this aspect the individual members of the syndicate are David Jeri and Spencer Tshuma. Both deposed to affidavits. Whilst David Jeri filed the founding affidavit Spencer Tshuma filed a supporting affidavit. Put differently if any authority was required (which wasn't), it had been provided by the only two members of the syndicate attesting that indeed it was the syndicate suing. Resultantly the objection is without merit.

2. <u>Non-Joinder</u>

The respondent contended that the applicant ought to have cited Geodynamics which owns the mining block in question.

There is no basis to this assertion by the respondent as citing the syndicate itself was sufficient. It is the one that is aggrieved by the actions of the respondent.

The law regarding the non-joinder of a party to proceedings is a well-trodden path. It was succinctly spelt out by GARWE JA (as he then was) in the case of *Wakatama and Others* vs *Madamombe* 2011 (1) ZLR at p 18 A-D when he stated thus:

"Whether the non-joinder of the Minister is fatal need not detain the court and can easily be disposed of by reference to r 87 of the High Court Rules which provides:

> 1. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party, and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the persons who parties to the cause or matter are.
> 2. At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application-
> (a)……
> (b) Order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party".

Save to say that the applicable rule is now Rule 32, the above dictum applies to the present case with equal force.

In *casu* the non-joinder of Geodynamics to these proceedings should not impede the court from determining this matter. In any case the remedy for non-joinder is not simply to oppose a cause. It is provided for in in R32 (8) of the High Court Rules. A party who is aggrieved by the non-joinder of another party must proceed in terms of that rule by making the

necessary application for the joinder of that other party. See *Mwazha and 9 Others* v *Mhambare* SC 116/21. The first respondent elected not to pursue that remedy. If he was serious that the non-joinder of Geodynamics was fatal to these proceedings the remedy lied squarely in his hands. He cannot be heard to seek to impeach this application based on his own ineptitude.

Cognisant of this the court is of the firm view that it was not necessary for the matter to be stalled on the issue of whether Geodynamics (Pvt) Ltd ought to have been joined to the proceedings.

3. Urgency

First Respondent perfunctorily raised the issue that the application was not urgent in his opposing affidavit. He simply mentioned in passing that the matter was not urgent. At the hearing counsel appearing for the first respondent at first remained mum on the issue. When the court inquired if the argument was being persisted with, both counsel for first respondent and for applicant admitted that it was not. Clearly therefore the objection that the matter is not urgent stands abandoned.

Having dismissed all the preliminary objections, the court considered the application on the merits.

The Merits

Establishment of prima facie right

The law is settled that in seeking to obtain a provisional interdict an applicant is expected to show that the right which he or she seeks to protect is either clear or, if not clear, is *prima facie* established though open to some doubt, that no authority is required for that proposition.

The starting point in consideration of the application on the merits is to note that the applicant submitted documentation proving the existence of its tribute agreement with Geodynamics (Pvt) Ltd. It was that tribute agreement which conferred the applicant with mining rights at Trafalgar Mine. It also attached a certificate of registration and a valid inspection certificate.

The first respondent did not any way challenge the tribute agreement. Rather he sought to raise the separate issue of a boundary dispute.

To support his position, the first respondent produced a prospecting license, a prospecting notice, a registration notice and a somewhat obscure map of GPS coordinates. As will be demonstrated below the first respondent's documents raised more questions than answers.

The applicant attacked the prospecting licence attached to the notice of opposition as Annexure E on the basis that it is neither dated nor stamped by the second Respondent's office. The prospecting licence and registration notice were equally suspicious due to lack of authentication by the relevant authority. They bore no stamp from the office of their purported issuance. The applicant added that it was curious that all those documents were issued on 26 July 2021.

The first respondent did not attempt to produce the original copies. There was equally no attempt to explain the discrepancies which were noted on the documents. Given that the court was left with no choice but to draw the only reasonable inference in those circumstances, that the purported mining documents were possibly not authentic.

Prospecting rights vs Mining rights

Further the applicant argued that it is not possible for one to prospect on an already identified and demarcated mining location. That argument is unassailable. Section 31 of The Mines and Minerals Act *[Chapter 21:05]* (the Act) provides that:

> **31 Ground not open to prospecting**
>
> (1) Save as provided in Parts V and VII, no person shall be entitled to exercise any of his rights under any prospecting licence or any special grant to carry out prospecting operations or any exclusive prospecting order—
>
> *(a)* …
>
> *(b)* upon any mining location, other than one in respect of which he may have acquired the exclusive right of prospecting under such licence or special grant or exclusive prospecting order;

Counsel for the first respondent said nothing in rebuttal of that point. He could not possibly have said anything in contradiction of such a clear legal provision. The long and short of it is that it was not possible for the first respondent to exercise any prospecting rights over Trafalgar Mine because it is a mining location.

The Cambridge English Dictionary (2022) defines the word prospecting to mean "*search for mineral deposits especially by drilling and excavation."* The provisions of section 27 and section 41(5) of the Act are in accord with this definition. Clearly prospecting simply means the identification of mineral deposits through the methods indicated. It is a process that is different from mining which involves the extraction of minerals from the ground. The reason why the Act prohibits prospecting on a mining location must be obvious. Mining can only take

place where mineral deposits have already been identified. It makes no sense therefore for anyone to seek to identify mineral deposits where they would have already been so identified.

Even if the first respondent were to be given the benefit of doubt that he could prospect at Trafalgar Mine in terms of his prospecting licence, the question which begs answers is whether the activities he was undertaking at the mine were still within the realm of prospecting. He opened two mining shafts. That activity is not consistent with the simple exercise of prospecting. That he further installed a hammer mill and a compressor amongst other mining equipment puts it beyond doubt that he exceeded the bounds of prospecting if at all he had that right. He clearly, was undertaking mining activities. The first respondent accepts that he does not have mining rights. Based on the refutable and suspect evidence which he provided in his papers the first respondent at the very best simply had prospecting rights. But as already said prospecting rights in terms of the Act cannot be exercised over a mining location.

The provisions of section 177(3) of the Act are also pertinent. The section provides that mining rights acquired earlier supersede those acquired later. The first respondent came to the location sixteen years after the applicant. Whatever mining rights he may claim will therefore be subordinate to those of the applicant.

Lastly, the prospecting licence and notice that first respondent alleges to possess gave him prospecting rights with a lifespan of only thirty-one days. The prospecting notice that first respondent attached to the opposing affidavit states the following;

> "Notice is hereby given that that the undersigned, being lawfully entitled to act under prospecting license number 016487AA issued at Mines office at Chinhoyi to Ngonidzashe Nyevera hereby claims for a period of thirty -one days, each of twenty-four hours, from the undermentioned time of posting this notice…."

Section 41(5) of the Act equally prescribes that the lifespan of a prospecting licence is thirty-one days. The holder of such rights must renew them after the lapse of the stipulated period. The first respondent's notice was issued on 26 July 2021.When the skirmishes occurred in November of the same year, its validity had long lapsed. He cannot claim to still be an exclusive holder of prospecting rights as defined in the Act.

In the face of these findings the first respondent is left clinging on to farming rights - which the applicant does not dispute he has.

Mining rights vs Farming rights

As already stated, both the applicant and the first respondent placed before the court their respective rights. I have already found that whilst the applicant indisputably proved his mining rights over Trafalgar Mine through the production of the various documents already referred to, the first respondent dismally failed to lay any claim to the mining location.

To prove his farming rights, the first respondent attached his A1 offer of Land Confirmation Letter dated 10 February 2014.The offer letter relates to plot 93 on Trafalgar farm. It measures 6 hectares. The applicant did not dispute this. Its argument on these competing interests was that the long acquired mining rights take precedence over the newly acquired farming rights.

To put this into perspective Geodynamics which ceded its mining rights to the applicant via their tribute agreement, acquired mining rights over Trafalgar Mine some sixteen years ahead of the first respondent's acquisition of farming rights in 2014.

An analysis of the first respondent's opposing affidavit shows that he acknowledges that the applicant has exclusive mining rights. The first respondent's farming rights, undisputed as they are; do not bestow mining rights on him. Once that is settled, the talk of there being a boundary dispute becomes illusory. Boundary disputes in relation to mines can only arise where the two brawling parties both have mining rights. There cannot be such a dispute where one holds mining rights and the other relies on farming rights.

In the circumstances, I am satisfied that the applicant has demonstrated that it is the holder of the right to the mining claim in question through its tribute agreement with Geodynamics. As such it has ably shown the existence of prima facie right as required by law.

Well-grounded apprehension of irreparable harm or injury

The chronology of events and the disturbances that occurred at Trafalgar Mine have already been described. What is important to note is that thefirst respondent did not dispute that those disturbances occurred on the dates alleged. He did not also dispute that as it stands, he and his proxies have pending criminal cases at Kadoma Court arising from those skirmishes. He also chose to remain silent regarding the alleged police reports and malicious damage to property as well as the alleged assaults on the applicant's security guards. As is accepted at law, that silence must be construed as acquiescence to the allegations. That which is not specifically denied must be taken as accepted. The first respondent's only excuse is that it

wasn't him who had caused the disturbances. Rather he alleges that it was the applicant who came to his farm and started opening mining shafts.

Despite that allegation, the totality of the evidence leaves me with no doubt that indeed there were disturbances at Trafalgar Mine as alleged by the applicant. The first respondent stoked the fumes that caused the disturbances when he sought to overstep the rights conferred to him by the letter offering him land for agricultural purposes and sought to venture into mining on a location which belongs to the applicant. His confirmation, in paragraph 12 of his affidavit, that he sunk two mining shafts and brought other mining equipment on to the land is equally damaging and puts beyond doubt his aggression from which the applicant seeks him to be interdicted.

The applicant further averred that first respondent has not only caused the harm described but is threatening even more disruptions at the mine. He has also vowed to continue illegally mining from the disputed location. The applicant equally harbours the fear that the first respondent will continue to pillage its 1000 tonnes of ore already extracted from the disputed location.

Under these circumstances it is not unreasonable for the applicant to apprehend that irreparable harm could be occasioned if the court does not move in to interdict the first respondent from continuing with the illegal activities.

Balance of convenience

In this case, there is no balance of convenience to talk of. The first respondent is simply an invader on the mining location. He clearly has no entitlement to protect. The balance of hardship favours the applicant which stands to suffer not only from disruptions to its mining operations but will continue losing its mineral resources if the first respondent is not interdicted from continuing with these illegalities.

Availability of other remedies

Respondent alleges that the available remedy for applicant would be to refer the matter to the relevant authorities for a resolution of the boundary dispute. That in the court's view is a simplistic approach. The law does not simply require that there be a remedy. Instead, the remedy must be both adequate and effective. Referral of the dispute to a regulating authority cannot be considered adequate or effective in this case. The applicant cannot sit back and watch whilst it is stripped of its resources and assets. The criminal reports made have failed to

deter the respondent. It is unimaginable that a referral of the dispute to a regulating authority would slow him down. The first respondent appears unrelenting and continues to threaten to unleash more violence to disrupt applicant's activities on the mine. The exigencies of the matter therefore call for urgent action and the employment of the extra-ordinary remedy of a provisional interdict which no other authority other than the courts can award. As such the applicant clearly has no adequate and effective remedy other than to seek this provisional interdict.

I am therefore satisfied that the applicant made out a case for the relief it seeks.

Disposition

Accordingly, a provisional order is granted in terms of the draft.

Ushewokunze Law Chambers, applicant's legal practitioners
Muronda Malinga Legal Practice, first respondent's legal practitioners
Civil Division, second, third & fourth respondent's legal practitioners