ELEMENTS MINERALS (PVT) LTD
versus
TASHINGA MINING SYNDICATE
and
ADAM MHLANGA
and
EDMORE DUBE
and
LOVEMORE LUNGA
and
MILTON KANGE
and
SHERPARD CHINOGUREI
and
KILLIAN MANHAMBARA
and
THE ACTING PROVINCIAL MINING DIRECTOR
MASH CENTRAL E.S MAKUMBE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 March & 1 April 2015

Urgent Chamber Application

Z Kajokoto, for the applicant
P Kwenda, for the 1st to 7th respondents
H Magadure, for the 8th respondent

MANGOTA J: The applicant filed an urgent chamber application moving the court to interdict the respondents from:

(a) visiting its mining operations at Joking 37, Shamva;

(b) interfering with its operations – and

(c) harassing its employees.

The respondents opposed the application. The first to the seventh respondents took the matter further. They filed an urgent chamber counter-application. They prayed that the applicant be stopped from mining gold at, and be evicted from, their registered claims known as Joking situated in Tafuna Hills approximately 4.5km South East of Tafuna Trigonometrical

Beacon in Shamva. They moved the court to authorise the officer-in-charge CID Minerals Unit, Bindura and the officer-in-charge, Shamva Police station to enforce the order which the court would have granted to them.

The applicant filed its answering affidavit to the respondents' opposing papers as well as its notice of opposition to the urgent chamber counter-application. As no relief was being sought against the eighth respondent in the urgent chamber counter-application, the latter did not file any papers in respect of that aspect of the case.

Because the applications were filed at about one and the same time, the court considered them as a single matter. It did so in terms of Order 13 r 85 of its rules which states that:

> "… two or more persons may be joined together in one action as plaintiffs or defendants whether in convention or in reconvention where -
>
> (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and
>
> (b) all rights of relief claimed in the action, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions" (emphasis added).

On an analysis of the parties' submissions, the court was satisfied that some common question of law and/or fact existed in the application(s) and that rights of relief claimed in the application(s) were in respect of, or arose out of, a series of transactions.

In the urgent chamber counter-application, the applicant was cited as the first respondent and the eighth respondent in the main application was cited as the second respondent. However, for purposes of clarity, convenience and consistency the parties remained as they were cited in the main application.

Each party stressed the urgency of its, or their, matter and the irreparable harm which it or they, said it, or they, would endure if its, or their, application was not granted. The applicant stated that the eighth respondent made frantic efforts to visit its mining operations and declare a dispute between the parties with a view to stopping its operations for an indefinite period of time. It claimed that the declaration would spell doom for it as production would cease and water levels would increase damaging its machinery. It estimated its loss to have been in the region of $500 000 within only three days of its stoppage of work.

The first to the seventh respondents' case on the same matter was that the applicant

was mining their claims illegally and removing ore from the same. They stated that, on its own admission, the applicant was prejudicing them of an average of $55 000 worthy of gold every month. They said they suffered irreparable harm and they stood to be permanently deprived of the gold which they claimed the applicant was stealing from them. They insisted that the applicant did not have any right to mine on their registered claims.

The court would mention in passing that the applicant did not demonstrate what would cause its machinery to be damaged if the eighth respondent declared a dispute between the other respondents and itself. It did not state whether the machinery it feared would be damaged was situated under, or on the surface of, the mine. That matter was left out to conjecture.

The current was not the first dispute which took place between the applicant and some members of the first respondent. The second, third and fourth respondents and others were involved in a dispute with the applicant in or about August, 2014. Annexure D which the applicant attached to its application is relevant in the mentioned regard. The dispute was so strong that the eighth respondent had to, and did actually, declare it as such as a result of which he instructed the parties to cease all mining operations in the disputed areas until his office resolved the same. The dispute was finally resolved on 27 November, 2014 when the Minister who is responsible for Mines and Mining Development gave his ruling on the matter. The parties are in this regard referred to Annexure F which the applicant attached to its application.

It is pertinent to emphasise that for the period of the existence of the stated dispute, the applicant led no evidence to show that it suffered any harm let alone irreparable harm. It was not operating for a period which was close to three months and it appeared not to have suffered any harm. The court found it hard, if not impossible, to accept that the applicant would *in casu* suffer irreparable harm which was to the tune of $500 000 within only three days of ceasing its mining operations this time around. That was so if account was taken of the fact that it suffered no known prejudice when it stopped operating at its mine for three consecutive months. The applicant was, in the view which the court holds of the matter, very economic with the truth on the matter which pertained to the harm which it said it would suffer if the eighth respondent declared a dispute between the respondents and itself.

Annexure F showed that the Minister of Mines and Mining Development ordered the disputants to confine themselves to their original locations as at registration of their mining

claims. He allowed the applicant access to two shafts which lay within the boundary of its registered claims. He made his decision in his capacity as the Appeals Authority to whom the applicant's adversaries had appealed against the decision of the eighth respondent.

The current impasse between the parties centred on the birth of the first respondent. Its members formed themselves into a syndicate and had it registered with the Ministry of Mines and Mining Development. Its registration took place on 6 March, 2015. Annexure H which the applicant attached to its application is relevant in that regard. The annexure relates to the first respondent's area of operation which was described as Joking situated in Tafuna Hills, approximately 4.5 km South East of Tafuna Trigonometrical Beacon. The applicant's area of operation was described as Joking 37 on Tafuna Hills, about 1.4 Km South, South East of Tafuna Trogonometrical Beacon and adjacent to 20316 BM Shamva.

It did not require the knowledge and expertise of a rocket scientist to discern that the parties' respective areas of operation were separate and distinct from each other. The applicant's claims were and are situated on the South, South East of Tafuna Trigonometrical Beacon and the respondents' claims lay on the South East of Tafuna Trigonometrical Beacon. The applicant conceded during the hearing of the application that the parties' areas of operation were separate and distinct from each other.

The applicant's main area of concern revolved around what it described as "Germany" shafts which were within the parties' respective areas of activity. These were four in number. Two of the shafts were located in the applicant's claims and the remaining two were situated outside of those. It stated that it used the shafts which were inside its claims to extract ore from underground. It said the two shafts which were on the periphery of its block provided ventilation to its mining activities inside Joking 37. It attached to its application Annexures B1 and B2. The annexures respectively referred to the site plan and block demarcations as per mine surveyors. They showed the positions of the four shafts. It claimed that members of Trust Mining Syndicate took advantage of the two shafts which lay on the periphery of its mine and entered the same from where they stole its ore. The registration of the first respondent, it said, placed the two shafts effectively in the possession and control of the respondents.

The applicant's position in regard to the shafts which lay outside its claims remained as unclear as a misty morning part of the day. It stated, on the one hand, that the shafts were useful to it as they provided it with ventilation. It submitted, on the other hand, that the shafts

served no meaningful purpose and insisted that they should, therefore, be closed.

The applicant stated that the respondents used the shafts to gain access into the ground and to encroach on to its claims from where they stole ore. The respondents were of a contrary view. They alleged that it was the applicant who, through the shafts which were registered in their name, entered their area of activity and stole ore from them.

The issue of which party encroached and continues to encroach on to which other party's area of operation constituted a material dispute of fact which could not be resolved on the papers. The eighth respondent submitted, correctly so, that the stated matter could only be effectively resolved when mine surveyors and mine engineers were allowed to go underground with a view to determining the correct position of the matter.

Paragraph 10 of the applicant's founding affidavit was aimed at moving the court to grant an interdict to it *pendete lite*. It prayed the court to order the eighth respondent not to declare a mining dispute between the parties till the Minister finalised the issue of the mining certificate which was issued to the first respondent on 6 March, 2015.

The applicant produced no evidence which showed that it applied to the Minister against the issuance of the mining certificate. The court remained in the dark on that aspect of the case. It attached to its application Annexure I. The annexure is a letter of complaint which the applicant addressed to the Deputy Minister of Mines and Mining Development on 9 March, 2015. The letter did not constitute the application which the applicant allegedly made to the Minister. The letter and the application are two separate and distinct documents. The court failed to appreciate the applicant's reasons for not attaching the application which it claimed to have made to the Minister on to its application. There was, in the court's view, no application which pended litigation under the stated set of circumstances.

The second to the seventh respondents stated that they formed the first respondent after which they applied to the Ministry of Mines and Mining Development for a prospecting licence. They said their aim and object were to regularize their mining activities at the two unregistered shafts which fell outside the applicant's area of operation. They insisted that they followed all the procedures which the law required them to have complied with as a way of giving birth to the first respondent. They attached to their urgent chamber counter-application annexure D. The annexure showed that there were three claims which were adjacent to each other in the vicinity of the disputed area(s). The claims comprised:

(i) Joking 8 which they said belonged to one Ken Sharpe

(ii) Joking 37 which, it was common cause, belonged to the applicant - and

(iii) Joking 7 which they alleged belonged to them.

The eighth respondent stated in clear and categorical terms that he allowed the respondents to register their claim in respect of Joking 7. He said he did so after the surveyor had gone to the place and verified that there was no one who owned the claim which was eventually registered in the first respondent's name. He stated that the registration of Joking 7 in the first respondent's name was necessitated by the fact that the Ministry's map was faint and that, as a result, his office could not determine whether or not the area had, earlier on, been allocated to someone.

It was on the basis of the foregoing, therefore, that it could not be said that the applicant did have a clear right to Joking 7. The applicant in the mentioned regard could not and did not satisfy two of the requirements which would persuade the court to grant an interdict to it. Malaba JA (as he then was) succinctly articulated the requirements for the granting of an interdict in *Airfield Investments (Pvt) Ltd* v *Minister of lands & Ors*, 2004 (1) ZLR 511, 517(s) wherein he said an applicant for an interdict must show:

> "(a) that the right which is the subject matter of the main action and which he 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) 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 ultimately succeeds in establishing his right,
>
> (c) that the balance of convenience favours the granting of the interim relief - and
>
> (d) that the applicant has no other satisfactory remedy".

The court associates itself with the learned judge's well-articulated remarks. It remains satisfied that the applicant's application fell short of requirements (a) and (b) in addition to other matters which the court was quick to observe as well as mention in some portions of this judgment.

Joking 7 which was registered in the first respondent's name was properly registered. It was, and is, the first respondent's claim. It remained, and remains, so until the applicant's alleged application to the Minister altered or changes the status of the first respondent's certificate of registration. The court is satisfied that the first respondent's operations at, or on, or within the area for which it was registered, the two shafts included, were undoubtedly

lawfully undertaken by it.

Both parties submitted that the application or counter-application was not urgent. The court observed that the application and the counter-application were filed within a space of four days of each other. They were, therefore, either urgent or not urgent. The urgency or otherwise of each of them should not, in the view which the court holds of the matter, be allowed to derail the due administration of justice.

The court has considered all the circumstances of this case. The application was not only untidy but it also lacked substance. The counter-application was, on the other hand, not devoid of merit. It was, in fact, unassailable and is, therefore, upheld.

It is, in the result, ordered as follows:

(a) that the application be and is hereby dismissed with costs;

(b) that the urgent chamber counter-application be and is hereby upheld;

(c) that the applicant be and is hereby ordered to pay the costs of the urgent chamber counter-application.

Kajokoto & Company, applicant's legal practitioners
Kwenda and Associates, respondents' legal practitioners