MAGRET KASONGO
And
NETSAI MUKWATURI
And
MACHAKARI MASHAMANDA
And
FRADRECK NYIKA

Versus

MUROWA DIAMONDS (PVT) LTD
And
MINISTER OF MINES & MINING DEVELOPMENT
And
MINISTER OF PRIMARY & SECONDARY EDUCATION

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 12 March 2020 and 20 May 2020

Opposed Application: Interdict

M. Mureri, for the applicants
T. Zhuwarara, for 1st respondent
T. Undenge, for 2nd respondent

ZISENGWE J: This is an application for an interdict wherein the applicants seek in the main an order barring the 1st respondent from continuing with their mineral prospecting activities on a certain piece of land situate in the Chivi communal lands. The four applicants are all parents or guardians of leaners at two schools (Danhamombe Secondary school and St Simon Zhara primary school) on whose premises part of the prospecting is taking place. I briefly pause here to observe that the parties used the term "exploration" to refer to the 1st respondent's prospecting activities.

The 1st respondent is a company duly incorporated in terms of the laws of Zimbabwe. It would appear from the papers filed of record that its main business is prospecting for minerals and mining and, hence the prospecting earlier stated.

The 2nd respondent on the other hand is the Minister of Mines and Mining development. He heads the ministry responsible for the regulation and superintendence of mining activities in the country.

The 3rd respondent is the Minister of Primary and secondary education. He was cited as a respondent because the dispute in question relates to alleged infringements by the 1st respondent on school and educational activities.

In brief the background to this application is as follows. The 1st respondent which is a subsidiary of RIOZIM (private) Limited has been conducting prospecting work in the area on or adjacent to the premises of the schools referred to above. They do so in the basis of what the 2nd respondent describes as "286 registered [diamond] mining blocks in the Chibi and Mshawasha communal lands" registered with it (i.e. 2nd respondent) between 2000 and 2001".

According to the applicants, the 1st respondent's prospecting activities generate unbearable noise incompatible with a proper learning environment. As if that is not bad enough, so the applicants aver, the exploration activities of the 1st respondent have resulted in considerable damage to some critical school infrastructure such as water pipes.

The applicants further aver that efforts to resolve the issue amicably with 1st respondent have proved fruitless leaving them as parents and guardians of some of the affected students with virtually no other option but to approach the courts and seek relief in the form of an interdict.

Initially the applicants launched a two -pronged attack on the 1st respondent's mineral exploration activities in or near the premises of the schools in question; the first leg being the noise complaint as alluded above. The second leg of the application was that the 1st respondent had neither sought nor obtained the consent of the authority responsible for either school something it was required to do before the commencement of its prospecting activities as required by section 31 of mines and minerals Act, *[chapter 21:05]* (the Act). It would also appear that the applicants are alleging that the 2nd and 3rd respondents are complicit in permitting the alleged transgressions at the two schools and want them ordered to stop being so permissive.

The applicants therefore sought an order in the following terms:

"wherefore, after hearing counsel and reading the document filed of record

It is hereby ordered that:

1. The first respondent is interdicted and restrained from carrying out mining activities at St.Simon Zhara Primary school and Danhamombe Secondary School premises and grounds.
2. The first respondent removes its machinery and move out of the school premises and grounds.
3. The first respond [is] interdicted and restrained from using school property including premises, ground and infrastructure
4. The second and third respondents and/or any employees of their ministries are interdicted and restrained from assisting the first respondent to do any of the restrained activities above or allowing the first respondent to use the school premises, grounds and infrastructure or do mining activities at these schools.
5. The second and third respondents are hereby interdicted and compelled and take active measures to protect the pupils, school resources, property and infrastructure from abuse by the 1st respondent.
6. The respondents to pay jointly and severally the applicant's costs.

In a nutshell, therefore, what the applicants initially sought was as amalgam of a prohibitory interdict and a mandatory interdict. Prohibitory in the sense that they sought an order prohibiting the 1st respondent from carrying out its prospecting activities (which were erroneously referred to as "mining" activities) in and around the premises of two schools. Additionally they sought an order prohibiting the 2nd and 3rd respondents from aiding the 1st respondent in whatever way in carrying out its prospecting activities in and around the premises of the two schools. It is also mandatory in part in the sense that the applicant wants the 1st respondent to be compelled to immediately remove its prospecting equipment and related paraphernalia from the schools' premises.

However, in the course of these proceedings counsel for the applicants, in view of the provisions of sections 31 and 32 of the Act, abandoned the attack related to the alleged absence of consent on the part of the 1st respondent to prospect on that piece of land. This effectively left the sole issue for determination being whether the interdict sought should be granted on the basis of the noise complaint.

The 1st and 2nd respondents opposed the application and in this regard the 1st respondent raised three interrelated issues to confront the noise complaint. These issues can be summarised as follows;

Firstly that the applicants do not have the mandate of the generality of the learners at the school to bring this application and in the absence of such a mandate this application should fail.

Secondly, the 1st respondent contended that the issues at hand are replete with factual disputes rendering it incapable of resolution via application proceedings. They therefore argue that the choice of application proceedings by the applicants constitutes what should be an ill-fated misadventure on their part.

Thirdly and perhaps most importantly 1st respondent avers that in the absence of empirical data on the noise levels complained of, the court is hardly in a position to conclude that the noise output of the 1st respondent's prospecting activities exceeds legally permissible levels.

From the above the issues for determination may be crisply put thus:

1. Do the applicants have the requisite mandate to bring the application?
2. Does the dispute lend itself to resolution on the papers and if not what are the consequences attendant thereto?
3. Have the applicants managed to sufficiently establish a noise infringement warranting inference from the courts?

It suffices however to observe that these issues are not (as is almost invariably the case) discrete and separate. There are several areas of convergence and overlap.

The first two issues are preliminary in nature and need to be addressed before embarking (should that be necessary) on a resolution of the third, the latter constituting as it does the main substance of this application.

Mandate

Right from the outset, counsel for the applicants conceded, rightly so, that in the absence of a clear mandate from the generality of the student population of the affected schools, the applicants cannot purport to represent same. There was a half-hearted attempt to seek refuge in section 85 (1) (b) of the Constitution which empowers a person to approach the court on behalf of another person who cannot act for themselves. However, this provision will not avail the applicant

for the simple reason that it has not been shown that the parents of the affected students cannot act on behalf of those other students. The applicants cannot arrogate unto themselves the power to act on behalf of all the students from the two schools without first establishing that those students have an interest in the order sought and secondly that their own parents or guardians are incapacitated form instituting such an application.

At best the applicants can only represent their own children or dependants and the application should be allowed to proceed on that basis. There was some apparent blurring and even conflation on the part of the 1st respondent of the concepts "mandate" and locus standi. Be that as it may, to the extent that the applicants are permitted to represent their children who are allegedly affected by the noise infringement, the applicants do have direct and substantial interest in the matter. They do therefore have the requisite locus standi to bring this application. What they cannot do, however, is purport to represent the interests of the generality of the learners at the two schools in question.

The question of the alleged use of the wrong procedure

As stated earlier, it was s argued on behalf of the 1st respondent that the dispute is ridden with factual disputes rendering it incapable of resolution on the papers. It was further contended in this regard that the appropriate procedure would have been for the applicants to proceed by way of action proceedings. In the main the argument is that there is an intractable dispute regarding the level of noise occasioned by the 1st respondent's prospecting activities and its impact on the teaching and learning environment. The first question therefore is whether there are material disputes of fact.

In *Supa Plant Investment (Pvt) Ltd v Edgar Chidavaenzi* 2009 (2) ZRL 132 (H) at 136 MAKARAU J (as she then was) described a material dispute of fact in the following terms;

> "A material dispute of facts its arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence"

In *Room Hire co. v Jeppe street Mansions* 1949 (3) SA 1155 it was held that for a respondent to allege that there was a material dispute of fact he must establish and real issue of

fact which cannot be satisfactorily determined without the aid of oral evidence. He must not make a bare denial or merely allege a dispute.

In the present matter I find the argument by 1st respondent that there exist material disputes of fact meritorious. There being sharp contestation as between the applicant and 1st respondent regarding nature, level, extent and impact of the noise emitted from the latter's prospecting activities it is virtually impossible for the court to make a proper determination regarding the same on the papers.

This is particularly so in light of the fact that neither submitted scientific reports on the actual noise emitted. The nature of the noise would of necessity need to be ascertained from those that produce and those that endure it. Similarly, the frequency or regularity of same would equally need to be established. Its alleged disruptive impact would likewise need to be proved. The 1st respondent averred without producing proof, that it has constantly recorded noise levels in the region of 68 decibels over a 50 metre radius; well below the acceptable guidelines of 90 decibels and further that the natural dissipation of sound as distance from source increases.

Given the diametrically opposite assertions by the applicants and the 1st respondent, regarding this all important issue, it would be too presumptive of this court to conclude either way without the leading of proper evidence – oral or otherwise.

What remains to be decided is the course of action to take. The 1st respondent urged the court to dismiss the application on the basis that the applicants consciously took the risk by persisting with the matter as an application despite realising the inevitability of disputes of fact arising.

In *Musevenzo v Beji and Another* HH 268/13 MAFUSIRE J synthesized the various options available to the court in such situations, namely, (a) to take a robust view of the facts and resolve the dispute on the papers, or (b) permit or require any person to give oral evidence in terms of r229B of the rules of it is in the interests of justice to hear such evidence or (iii) refer the matter to trial with the application standing as the summons or the papers already filed of record standing

as pleadings or (iv) dismiss the application altogether if the applicant should have realised the dispute when launching the application.

In view of the fact that the answer to this question in the present matter dovetails with the third and final issue for determination, it will be deferred accordingly.

Whether or not the requirements for an interdict have been satisfied.

For a final interdict to succeed the following pre-requisite have to be satisfied (see *Flame Lily Investment Company (Private) Limited v Zimbabwe Salvage (Private) Limited and Anor* 1980 ZLR 378; *Setlogelo v Setlogelo* 1914 AD 221)

(1) a clear right on the part of the applicant
(2) actual or reasonably apprehended injury, and;
(3) absence of any other remedy by which applicant can be protected with the same result.

Each of these will be applied to the facts of this matter in turn.

Clear right

This term has been interpreted to mean *"a right clearly established at law."* In Erasmus *"Superior court Practice,"* 2nd edition at D6-12-13 following is stated:

> "It is submitted that what is meant by the phrase (clear right) is a right clearly established. Whether the applicant has a right is a matter of substantive law, whether that right is clearly established is a matter of evidence. In order to establish a clear right the applicant has to prove on a balance of probability the right which he seeks to protect."

In *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the test as enunciated as follows;

> "That the interdict sought can be granted only if the facts as stated by the respondents, together with the admitted facts in the applicants affidavit, justify the granting thereof"

It is pertinent to note, as was stated in *Flame Lily investment Pvt Ltd v Zimbabwe salvage (Pvt) Ltd and Anor* (Supra) that a clear right need not be incontrovertible but definite.

Against the above stated principles, can it be said that in the present case the applicants have managed it establish a clear right against the respondents? Can it be said that the test formulated in the *Plascon-Evans Paints* case (Supra) has been satisfied? In other words do facts clearly justify the granting of the order sought? I think not. Here is why: first and foremost it is not disputed that the 1st respondent is legally entitled to carry out prospecting activities in the geographical area in question from the papers filed of record, particularly the affidavit filed by 2nd respondent. The 1st respondent enjoys the unequivocal support of the Ministry of Mines and Mining development being the government organ mandated with the responsibility of regulating mining activities in the country. That being the case how can the applicants claim to have a right to have 1st respondent ejected from that area?

Further it is clear that 1st respondent enjoys the support of the various strata of the education authorities as amply demonstrated by the minutes of various consultative meetings held in connection with the 1st respondents prospecting activities in the area. The headmasters of the two schools supposedly affected by the noise lend their support to the prospecting activities of the 1st respondent. All this is borne out from the minutes of those consultative meetings.

Thirdly, the 1st respondent, from various documents filed of record including the minutes of the meetings referred to above, enjoys the unreserved support of other government organs (such as the Ministry of Local Government) all of whom participated in the said meetings. The traditional leaders of the community in question also evidently support the venture undertaken by the 1st respondent.

Strangely the applicants seek not the abatement of the noise created by prospecting but the ejectment of the 1st respondent from the area in question.

It must be stressed that the right claimed by the applicant should not be viewed in the abstract but against other compelling rights enjoyed by the respondents. Ordering the ejection of the 1st respondent will amount to a negation of the 1st respondent's rights to conduct prospecting operations in the area in question. In *Natural Stone Export Co (Pvt) Ltd & Anor v Dir, National Parks & Ors* 1997 (2) 215 (H) a dispute arose regarding whether or not the Parks and wildlife

authority could impose restrictions on the mining activities of the applicant who was the holder of a mining licence authorising it to mine within a safari area. The court stated as follows:

> "I agree that it is the function and duty of Director and minister to control, manage and maintain Safari areas for the specified purposes but they cannot deprive prospectors and miners of rights conferred on them by Chapter 21:05 unless specifically authorised by Chapter 20:14 to do so. There is no such authority conferred by Chapter 20:14." (Emphasis added)

In the same vein, in the present case applicants cannot purport to hold such rights as to oust the rights held by 1st respondent to conduct prospecting activities in the area in question.

ACTUAL OR REASONBLY APPREHENDED INJURY

The applicants aver that the noise produced by or from the 1st respondent's prospecting activities does not conduce to a proper teaching and learning environment or to the proper administration of examinations. The 1st respondent on the other hand relying on a passage from the case of *Wright v Pomona Stone Quarries (Pvt) Ltd* 1988 (2) ZLR 144(5) contend that there simply isn't sufficient evidence to support that allegation.

In that case as, in the present one, the nuisance complained of was noise generated by some excavation or quarrying activities undertaken by the respondents at a location adjacent to the suburb of Pomona where the applicant resided.

The court stated as follows:

> "She (Applicant) says the noise level is now sufficiently greater and more intrusive than at any time during 1950 to 1979. She does not say how she measures the noise level.
>
> The level of noise complained of is a matter of fact and opinion. More so it is a matter of common sense. But it must be measured for the court to give value judgement Miller J in *de Charmoy v Day star Hatchery (Pvt) Ltd* 1967 (4) SA 188 (D) at 192 E-F, puts the test as follows: "the test moreover, is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person who truthfully complains that the finds the noise intolerable is to be decisive, but the reaction of the reasonable man- one who, according to ordinary standards of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not quite intolerable a serious impediment to the reasonable enjoyment of his property *(cf Hilland v Scott 2 EDL at 324, Graham v Dittman and Son 1917 TPT 288 at 290-1, Leith v Port*

Elizabeth Museum Trustees 1934 EDL 211 at 213-4, Ferreira v Grant 1941 WLD 186 at 188-9, Prinsloo v Shaw 1938 Ad 570 at 575)."

In applying the above test one finds that the application suffered from a paucity of evidence to sustain it. Unlike the *Wright v Pomona Quarries* case (Supra) where the noise complained of was described in great detailed, here we have only generalised averments to the effect that 1st respondent's prospecting activities are disturbing classes and examination due to the noise produced thereby.

Secondly there was no empirical evidence to demonstrate the extent of noise produced. Such a measurement in decibels would probably have assisted the applicants' cause. I must however hasten to point out that the *Wright v Pomona Quarries* matter was not necessarily decided on the production of scientific data on the quantum of noise produced but upon a sufficiently descriptive account thereof something which is woefully lacking in the present matter.

The third shortcoming is the absence of supporting affidavits from any of the affected learners. What we have are averments by persons who have not personally experienced the noise. Such affidavits would have enabled the court to gauge the nature, extent and frequency of the noise nuisance and its impact on learning related activities. Affidavits by the school children supposedly affected by the noise would perhaps have assisted the applicants.

I have already alluded to the fact that the 1st respondent's prospecting activities enjoy wide spread support as evidenced by the minutes of the various consultative meetings filed of record. This casts serious doubt on the truthfulness of the applicant's averments that the noise produced by the prospecting activities of the 1st respondent are very highly disruptive to normal teaching/learning activities at the two schools. How probable is that the persons mandated with the proper administration of the schools (the school heads, Education inspectors etc.) would ignore or otherwise condone an infringement such as the one the applicants seek to portray? Put differently it is strange that this application is not backed by supporting affidavits deposed to by any of the other persons naturally expected to be adversely affected by the alleged noise nuisance, namely the teachers, the school headmasters and members of the school development committee.

The danger, therefore, is to grant this application on the basis of unsubstantiated complaints by only four disgruntled students and their parents. Sight must not be lost of the objective nature of the test. I am of the view that it has not been established on an objective basis that the noise complained of is of such a nature as to justify the granting of the interdict sought. In other words the applicants have not managed to prove injury/harm actually suffered or reasonably apprehended.

Earlier I reserved the question of whether to dismiss the application or refer it to trial or to lead evidence given the material disputes of facts present. Having thus dealt with the patent absence of evidence to support the applicant's case as demonstrated above, I believe that this is a case where the application ought to be dismissed as opposed to any of the other available options. The applicants must have realised from the respondent's notice opposition and accompanying opposing affidavits of the inevitability of material disputes of fact arising. Ultimately therefore, for the reasons outlined above, I find that the application lacks merit and should be dismissed.

Accordingly, I make the following order:

1. The application is hereby dismissed.
2. The applicants to pay costs of suit

Matutu & Mureri, Applicants' Legal practitioners
Coghlan Welsh & Guest, 1st Respondent's legal practitioners
Civil Division of the Attorney General, 2nd respondent's legal practitioners