CBF CONSULTANTS (PRIVATE) LIMITED
versus
BLUE RIDGE
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 15, 17, 24 February and 30 March 2022

Opposed Application

Mr.T. Tanyanyiwa- for the applicant
Mr.P. Pabwe - for first respondent.

CHILIMBE J

[1] Applicant seeks an order interdicting first respondent and all those claiming through it from carrying out all prospecting and mining activities on a piece of land described as Lot 4 of Subdivision A of Lichfield of Willesden Farm in the District of Salisbury.

[2] The applicant claimed in its founding affidavit that it is the owner of the piece of land in question which is 64, 8900 hectares in extent. Applicant further claimed that it acquired this piece of land with a view to conducting farming operations thereon. On a date not specified in the papers, the applicant claims that first respondent descended on its farm, fenced off a certain portion and commenced "exploration of minerals".

[3] Applicant states that it was neither served with a notice of intention to prospect on its farm nor was its consent requested as per the requirements of sections 38 and 31 of the Mines and Minerals Act [*Chapter 21:05]* (the "Mines Act").The piece of land, being 64, 8900 hectares in extent, fell within the threshold prescribed by s 31 (1) (g) of the Mines Act requiring first respondent to give applicant notice in terms of that section. Since no notice had been given, applicant could not ascertain if the first respondent was the holder of any prospecting licence, special grant or other lawful sanction. In any event, the applicant submitted that even if first respondent was in possession of any grant, permit or licence, such authorisation would be rendered invalid because of the provisions of section 31 of the Mines Act. That section made the procurement of a landowner`s written consent prerequisite to the exercise of any rights as may have been extended to a prospector or miner under the Act.

[4] As a result of the first respondent`s actions, applicant claims that it carried "a reasonable apprehension of injury". If fact, the applicant states (in the same breath) that first respondent`s activities had resulted in gullies, pits, and trenches, implying that the feared injury had since taken place. These activities pose an environment risk as well as threaten human and animal life on the farm. Worse of all, the environmental degradation had, according to applicant, rendered the land "inarable".

[5] The first respondent, describing itself as "Blue Ridge Mining Syndicate", opposed the relief sought. To begin with, first respondent disputed the applicant`s claim of ownership of the piece of land in question. In paragraph 8 of the opposing affidavit deposed to by one Peter Kloppers, described as its managing director, first respondent as follows: -

> "This [the claim that applicant owned lot 4 of Subdivision A of Lichfield of Willesden Farm] is denied the applicant is not the owner of the property. In any event, a diligent search of the file with the Registrar of Deed (sic) was conducted and has yielded that the file is missing and can possibly have been stolen. I suspect that Applicant is responsible for the disappearance of the file."

[6] Secondly, first respondent claimed that it was the holder of a prospecting licence and that it was authorised to carry out all explorations in terms of the law. On the same point, first respondent denied that it needed to secure applicant`s consent at all before embarking on the mining or exploration activities. The first respondent`s defence then took a different turn. It denied that its activities were taking place on, in its own words, "*applicant's farm*." .Kloppers went on to state in paragraph 19 of his opposing affidavit;-

> "There are two distinct pieces of land, one is occupied by first Respondent and the other which MAYBE (sic) owned by the Applicant which has nothing to do with first Respondent`s mining land."

[7] The first respondent submitted that applicant had rushed to file the present suit when it ought to have exhausted the domestic remedies provided by the Mines Act. In particular, first respondent stated that the matter essentially amounted to a boundary dispute which the Ministry of Mines and Ministry of Lands could have resolved by ascertaining the requisite bearings. Similarly, first respondent argued that applicant also enjoyed a remedy under s368 of the Mines Act. Finally, first respondent denied that its activities were causing environmental damage. Mr. *Pabwe* conceded in his submissions that gullies, trenches and pits were an inevitable result of mining activities but maintained that remedial work was done to address the impact of exploration.

[8] Before dealing with these disputations, I will set out the requirements of the relief sought by applicant. The requirements of an interdict were outlined in the matter of *Magret Kasongo and 3 Others* v *Murowa Diamonds and 2 Others* HMA 12-2020 ZISENGWE J restated the classic position on the requirements of a final interdict [page 7] as follows;-

> "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.

[9] The learned judge proceeded further to explain the meaning of the term "*a clear right*" and stated thus [at page 7];-

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

[10] In *Kasongo* v *Murowa* (supra) the court also cited with approval Flame *Lily investment Pvt Ltd v Zimbabwe salvage (Pvt) Ltd and Anor* (*Supra*) and held [page 7] that *"... a clear right need not be incontrovertible but definite."*

[11] Applying the above principle to the present matter, I have no hesitation to find, despite first respondent`s protestations, that applicant has established a clear right. This right derives from three sources. The first source is that applicant owns the piece of land under consideration. It attached a copy of the title deed to the piece of land to its papers and there is no basis for me to doubt legitimate title in that regard. The first respondent`s spirited denial of applicant`s title to the farm amounted to no more than vehement disputation. There was no basis laid before the court to support the denial. I was referred to the remarks of GOWORA J (as she then was) in n *Agro Chem Distributors* v *Stanley Gomo and 3 Others* 2009 (1) ZLR 255[H] A-D,where the learned judge discussed the concept of *dominium* as flowing from the conferment of a real right through registration of title;-

> "The registration of title in one's name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to vindicate his right, i.e. to enforce his right in the thing for his own benefit as against the world; that is against all

> persons whatsoever.[1] Another definition of a real right is that it is a right in a thing which confers on the holder of the right an exclusive benefit in the thing which benefit is indefeasible by any other person".

[12] In the same vein, first respondent prevaricated in its defence. It completely denied applicant`s ownership of the farm then stated in the same breath that they (first respondents) were not present on applicant`s piece of land. On the issue of ascertainment of the boundaries, applicant commissioned a land surveyor, Terence Mabasa Juru, whose report was attached to the applicant`s answering affidavit. It is necessary to distinguish the general beacon relocation which was conducted by Mr. Juru to identify the farm boundaries through beacons established in terms of the Land Survey Act [*Chapter 20:12*] ,from a beacon relocation to identify beacons demarcating a mining leases, claims or concessions claim in terms of the Mines Act. Mr.Juru`s report was interrogated after I called for oral evidence from Mr. Juru in terms of rule 59 (26) (b) .Both the report and evidence of Mr. Juru confirmed that the first respondent`s mining operations are indeed taking place on applicant`s farm. No serious challenge was mounted against both the report and evidence. Mr. Juru is a properly qualified professional whose trade is regulated by the provisions of the Land Surveyors Act [*Chapter 27:06*] and I accept his report and evidence as confirming that first respondent`s activities were taking place on applicant`s farm.

[13] The Mines Act invests a landowner with certain rights in terms of sections 31 and 38 of the Mines Act. Section 38 (2) requires that any person must, before exercising any of his rights under a prospecting licence, special grant to carry out prospecting operations *or* exclusive prospecting order on specified categories of land ,to give notice of his intention to do so to the landowner.

[14] It is common cause that no such notice was served on the applicant by first respondent. In the same respect, section 31 (1) of the Act places an obligation on the part of anyone intending to carry out mining or prospecting activities on private land to secure the consent of the landowner. Section 31 of the Act also sets out the criteria or circumstances under which such obligation to secure the consent in question arises. Applicant pleaded that the qualifying criteria had been fulfilled and that first respondent was obliged to give it notice. This fact was not seriously contested by first respondent. It must be noted that first respondent did not attach any permit, licence or grant despite claiming possession of such. It also failed to deliver the

[1] See Wille's Principles of South African Law 8ed p 259

notice to landowner required nor was a landowner`s consent produced in terms of sections s31 and s 38 of the Act.

[15] It is quite clear that the first respondent`s presence on the piece of land is inconsistent with the law. In *Ethel Tsitsi Mpezeni v Zimbabwe Electoral Commission and 13 Others HH 475-18*, ZHOU J went a step back and traced the issue of rights all the way to the Constitution. In this instance, indeed the applicant has a constitutional right to enjoy its property and be defended against invasion.

[16] Having established that applicant has a clear right, is there an actual or reasonable apprehension of injury? In *Ethel Tsitsi Mpezeni v Zimbabwe Electoral Commission and 13 Others* (*supra*) the court was seized with the issue of a temporary interdict based on the invasion of an individual`s privacy. Whilst the context of that case differs from the dispute before me, I find the remarks of ZHOU J in that case quite apposite [at page 6];-

> "The term injury in the broad sense in which it is used in the context of an interdict includes any prejudice which may be suffered by an applicant as a consequence of the invasion of the right The injury is not confined to bodily harm or one that is capable of pecuniary assessment or evaluation, see *Minister of Law and Order, Bophuthatswana* v *Committee of the Church Summit of Bophuthatswana* 1994 (3) SA 89 (B) at 98 H-I. Injury in the context of contravention of the declaration of rights arises from the mere invasion of the right protected by the Constitution and by the common law."

[17] *In casu,* first respondent has engaged in mining operations on applicant`s land. Mr. *Pabwe* for first respondent submitted that by their very nature, mining operations inevitable involve causing damage to the environment. The mitigant to such outcomes are good reclamation practices to backfill any excavations done. In *Mount Grace Farm (Pvt) Ltd* v *Jumua Metals & Minerals (Pvt) Ltd and Another HH844-19*, the court stated as follows [at page 6]; -

> "In the present matter, prospecting and mining operations are by their very nature intrusive, invasive and sometimes even disruptive on the land (and its inhabitants) on which they are to be carried out. This is particularly so in respect of a relatively small holding such as that of the applicant measuring only 89 hectares in extent. Section 31 of the Act was created for good reason: namely to protect the interests of the land owner vis-à-vis the rights of the grant holder. The apprehension by the applicant of an infringement of his rights in the absence of his consent is reasonable."

[18] I am satisfied that the applicant has demonstrated the existence of potential harm as defined in the authorities including *Herbstein and van Winsen* who described such as follows in The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th edition) stated thus ;-

> "It is not necessary for the applicant to establish on a balance of probabilities that the injury will occur: he must simply establish on a balance of probabilities that there are grounds for a reasonable apprehension that his rights will be detrimentally affected."

[19] It was argued on behalf of first respondent that (a) the applicant was improperly before the court because it had not exhausted domestic remedies in that (b) it ought to have reported the matter to the police in terms of Part XXVI of the Mines Act.It was also contended as (c) that this Court could still refer the dispute to the mining commissioner to investigate and table a report in terms of section 345 (1) of the same Act.

[20] In *John Makarudze and Maxwell Munondo* v *Cosmos Bungu and The Executive Committee, Harare Municipal Workers' Union and the Harare Municipal Workers' Union* HH 08-15.MAFUSIRE J held as follows [page 10] ;-

> "The general view is that it is discouraged for a litigant to rush to this court before he or she has exhausted such domestic procedures or remedies as may be available to his or her situation in any given case. He or she is expected to obtain relief through the available domestic channels unless there are good reasons for not doing so: see *Nokuthula Moyo* v *Norman Gwindingwi NO & Anor* [8]".
>
> However, it is also the general view that the domestic remedies must be able to provide effective redress to the complaint."

[21] It is necessary to state, the position in the matter before is similar to that which confronted MAFUSIRE J in *John Makarudze and Maxwell Munondo* v *Cosmos Bungu and The Executive Committee, Harare Municipal Workers' Union and the Harare Municipal Workers' Union* (*supra).*The learned judge noted that the existence of domestic procedures did not automatically oust the jurisdiction of the court. In *African Consolidated Resources Plc and 4 Others* v *Minister of Mines and Mineral Development and 2 Others* HH 57-10,on the other hand, the court found that applicant in that matter had not exhausted domestic options. This was because in that matter involved a protest against cancellation of rights to claims, which was supposed to be filed as an appeal to the Minister. In other words, a mandatory procedure to process an appeal was prescribed in the Act.

[22] The position articulated in *Makarudze and Another* v *Bungu and 2 Others*, and related authorities is premised on delivering practicality and convenience to both litigants as well as the administration of justice. Where domestic processes can deliver speedy remedies, (and that will be a case by case situation), then litigants were encouraged to pursue same before approaching the courts. In the same decision of *Makarudze and Another* v *Bungu and 2 Others*, the court went on to examine the feasibility of such domestic procedures and concluded that they were wholly unsuitable.

[23] *In casu,* first respondent submitted that the matter could still be remitted to the mining commissioner for purposes of ascertaining the disputed land boundaries. I take the view that such referral would not be necessary given the evidence placed before me by applicant. The surveyor`s report and evidence confirmed that a beacon relocation had been undertaken to establish the boundaries of the applicant`s property relative to the mining area. Further, in this present case, applicant was served with no document suggesting that first respondent had been lawfully cleared to prospect or mine on its land. Mr. *Tanyanyiwa* submitted on behalf of applicant that consideration of domestic remedies was not a feasible option. The applicant was seized with an invasion of its rights to property. Faced with that lawlessness, applicant had no option but to approach the courts to protect its rights. Reporting the matter to the police under a general provision for offences hardly counted as a remedy, so it was submitted on behalf of applicant.

[24] I was not persuaded by the arguments regarding existence of an alternate domestic remedy. The domestic remedies must offer a party reasonable and feasible relief. In any event the approach taken by applicant is not ousted by the s 345 of the Mines Act, contrary to the submission by Mr.*Pabwe*. Counsel had sought to convince me that s 345 (1) of the Act obliged parties to a dispute to refer their matter to the relevant Mining Commissioner for the district prior to instituting proceedings in the High Court. That position is incorrect. Section 345 (1) of the Act is quite clear and sets out the jurisdiction of the High Court in very plain terms;

345 Jurisdiction of High Court and mining commissioners

(1) *Except where otherwise provided in this Act, or except where both the complainant and defendant have agreed in writing that the complaint or dispute shall be investigated and decided by the mining commissioner in the first instance, the High Court shall have and exercise original jurisdiction in every civil matter, complaint or dispute arising under this Act and if in the course of any proceeding and if it appears expedient and necessary to the Court to refer any matter to a mining commissioner for investigation and report, the Court may make an order to that effect.*

[25] The applicant was therefore well within its rights to approach this court. But it is necessary that I comment briefly on s 345 (1) and its dispute resolution implications. Three matters emerge from the above provision. Firstly, the jurisdiction of the High Court is prescribed. Which means that parties will be within their rights to approach this court to resolve mining disputes. Simultaneous, the same provision permits parties to submit, by consent, to the jurisdiction of the mining commissioner. In recognising these two options, it becomes clear that s 345 (1) restricts the jurisdiction of the mining commissioner to those matters in respect of which parties agree to refer to the mining commissioner.

[26] It is (a) an obvious implication of s 345 (1) and (b) a specific limitations imposed by the proviso to s 345(3), that the mining commissioner can only "decide" on matters by exercise of the extent of his or her authority. If the relief claimed by a party or parties, or subject matter before that officer extends beyond capacity, then the mining commissioner may not be able to "decide" a matter. [The discourse of MALABA CJ in *Isoquant Investments (Private) Limited* v *Memory Darikwa CCZ 6/*20 is useful in the definition of "decide" as stipulated in s 345(1)].

[27] On the other hand, the jurisdiction of the High Court is expressed in much wider terms. Section 345 (1) states that the High Court shall have jurisdiction over "*every civil matter, complaint or dispute arising under this Act* …" It is clear therefore that s345 (1) of the Mines Act permits parties to approach the High Court seeking settlement of disputes relating to exercise of rights to minerals. The expectation being that (a) parties may voluntarily submit to the jurisdiction of the mining commissioner or, (b) where the relief sought is beyond that which a mining commissioner may grant, or consent unavailable,to approach the High Court. These considerations ought to guide parties as they reflect on which forum to approach.

[28] Secondly, the Mines Act recognises the invaluable role which mining commissioners can play in the dispute resolution matrix. Sections 345 to 360 define the judicial powers of the mining commissioner, complete with the procedural framework governing the exercise of such powers. Section 345 (1) in particular, enables the High Court to still redirect matters that may have been brought before it ,with specific guidance, back to the mining commissioner. This judicial power is obviously exercised on the back of the wide, administrative authority reposed in the Minster responsible for administration of the Mines Act, as also noted by the court in *African Consolidated Resources Plc and 4 Others v Minister of Mines and Mineral Development and 2 Others* (supra).In that respect dispute resolution framework created by the Mines Act places reliance on the facility of domestic remedies without barring litigants from approaching the High Court in terms of its specified or general jurisdiction.

[29] Naturally, those litigants who chose to escalate disputes to the High Court rather than the mining commissioner will still need to satisfy the court that they selected the most expedient option as held in *John Makarudze and Maxwell Munondo* v *Cosmos Bungu and 2 Others.* This is so because despite the limitation created by the proviso to s345 (3), the office of mining commissioner should be well-placed to resolve the bulk of the disputes arising in that sector. In that respect, the dispute resolution latitude created by the Act ought to see the market resolving mining-related disputes with expediency. The duplicity of miner-farmer and miner-miner disputes now flooding the courts is worrisome and requires further reflection. Increased

effectiveness of the administrative conflict resolution mechanisms entrusted to those responsible for regulating land and mineral rights is an imperative. The nation must harmonise the mining sector which is presently source of much civil and criminal conflict.

[30] Accordingly, it is ordered s follows;

1. The application for an interdict be and hereby granted.
2. The first respondent, its employees, agents and or anyone acting or claiming on its behalf be and are hereby ordered to cease all prospecting and or mining activities on Lot 4 of Subdivision A of Lichfield of Willesden Farm situate in the District of Salisbury.
3. The first respondent be and is hereby ordered to remove its equipment, property, employees, and agents as well as anyone else acting or claiming on its behalf, from Lot 4 of Subdivision A of Lichfield of Willesden Farm situate in the District of Salisbury within forty-eight (48) hours of service of this order upon first respondent.
4. The Sheriff of the High Court be and is hereby authorised to remove first respondent`s equipment, property, employees, agents and or anyone acting or claiming on its behalf from Lot 4 of Subdivision A of Lichfield of Willesden Farm situate in the District of Salisbury.
5. That first respondent be and is hereby ordered to pay costs of suit on an ordinary scale.

Messrs *Tanyanyiwa and Associates*, applicant`s legal practitioners.
Messrs *Venturas and Samkange*, first Respondent`s legal practitioners.