SAMUEL GEZA
versus
HUMROP QUARRY MINERS
and
CHEGUTU RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 7, 8, 10 August 2012 and 12 November 2013

Urgent Chamber Application

G. Nyandoro, for the applicant
W. Muchengeti, for the 1st respondent
No appearance for the 2nd respondent

MAWADZE J: On 10 August 2012 after hearing counsel for the applicant and the first respondent I granted the following provisional order;

"INTERIM RELIEF GRANTED

Pending return date the applicant is granted the following:-

1. 1st respondent or his assignee be and is hereby ordered to stop forthwith quarrying activities on the applicant's farm namely Coburn 27A till finalisation of the matter on the return date.

2. 2nd respondent or his assignee be and is hereby barred from authorising the 1st respondent from carrying out quarrying activities on the applicant's farm namely Coburn 27A till finalisation of this matter on the return date.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioner be and is hereby granted leave to serve this provisional order upon the respondents".

The terms of the final order sought are couched in the following terms:

"TERMS OF FINAL ORDER

That you show cause why an order in the following terms should not be granted;

1. 1st respondent's quarrying activities on the applicant's farm namely Coburn 27A be and is hereby declared unlawful.

2. 1st respondent to pay costs of suit on a client-legal practitioner scale".

When I granted the provisional order on 10 August 2012 I gave my reasons to both the applicant and the first respondent's legal practitioners *ex tempore*. I indicated that if full written reasons are required I should be advised timeously.

It was only at the end of October 2013 (after one year and 3 months) that I was advised by the Registrar that the first respondent had noted an appeal and requires the full written reasons for judgments. It remains unclear if the matter was subsequently set down for the confirmation or discharge of the provisional order I granted on 10 August 2012.

I now proceed to give the reason for the provisional order granted.

On 2 August 2012 the applicant filed an urgent chamber application seeking the provisional order in the terms already stated. I was allocated the matter on 6 August 2012 and I proceeded to set it down for hearing on 7 August 2012.

On 7 August 2012 the applicant had not served the second respondent and sought the deferment of the matter to 8 August 2012. This was granted. The first respondent had filed a notice of opposition.

At the commencement of the hearing on 8 August 2012 Mr *Nyandoro* for the applicant took the point *in limine* to the effect that MTHOKOZISI MABHENA who is the Chief Executive Officer of the first respondent and had deposed to the first respondent's opposing affidavit had no authority to do so. Mr *Nyandoro* submitted that there was therefore no notice of opposition and that the matter should be dealt with as unopposed. The second respondent was in default. I dismissed the point *in limine* on the basis that this was an urgent application in which the first respondent could be heard even without having filed a notice of opposition. I therefore did not find merit in the argument advanced by Mr *Nyandoro*. Thereafter I proceeded to deal with the matter on the merits as the first respondent proceeded to withdraw the two points *in limine* which had been raised in the opposing affidavit.

The applicant is employed as a lecturer at Mlezu Agricultural College in Kwe Kwe where he normally resides. On 16 December 2002 the applicant was allocated an A2 farm by the State known as Coburn 2A in the district of Chegutu which farm measures 186.42 hectares. The applicant was granted a 99 year old lease, LEASE NO 1007. It is clear that the leased holding is for agricultural and pastoral purposes only for the exclusive benefit of the

applicant. This is the basis upon which the applicant claims exclusive personal rights over the said property Coburn 27A.

The first respondent is a duly registered company in terms of the laws of Zimbabwe and carries out quarrying activities. The second respondent Chegutu Rural District Council is cited in its official capacity as the authority responsible for the issuing of permits for quarrying activities within its jurisdiction.

In his founding affidavit the applicant stated that sometime in mid May 2012 his employees at the farm Coburn 27A (hereafter the farm) advised him that certain people unknown to them had invaded the farm and were carrying out quarrying activities. The applicant later established that the alleged invaders was the first respondent. The applicant said the first respondent when approached was un-co-operative and unwilling to provide proof that they had been granted authority to carry out the quarrying activities at the farm. The applicant said he found no joy when he made a report to police at Chegutu who advised him that the matter was civil rather than criminal as the first respondent was now alleging that authority to carry out quarrying activities on the farm had been granted by the second respondent. This prompted the applicant to approach the Chief Executive Officer of the second respondent who was unhelpful as no definite answer was proffered as to whether such authority had been granted to the first respondent. The applicant states that after realising that his efforts to establish the lawfulness or otherwise of the first respondent's activities at the farm were futile decided to approach the court on a certificate of urgency seeking the provisional order.

The basis of the applicant's claim for the interim relief is outlined in the founding affidavit as follows:-

The applicant believes that the quarrying activities being carried out on the farm by the first respondent are illegal as no authority from the second respondent was availed. The applicant believes that he has a clear right to be the only beneficiary of the farm as he is the sole holder of the lease agreement to the farm. It is the applicant's case that the farm is to be used for agricultural and pastoral purposes only hence he risks losing it back to the State if the first respondent continues to carry out quarrying activities on the farm outside the law. The applicant believes he has no other remedy to stop the illegal activities on the farm by the first respondent save to seek the interdict.

In response the first respondent submitted that the applicant has no cause of action as the quarry in issue does not belong to him but to the State. The first respondent in support of

this contention attached the applicant's undated letter to the Chief Executive officer of Chegutu in which the applicant *inter alia* stated that;

> "In other words the quarry site is owned by the Ministry of Transport as Government property and managed by the Road Engineer, Mashonaland West, Chinoyi …….. it is Government property".

It is the first respondent's argument that the quarrying activities are above board and lawful. The first respondent attached a letter written by Chief Ngezi giving his blessings to the first respondent's quarrying activities on account of the fact that the first respondent's activities are in line with the government policy of black economic empowerment and that many locals under the Chief would be employed.

The first respondent made reference to a letter dated 20 October 2011 written to the first respondent by the Provincial Road Engineer Mashonaland West responding to the first respondent's application to carry out a quarry extraction project in Mhondoro. As per the said letter the first respondent was advised to first obtain the authority to operate a quarry after which a further application for an access to the public road would be made and that the quarry site should be out of the State's road servitude. The first respondent was to be granted access to the public road.

As regards the authority to operate quarrying activities the first respondent attached a letter from the Acting Chief Executive officer of the second respondent dated 10 November 2011. The contents of the letter are as follows:

> "RE QUARRY APPLICATION
>
> Council approved your application to operate in the district
>
> Letters of support from the Ministry of Mines and Ministry of Transport regarding the intended quarry site are acknowledged.
>
> Council as licensing authority gave you the permit to operate the business but advise you to meet the other requirements of relevant authorities namely Ministry of Transport and EMA".

The first respondent argued that while the applicant's lease entitles him to only engage in agricultural and pastoral activities it does not preclude third parties from lawfully quarrying over the quarry site on the farm and that mining activities take precedence over agricultural activities. According to the first respondent the applicant has no right at all over the quarrying hence he cannot suffer any actual or perceived injury arising from the first respondent's activities. The first respondent's view is that the applicant has no *prima facie*

right to protect and has not made a case for an interim interdict. The first respondent believes the balance of convenience favours the none granting of the interim interdict as the first respondent employees 30 people from the locals and contributes to the fiscus.

From the facts of the matter it is common cause that the applicant has a 99 year lease of the farm and that the applicant is enjoined to abide by certain conditions as outlined in the attached lease agreement. It is not disputed that the first respondent is carrying out quarrying activities on the farm.

The question to be answered is whether the applicant has made a case, on a balance of probability for the grant of the interim interdict.

The principles applicable to interdicts are settled in our law See *Nument Security (Pvt) Ltd* v *MUtoti & Ors* 2007(2) ZLR 300(S) at 302F-G to 303A. The requirements for granting an interdict are as follows:-

(i) a right, which though *prima facie* established may be open to some doubt

(ii) a well grounded apprehension of irreparable harm or injury

(iii) the absence of any ordinary remedy.

I share the view taken by both the applicant and the first respondent that at law the quarrying site belongs to the Government of Zimbabwe which manages the site through the Ministry of Transport. In terms of s 2 of the Regional Town and Country Planning Act [*Cap 29:12*] "mining operations" include quarrying. This therefore means that the first respondent is carrying out mining operations on the farm allocated by the State to the applicant.

The authority to a permit to quarry on the site in issue rests with the second respondent, that is Chegutu Rural District Council. Section 13(g) of the Second Schedule of the Rural District Councils Act [*Cap 29:13*] provides as follows:-

"Permits for certain activities on land controlled by council

13. The granting of permits in respect of property under the control of the council for -

(a) –

(b) –

(c) –

(d) –

(e) –

(f) –

(g) The quarrying of stone or

(h) –

(i) –"

The question to be answered is whether the first respondent has provided proof that the second respondent has granted a permit to the first respondent to carry out quarrying activities on the applicant's farm. The letter from Chegutu Rural District Council written to the first respondent cannot by any stretch of imagination be deemed to be a permit to carry out quarrying activities on Coburn 27A farm to which the applicant holds a 99 year lease. The letter in issue allows the first respondent to operate in Chegutu District carrying out quarrying activities and advises that certain conditions as required by the Government Zimbabwe through the Ministry of Transport and EMA should be met first. The same views are expressed by the Mashonaland West Provisional Road Engineer in a letter to the first respondent that certain requirements are to be met. It is important to note that both letters do not specifically cite the quarry site on the applicant's farm. Chief Ngezi's letter in my view is inconsequential and deserves no further comment. All in all the first respondent was unable to show that authority was granted by the second respondent after all requirements were met for the first respondent to carry out quarrying activities on the applicant's farm. At the time of the hearing Mr *Muchengeti* for the first respondent rightly conceded that the first respondent was unable to produce the permit preferring to say that the permit had not been uplifted from the second respondent's offices. If such a permit existed at the time of hearing there is no reason why the first respondent was not able to avail it. I gave the first respondent the opportunity to do so. Instead the first respondent chose to file an opposing affidavit and attach irrelevant documents instead of the said permit. The first respondent had time to file heads of argument but unable to simply attach the permit in issue. A finding of fact at material time that such a permit was not issued and therefore unavailable could not be avoided.

This leads me to the question of whether the applicant has made a case for an interim interdict. In the absence of a permit it means the first respondent's activities on the applicant's farm are illegal and in violation of the applicant's lease agreement. As a holder of a 99 year lease the applicant has a *prima facie* right over the farm and to ensure that only lawful activities are carried out at the farm. In the absence of authority to carry out quarrying activities on the applicant's farm irreparable harm is being occasioned as it is not clear whether the conditions set out by the Ministry of Transport and EMA are being met. The applicant is therefore entitled to seek an interim interdict as there is no any other available

remedy to stop the illegal activities on his farm. The balance of convenience favours the respondent and it is for these reasons that I granted the provisional order.

Hamunakwadi, Nyandoro & Nyambuya, applicant's legal practitioners
Matimba & Muchengeti, 1st respondent's legal practitioners