

**JABULA MINE (PVT) LTD**

**Versus**

**OBERT MUNDOREYA**

**And**

**MICHAEL MASHIZHA**

**And**

**OFFICER IN CHARGE ZIMBABWE REPUBLIC  
POLICE INYATHI N.O.**

**And**

**OFFICER COMMANDING ZIMBABWE REPUBLIC  
POLICE MATABELELAND NORTH PROVINCE N.O.**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 2 JUNE 2022 & 20 APRIL 2023

**Urgent Chamber Application**

*B. Sengweni with M. Lunga & K. Nkomo* for the applicant

*B. Mhandire* for 1<sup>st</sup> and 2<sup>nd</sup> respondents

*B. Moyo with S. Jukwa* for 3<sup>rd</sup> & 4<sup>th</sup> respondents

**TAKUVA J:** This is an urgent chamber application wherein the applicant seeks an order on the following terms:

“Interim relief sought

That pending the determination of this matter, the applicant is granted the following relief:

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents and all those claiming through them be and are hereby ordered to suspend all mining activities at Parameter B 16 to 19 and to vacate the same forthwith.
2. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents be and are hereby ordered to provide the applicant with protection and ensure that applicant is granted access to its Parameter B16 to B19 mining claims Inyathi.

Terms of final order sought

To show cause to this Court why a final order should not be made in the following terms:

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents be and are hereby permanently interdicted from conducting any kind of mining activity at Parameter B16 to B19 mining claims Inyathi.
2. The 3<sup>rd</sup> and 4<sup>th</sup> respondents be and are hereby ordered to maintain law and order at Parameter B16 and B19 mining claims Inyathi by preventing 1<sup>st</sup> and 2<sup>nd</sup> respondents and any invaders from interfering with applicant's mining activities; and
3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay costs of suit on an attorney-client scale.
4. The 3<sup>rd</sup> and 4<sup>th</sup> respondents to pay costs of suit in their personal capacities should they oppose the order ...”

The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application. On the date of the hearing both parties' legal practitioners requested the court to refer the dispute to the Provincial Mining Director for Matabeleland North Province to inspect the respective claims' boundaries on the ground. By consent of the parties, the court made the following order:

1. The Provincial Mining Director Matabeleland North Province be and is hereby ordered to visit Parameter Farm, Inyathi to establish the extent and dimensions of the following mines B16 – B19 and K & N Syndicate.
2. Both parties stop mining operations at Parameter B16 to B19 and at K & N Syndicate pending the finalization of this case.
3. Both parties and their legal practitioners must be present during the inspection.
4. The officer-in-charge Inyathi Police station be and is hereby ordered to provide security during the exercise.
5. The Provincial Mining Director Matabeleland North Province be and is hereby directed to submit his report to the Registrar of this Court within two weeks from the date of service of the order.” This order was granted by consent on 8 June 2022 and for reasons that follow, heavily diluted the status of the application as an urgent matter.

## The facts

The applicant is a holder of mining claims known as Parameter B16 to B19. The four claims were registered on 24 January 2022 in terms of the Mines and Minerals Act as follows;

- (a) Mining Certificate number 49796
- (b) Mining Certificate number 49797
- (c) Mining Certificate number 49798
- (d) Mining Certificate number 49899

The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application on the grounds that the matter was not urgent and that they were not mining on any of the applicant's claims instead they were mining on their own claim known as Bonafide A14 which they state on their notice of opposition to be more than 5km from the applicant's claims.

Pursuant to the order of the 8<sup>th</sup> June 2022 *supra*, the parties visited the ground together with Ministry of Mines officials on the 15<sup>th</sup> of June 2022. All interested parties were invited to make indications and submissions on the ground. The parties observed a fresh shaft which both parties claimed to form part of their respective claims. The applicant claimed that the shaft was on its Parameter claims while the 1<sup>st</sup> and 2<sup>nd</sup> respondents claimed the shaft was on Bonafide A14.

On the 15<sup>th</sup> of June 2022, the Provincial Mining Director, Matabeleland North produced his findings in a report. The findings are as follows;

- “1. Parameter B19 (registration number 49799) was registered on 24 January 2022)
2. Bonafide A14 (registration number 496576) was registered on the 3<sup>rd</sup> of September 2021.
3. The shafts at the centre of the dispute were also surveyed. (see attached map)
4. According to Mines Office records and survey results, all the shafts and other workings in dispute fall within Parameter B19 (49799) owned by Jabula Mine (Pvt) Ltd (see attached map).
5. The surveyed position of Bonafide A14 (as indicated by K & N Syndicate members) differs with its original position as at registration. (See attached map)

6. The distance between Jabula Mine's Parameter B19 (where the disputed shafts are) and Bonafide A14 (K & N Syndicate) is 790 metres.

### **Basis of conclusions and opinion**

The conclusions stated on this report are based upon the procedures, data and survey described herein, upon the undersigned personal observations of the mining claims in dispute and upon the undersigned personal knowledge, training and experience in the field of surveying. The survey plan attached hereto will be used as a summary of the opinions herein set forth." (the underlining is mine)

The 1<sup>st</sup> and 2<sup>nd</sup> respondents criticized the above findings as being grossly unreasonable for the following reasons;

1. The applicant failed to locate all its beacons therefore his assertions in his founding affidavit are false and malicious.
2. The findings are contrary to the dictates of section 177 of the Mines and Minerals Act which provides the procedure to be followed in resolving any mining dispute between various pegging of mining locations, reefs or mineral deposits.
3. It was improper and irregular for the Provincial Mining Director to use the GPS system only and base his findings on it contrary to the provisions of section 177 (3) of the Act.

The sole issue for determination at this stage is whether or not the applicant has established all the requirements for an interdict.

### **The law**

C. B. Prest *The Law and Practice of Interdicts* Juta & Co. 9<sup>th</sup> impression 2014 at pages 50-51 quoting CORBETT J (as he then was) in *L. F. Borshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (c) at 267A-F, states the requirements as;

“Briefly these requisites are that the application for such temporary relief must show –

- (a) That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established, though open to some doubts;

- (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 he ultimately succeeds in establishing his right;
- (c) That the balance of convenience favours the granting of an interim relief; and
- (d) That the applicant has no other satisfactory remedy.”

Applying the law to the facts and taking each requirement separately I make the following observations;

1. As regards the *prima facie* right, it is trite that interdicts are based upon rights that are sufficient to sustain a cause of action, such right may arise from a contract, a delict or may be based in the common law or some other statute. The right may be a real or personal right. For an application to succeed the applicant must show a right which is being violated or which he apprehends will be infringed.

*In casu*, it is clear from the certificates of registration of the mining claims that these claims belong to the applicant. No challenge has been mounted by the respondents on their authenticity. These certificates in my view establish a *prima facie* right to the claims. See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

2. Whether or not there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing this right?

The 1<sup>st</sup> question to consider here is whether or not there has been an act of interference on the part of the respondents with the rights of the applicant.

3. In paragraph 7 of the applicant’s founding affidavit, the applicant avers as follows;

“7. The applicant’s employees have for the past 10 days been blocked from accessing the afore-stated claims by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who are together with a mob of about thirty people allegedly mining gold at the applicant’s claims. The said respondents and the mob who are armed with various weapons including machetes and tools have threatened myself and the applicant’s employees with violence ...”

In his opposing affidavit, the 1<sup>st</sup> respondent in paragraph nine (9) responded to this allegation saying;

- “9. This is disputed. I never blocked the applicant or its employees from accessing their mine. As I have already stated, the applicant’s mine is not related to our mines in anyway. It is actually 5 kilometres away from our mines. I do not even have an idea as to which mob is he reforming to or the weapons which he alleges we used. It defies logic and even surprising for the applicant to allege that I threatened and invaded his mine claiming that we were given the mines by the President. These are just bald allegations. I have attached our certificates of registration for our mines hereto ...”

The first point to make is that despite attaching their registration certificates for their claims, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not attach the accompanying “survey plan” or map to show the exact location of these claims on the ground in relation to the applicant’s claims. Secondly, both 1<sup>st</sup> and 2<sup>nd</sup> respondents confirm that they are carrying out mining activities on “our registered mines.” However according to the Provincial Mining Director’s report, members of K & N Syndicate who included the 1<sup>st</sup> respondent indicated the position of “Bonafide A14 mine that differs with its original position as at registration.”

Further, the boundary of Bonafide A14 as per survey is not 5km or 790 metres away. Instead, it sits on top of Parameter B19 as confirmed by Mines office records. (See attached map). What this entails is that during the survey exercise, 1<sup>st</sup> and 2<sup>nd</sup> respondents indicated Bonafide A14’s position as depicted by the survey plan. This confirms and corroborates applicant’s evidence that the 1<sup>st</sup> and 2<sup>nd</sup> respondent or their employees are currently mining on Parameter B19 mine. The respective ground positions indicated by both parties prove that they are currently mining on the same spot. Clearly, according to records kept at the Mines Office, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have no business at or near Parameter B19 as their ground position is or should be 790 metre away.

In the result I find that there has been an act of actual interference with the applicant’s rights by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Therefore there is a likelihood of irreparable damage or loss to the applicant if the relief is refused. This arises from the fact that gold is a finite mineral which once extracted cannot be replenished. If 1<sup>st</sup> and 2<sup>nd</sup> respondents are permitted to continue

mining gold at applicant's mine they will deplete the resources therefore seriously prejudicing the applicant. Accordingly, I find therefore that the second requirement has been satisfied.

The 3<sup>rd</sup> requirement is whether or not the balance of convenience favours the granting of the interim interdict? The essence of the balance of convenience is to try to assert which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found. In assessing whether the balance of convenience lies in granting or refusing interlocutory interdicts, the judge is engaged in weighing the respective risks the injustice may result from his deciding one way rather than the other at a stage when the evidence is incomplete. The balance is more fundamental, more-weighty than mere convenience – see C B Pres *supra* at page 73.

*In casu*, the respondents (1<sup>st</sup> and 2<sup>nd</sup>) are clearly violating the law by forcibly mining at the wrong place. The probabilities of the case appear to me in favour of the applicant and it has been shown that it would suffer irreparable damage by the continuance of the respondents business, while on the other hand, the granting of the order would cause no irreparable damage to the respondents. The applicant *in casu* has been able to contend that the balance of convenience favoured granting of an interdict,

The final requisite is whether or not the applicant has no alternative satisfactory remedy. The touchstone should be the question, “Is it just in all the circumstances, that the plaintiff should be confined to his remedies in damages?” per SACHS L J in *Evans Marshall & Co. Ltd v Bertola SA* [1973] 1 ALL ER 992 (CA) at 1005d – e

In this case the remedy of damages will certainly bring great injustice to the applicant in that by the time he goes through the legal processes the horse will have bolted. In any event, applicant failed to obtain assistance from the 3<sup>rd</sup> and 4<sup>th</sup> respondents at the hour of need. On the facts, the applicant has no other adequate remedies except the granting of an interdict.

To the extent that some of my findings are based on the Provincial Mining Director's conclusions, it is necessary that I consider the objections by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 1<sup>st</sup> criticism was that the applicant's director is an incredible witness in that he only managed to indicate only one of the four beacons while the 1<sup>st</sup> and 2<sup>nd</sup> respondents indicated all four beacons. I do not find any merit in this argument because at the heart of this case is the location

of the disputed shafts. These were probably pointed out by both parties leaving no room for contestation.

Secondly, it was contended that the Provincial Mining Director's findings are contrary to the dictates of section 177 of the Act. The section provides:-

“177. Priority of mining rights

- (3) Priority of acquisition of title to any mining location, reef or deposit, if such title has been duly maintained, shall in every case determine the rights as between the various peggers of mining locations, reefs or deposits as aforesaid and in all cases of dispute the rule shall be followed that in the event of the rights of any subsequent pegger conflicting with the rights of a prior pegger, then to the extent to which such rights conflict, the rights of any subsequent pegger shall be subordinated to those of the prior pegger and all certificates of registration shall be deemed to be issued subject to the above conditions.”

I take the view that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have adopted a superficial approach to the true meaning of this section. If the proper meaning is taken, it will become clear that it is inapplicable to the dispute *in casu*. It certainly does not mean that a prior pegger can just abandon his mine 709 metres away and move to his neighbor (a subsequent pegger)'s mine and announce that he has rights to the neighbour's mine by virtue of being a prior pegger. The section applies to the same mining location pegged by two different peggers at different times. What is sometimes referred to as “over pegging.” *In casu*, in view of the distance between the two mining locations, there is no question of any rights of a subsequent pegger conflicting with the rights of a prior pegger.

In the result, the argument that relies on section 177 is not only misplaced, but lacks merit. It is totally irrelevant to the dispute before the court.

Thirdly it was argued that the Provincial Mining Director improperly and irregularly resorted to the use of GPS which is not yet part of our law. Reliance was placed on *Moyo v Secretary for Mines & Mining Development N.O. & Ors* HB-24-21.

What distinguishes this case from the one *in casu* is the methodology employed. While the Provincial Mining Director *in casu* used the Global Positioning System (GPS) to obtain coordinates on the ground, he did not solely rely on this method for his findings. He also relied on office records, indications by the parties, data and personal observation of the disputed claims, training and experience in the field of surveying. Principally, the two mining locations were verified using records kept in the mines office. In any event, the Global Positioning System (GPS) is not only the new kid on the block but also the most efficient system any surveyor would want to place his hands on. Those who detest it have skeletons in their cupboards. For these reasons, the submission lacks merit.

The point *in limine* relating to urgency was overtaken by events when the parties agreed to have the matter argued on the merits.

Accordingly, it is ordered that pending the determination of this matter, the applicant is granted the following interim relief;

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents and all those claiming through them be and are hereby ordered to suspend all mining activities at Parameter B16 to B19 and to vacate the same forthwith.
2. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents be and are hereby ordered to provide the applicant with protection and ensure that applicant is granted access to its Parameter B16 to B19 mining claims, Inyathi.

*Sengweni Legal Practice*, applicant's legal practitioners

*Masawi & Partners*, 1<sup>st</sup> respondents' legal practitioners

*Attorney General's Office Civil Division*, 3<sup>rd</sup> & 4<sup>th</sup> respondents' legal practitioners