TECHMATE ENGINEERING (PVT) LTD

Versus

WHITE NILE

And

PROVINCIAL MINING DIRECTOR, GWANDA N.O.

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 17 NOVEMBER 2021 & 6 JANUARY 2022

Urgent Chamber Application

I.R. Mafirakureva with Mutanga for applicant
D. Dube with B. Samuriwo for 1st respondent
B. Moyo with Tanyanyiwa for 2nd respondent

TAKUVA J: This is a simple application that has been mystified by 1st and 2nd respondents' legal practitioners. The application is for an interdict and an order suspending mining operations at the mining shafts under dispute between the 1st respondent and the applicant. Applicant filed this urgent chamber application seeking the following relief:

"Terms of the final order sought

1. The determination of the 2nd respondent which is dated 19 October 2021 in respect of the dispute between the applicant and 1st respondent be and is hereby suspended pending conclusive and definitive judgment of the court application for review under HC 1644/21.
2. The mining operations at the disputed shafts falling within Goodenough Mine 7 – 8 registration number 34307 – 8 pegged in 1988 be suspended pending the definitive and conclusive judgment of the court application for review filed under HC 1644/21.
3. Costs of suit at attorney and client scale.

Interim relief granted

1. Pending the determination of the matter on the return date, the applicant is granted the following relief:
2. 2nd respondent be and is hereby ordered to stop all mining operations by both parties at the disputed mining shafts falling within Goodenough mine 7 – 8 registration number 34307 – 08 pegged in 1988 pending the return date of this application.

Service

Service of the urgent chamber application and provisional order will be through the Deputy Sheriff for Bulawayo or applicant's legal practitioners or their client."

Background facts

The applicant is the registered owner of two mining claims namely Goodenough 7 and 8 registration numbers 34308 and 34309 respectively. These claims were registered in 1988. The 1st respondent has failed to produce any legal documents authorizing it to conduct any mining activities at applicant's shafts that fall within the Goodenough Mine 7 registration number 34308. The 1st respondent insists that it is a holder of a Special Grant which it refused to produce to the applicant and 2nd respondent. It has also refused to produce it to this court. On that basis 1st respondent bulldozed its way into applicant's claims and started working on the shafts.

Aggrieved, applicant filed an application to have the mining dispute resolved by the 2nd respondent. The hearing was conducted but the 1st respondent failed to produce any documentation authorizing it to carry out mining activities at the applicant's claims. Notwithstanding this anomaly, the 2nd respondent proceeded to hear and determine the dispute in favour of the 1st respondent. Upon receipt of the determination, the applicant filed an application for review under HC 1644/21 which is pending. Applicant also filed this urgent chamber application for an interdict.

What has irked the applicant are the following resolutions by the 2nd respondent.

"Resolution

1. According to section 177, it is hereby deemed Special Grant title SG 8565, was issued subject to that any portion of it overlapping Goodenough 7 – 8 registration numbers 34308 – 9 is subordinated to Goodenough 7 - 8.
2. Brian Samuriwo of SG 8565 is hereby ordered to adjust SG 8565 boundaries outside Goodenough 7 - 8G boundaries with immediate effect and submit adjusted map for survey verification.
3. Techmate Engineering, P/L of Goodenough 7 is hereby ordered to revert to their boundary position as at registration with immediate effect and request surveyors to verify.
4. The workings and workings under contest are hereby confirmed as falling within SG 8565 and outside Goodenough boundaries.
5. Any suspension of operations is hereby uplifted.
6. Any party not concurring with the above may appeal to the High Court.

K. Mlangeni
Provincial Director, Mat South"
(my emphasis)

The applicant's grounds for review as stated in the founding affidavit are briefly that;

1. The 2nd respondent proceeded with the hearing notwithstanding the fact that the 1st respondent did not produce any documentation to allow them to mine at the said mining claim.
2. The 2nd respondent turned a blind eye to the 1st respondent's failure to produce the Special Grant thereby exhibiting consistent and clear bias and malice in favour of the 1st respondent.
3. The determination by the 2nd respondent clearly established, correctly that the mining claims of the applicant, that is Goodenough 7 – 8 registration number 34308 – 9 were pegged earlier than the 1st respondent's Special Grant.
4. Quite correctly, again, the 2nd respondent cites the correct section that resolves the dispute in the matter. That section 177 of the Mines and Minerals Act (Chapter 21:05) must give priority to the initial pegger. *In casu*, the applicant feels that it is outrageous, grossly irregular and indeed shocking for the 2nd respondent to then conclude that the workings and

the mining shafts that fall within the applicant's pegged mining claims are outside the boundaries of the applicant's mining claims.

5. That determination is so outrageous in its defence of logic that no reasonable or right minded person seized with the same facts and or instances could have arrived at such an irrational decision.
6. Quite clearly, the determination is self- destructive and contradictory. It approbates and reprobates at the same time. Also, it conflicts with the survey diagram that clearly establishes that the disputed mining shafts are within the pegged area of the applicant's Goodenough 7 mine.
7. Accordingly, applicant in the review application prayed for the setting aside of the 2nd respondent's determination in terms of s28 of the High Court Act Chapter 7:06).

As regards this application for this interdict, the applicant contended that it has met all the requirements for an interdict in that it has demonstrated that the matter is urgent and applicant immediately took action to file both the court application for review as well as the present urgent chamber application in the following week of receiving the determination on 22 October 2021. Applicant also contended that it has established a *prima facie* right as the registered owner of the claims. Those rights face inherent threat from 2nd respondent's decision to authorize the 1st respondent to proceed to mine. Applicant therefore stands to suffer irreparable harm if the mining operations are not suspended as the gold extracted by the 1st respondent will not be recovered at all leading to unjust enrichment especially if the review application is granted in favour of the applicant. It is applicant's further contention that it has no alternative remedy at its disposal. Without this urgent chamber application there is absolutely no way of ensuring that the operations can be stopped pending the determination of the review application. Finally, it was submitted that the balance of convenience favours the granting of this application in light of the imminent threat and irreparable harm that the applicant stands to suffer. On the other hand, the 1st respondent does not stand to suffer any prejudice if the mining operations are suspended pending the determination of the application for review.

In opposing the application, the 1st respondent which has always called itself "White Nile" whatever that means contends that;

"In limine

(a) Whether or not applicant used the correct form
(b) Whether or not applicant has *locus standi*
(c) Whether or not this matter is urgent
(d) Whether or not applicant has satisfied the requirements for an interdict.

The 2nd respondent opposed the application for review and opted to rely on those grounds to oppose the interdict.

The law

The requirements for an interim interdict have been settled in our jurisdiction for 107 years. See *Setlego* v *Setlego* 1914 AD 221. They are;

(a) A *prima facie* right, even if it is open to some doubt
(b) A well-grounded apprehension of irreparable harm if the relief is not granted
(c) The balance of convenience favouring the granting of the interdict
(d) The absence of any other satisfactory remedy.

The 1st point *in limine* is the normal point raised by legal practitioners with nothing material to raise in opposition. The approach is a more formalistic and rigid giving greater emphasis to "form over substance". The 1st respondent's point has no merit in that the applicant used form 25 with appropriate modifications that necessarily provide for the filing of a notice of opposition. It is the form required by r60 (1) of SI 202/21. It contains the summary of what the applicant seeks. There is no material difference between the old form and the new one. I would dismiss the 1st point *in limine* as it is completely unmerited.

The second point taken is meant to pull the wool over the court's eyes. The point is that the applicant has no *locus standi in judicio* as it has no direct and substantial interest in the matter. The 1st respondent erroneously believes that since those claims are now registered in applicant's name, applicant has no *locus standi*. There are a number of reasons why this argument is fallacious. Firstly, there is an agreement of sale between applicant and P. E. Steyn involving these claims. That agreement is *perfecta.*

Secondly, applicant took control and possession of these claims since 2016. The 1st respondent encroached bullishly in 2021. Thirdly, the 2nd respondent's determination relates to the applicant and 1st respondent, indicating that the issue was one of "encroachment". The 2nd respondent is clearly aware of the sale hence he proceeded to entertain the dispute between the applicant and the 1st respondent. In the circumstances, it cannot seriously be contended that the applicant has no *locus standi*.

In any event, in paragraph 16 of 2nd respondent's opposing affidavit, 2nd respondent concedes that both parties are mining title holders. That is an acceptance that applicant has authority to mine. Finally, the law accepts that a *prima facie* right might be open to some doubt. In my view, this point was not well taken and it is hereby dismissed.

The 3rd point *in limine* is that on urgency. The 1st respondent contends that the applicant did not treat this matter with the urgency that it deserves by filing this application on the 1st of November 2021 after receiving the 2nd respondent's determination on the 22nd October 2021. Applicant is accused of having failed to proffer a reasonable explanation for the alleged delay. *Mr Dube* for the 1st respondent submitted that he simply relied on the 5 day delay to make his point.

However, what must be noted is that urgency is very broad. Firstly, not only must it be seen within the time but also on whether the nature and cause of action together with the relief sought are of an urgent character. *In casu,* applicant acted swiftly in bringing this matter before the court. The applicant is based in Kwekwe, the disputed claims are located in Matobo, Matabeleland South and the dispute was resolved in Gwanda. By acting within 5 days i.e. from the 22nd October to the 1st November 2021, applicant treated the matter as urgent in the circumstances. Further, the relief sought is of an urgent nature as applicant is likely to suffer serious financial prejudice if the matter is found not to be urgent.

On the merits, it is not in dispute that the relief is one of an interdict. The applicant has established a *prima facie* right and if one examines the grounds of review, the picture that emerges is that the application for review has bright prospects of success. For starters, both respondents have not bothered to produce the Special Grant despite numerous challenges. On what basis does 2nd respondent arrive at the conclusion that it is the 1st respondent who should

receive his blessing to carry on mining activities at the expense of the applicant? Our courts use evidence and it does not assist a party to go on top of a village hill and shout "I have the evidence in my office". What is required is proof. The 1st respondent in my view should not be allowed to have its cake and eat it at the same time.

Further, the 1st respondent did not attach the Special Grant to its notice of opposition. Even now, the 1st and 2nd respondents have not produced such proof to mine. It is common cause that the applicant requested for this document during the hearing but the request fell on deaf ears. However, suddenly in the determination, the 2nd respondent found the zeal to announce to the world that the "Special Grant was filed with the Ministry". It's not a quantum of truth but proof. It appears the 2nd respondent operates under a misapprehension that since he is the "custodian" of official documents, he and he alone decides which document should be disclosed to which party. Unfortunately, this position is shared by *Mr Moyo* for the 2nd respondent who placed too much reliance on the provisions of section 334 of the Mines and Minerals Act.

Can it be said that the 2nd respondent's proceedings are regular? I think not.

Secondly, the 2nd respondent's determination is contradictory in that while it accepts that applicant pegged first i.e (33 years ago) it goes against s177 of the Act in the same vein.

Thirdly, the Surveyor General's diagram has not been accepted by the 1st respondent. According to *Mr Dube* for the 1st respondent the diagram is "questioned and not authentic". Even *Mr Moyo* for the 2nd respondent conceded that according to the survey map, <u>both</u> parties – "appear to be out of their positions". Now the question is, if the authenticity of the diagram is questionable, why rely on it to allow one of the parties to mine by uplifting the suspension? This is illogical and irrational.

Fourthly, both parties accepted that in 1988, there was no GPS. However in 2021 the surveyors used GPS to dislodge pegs done in 1988. In any event even assuming the Special Grant exists and it authorizes 1st respondent to mine, the 2nd respondent's resolutions are clear that it was issued subject to certain conditions which had not been met by 19 October 2021. Its boundaries overlap

into Goodenough 7 – 8 and these were not adjusted as ordered. In my view applicant stands to suffer irreparable harm if the mining operations are nor suspended pending the finalization of the application for review. Also, applicant has no alternative remedy at its disposal and the balance of convenience favours the granting of this application in light of the imminent threat and irreparable harm that the applicant stands to suffer. On the other hand, the 1st respondent does not stand to suffer any prejudice if the mining operations are suspended pending the determination of the application for review.

In the circumstances applicant has met the requirements for the granting of this urgent chamber application.

Accordingly, it is ordered that;

1. Pending the determination of the matter on the return date, the applicant is granted the following relief.
2. Both parties be and are hereby ordered to stop all mining operations at the disputed mining shafts falling within Goodenough Mine 7 – 8 registration number 34307 – 8 pegged in 1988.

Messrs Moyo & Nyoni, applicant's legal practitioners
Mathonsi Ncube Law Chambers, 1st respondent's legal practitioners