

**ALL AFLAME MARKETING [PVT] LTD**

**And**

**COMPETITIVE MARKETING [PVT] LTD**

**Versus**

**JOHN FARLEY PETERSEN**

**And**

**PROVINCIAL MINING DIRECTOR MATABELELAND SOUTH PROVINCE**

**And**

**OFFICER IN CHARGE, ZIMBABWE REPUBLIC POLICE, FILABUSI**

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 08 MAY, 06 JUNE 2024 & 10 FEBRUARY 2025

*Interdict Application.*

*Mr. G. Nyoni*, for the applicant.

*Mr. S. Nkomo*, for the respondent.

*No Appearance* for the 2<sup>nd</sup> & 3<sup>rd</sup> respondent.

**NDLOVU J:** This is an application for an interdict against the 1<sup>st</sup> respondent. The basis for this application is that the 1<sup>st</sup> applicant is the registered holder of mining claims, known as the **ROYAL FAMILY GROUP MINING CLAIMS**. The 1<sup>st</sup> respondent allegedly conducts mining activities independently on the 1<sup>st</sup> applicant's mining claims. He holds no certificate of registration in respect of those claims but the 1<sup>st</sup> applicant does. He is not a director, shareholder,

or employee of the applicants. The 1<sup>st</sup> respondent is the only one who has opposed this application.

### **BACKGROUND FACTS.**

In February 2010, the 1<sup>st</sup> respondent sold and transferred his 50% shareholding in the 1<sup>st</sup> applicant company to the 1<sup>st</sup> applicant. He thereafter resigned as a director of the 1<sup>st</sup> applicant company. This position is a common cause.

On 18 December 2012, the applicants, the 1<sup>st</sup> respondent, and one other individual entered into a joint venture agreement concerning the Royal Family and Marvel mining claims. The joint venture was to be the instrument with which the parties would operate on these mining claims, and the joint venture agreement would regulate their mining operations. The ownership rights fully remained with the 1<sup>st</sup> applicant. The 1<sup>st</sup> respondent would only benefit from the operations' outputs as per the joint venture agreement.

The 1<sup>st</sup> respondent has since started to independently exploit gold in the claim outside the provisions of the joint venture agreement. That conduct has birthed this application.

### **RELIEF SOUGHT.**

- 1. 1<sup>st</sup> Respondent be and is hereby interdicted from conducting any mining or mining-related activities at Plant Site 682 [Registered Number 32866] located at Royal Family claims and at all other mining claims owned by the Applicants in Filabusi pending the finalization of the Summons action instituted by the 1<sup>st</sup> Respondent under cover of Case No. HC 1086/21.*
- 2. 1<sup>st</sup> Respondent be and is hereby ordered to cease any mining or mining-related activities that he had commenced at the Royal Family claims in Filabusi and belonging to 1<sup>st</sup> Applicant including but not limited to plant Site 682 mentioned in paragraph 1 above until such a time as the suit in case number HC 1086/21 will have been finalized.*
- 3. 1<sup>st</sup> Respondent be and is further interdicted from interfering with Applicants' mining activities and operations at Plant Site 682 mentioned in paragraph 1 above, and at any of the mining claims registered in the names of the 1<sup>st</sup> Applicant until the suit in case number HC 1086/21 will have been determined.*

4. *If 1<sup>st</sup> Respondent does not comply with the above orders, 3<sup>rd</sup> Respondent be and is hereby authorized to do all that in his powers to ensure that 1<sup>st</sup> Respondent does not conduct any mining or mining-related activities at Plant Site 682 described in paragraph 1 above or at any mining site belong[sic] to the Applicants.*
5. *1<sup>st</sup> Respondent shall pay costs of this application at an attorney and client scale only if he opposes the relief sought herein.*

#### **ISSUES FOR DETERMINATION.**

The 1<sup>st</sup> respondent has taken 5 [five] preliminary points causing the issues to be determined to be 6 [six] in total:

1. *Whether or not there are material disputes of facts.*
2. *Whether or not the resolutions are fatally defective.*
3. *Whether or not the shareholding is a nullity.*
4. *Whether or not the founding affidavit is fatally defective.*
5. *Whether or not this matter is lis pendens AND*
6. *Whether or not the applicants have satisfied the requirements of interdict.*

#### **PRELIMINARY POINTS.**

*Whether or not there are material disputes of facts.*

This court has expressed disdain with litigants who take preliminary points out of fashion in numerous authorities. The time is about to visit litigants who persist in this fashion with costs on a punitive scale and, in relevant matters, to visit the legal practitioner with an order for costs *de bonis propriis*.

The 1<sup>st</sup> respondent avers that the joint venture agreement excluded the concentrate dump on the **MARVEL CLAIMS** from being mined and enjoyed by both parties and was left for the exclusive enjoyment of the 1<sup>st</sup> respondent and his partner.

The evidence before this court is that the mining claims under the joint venture were to be exploited only in terms of and under the joint venture agreement. The 1<sup>st</sup> respondent has pleaded nothing better than his mere say-so, to the contrary. How that mere say-so is expected to metamorphose into a material dispute of fact challenges logic. Not every difference in the

narration of the history or circumstances of the matter is a material dispute of fact. There must be substance in the factual matrix differences between the parties. The dispute must be such that the court is disabled from deciding the difference without the benefit of cross-examination of those who allege differently.

Where a party alleges a material dispute of fact it must set out in detail the basis thereof, in other words, one cannot just allege a material dispute of fact without saying or giving more to highlight to the court and therefore enable the court to decipher the point of departure between the parties. The 1<sup>st</sup> respondent has failed to do that.

The point in *limine* taken is unmerited and is duly dismissed.

***Whether or not the resolutions are fatally defective.***

The resolution filed of record is not defective. It was made by the company's directors as is supposed to be done according to the law, and that settles the matter.

The preliminary point is therefore dismissed.

***Whether or not the shareholding is a nullity.***

This point is without merit and is not relevant to these proceedings. It is a matter for another day. The point taken is therefore dismissed for want of merit.

***Whether or not the founding affidavit is fatally defective.***

The applicants are corporate entities. They are companies with limited liability. They can only act through their director. This is trite. It is not the director who speaks; it is the corporate entity that avers through the Director. The matter before this Court is about the rights that the 1<sup>st</sup> applicant holds in the mining claims in question. As a director of the applicants and their Asset Development Manager, the deponent of the founding affidavit is legally clothed to swear to the facts founding this application.

The point *in limine* taken by the 1<sup>st</sup> respondent in this regard is, therefore, without merit and is duly dismissed.

***Whether or not this matter is lis pendens***

No provision exists in the rules of this court making a tender for costs a peremptory requirement to accompany a withdrawal of a motion matter. There is a gap in the rules of this court. That exercise is out of practice and decency. It means that non-tender of costs upon withdrawing an application cannot legally invalidate a withdrawal. There is no evidence that the 1st respondent demanded the costs in this matter. *Rule 66* of this court's rules makes it trite that no *pendens* attaches to a matter that has been struck off the roll. The point *in limine* taken is therefore dismissed.

### **THE LAW**

The requirements of a final interdict are:

*[1] a clear right.*

*[2] irreparable harm committed or reasonably apprehended, and*

*[3] absence of an alternative remedy.*

This is trite. A clear right must be established through evidence on a balance of probabilities. Mineral rights are acquired or lost in terms of a statute in this jurisdiction. Unless lost in terms of the *Mines and Minerals Act [Chapter 21:05]*, they remain held by the one whose name appears registered with the Ministry of Mines and Mining Development that superintends mineral rights in this country. A certificate of registration is the evidence a litigant has to adduce to prove that he or she has a clear right in a matter like this. It equates to a title deed.

### **APPLICATION.**

The 1<sup>st</sup> applicant has adduced evidence of title to the claims in question. The 1<sup>st</sup> respondent has not challenged it. The 1<sup>st</sup> applicant, therefore, has an exclusive right to mine the claims.

The 1st respondent has not denied that he is mining the claims in question. He has explained his conduct. However, he has not provided any proof to back his explanation that he has a right to mine the claims under discussion. His conduct is unlawful and harmful. He is extracting gold from the 1<sup>st</sup> applicant's claim. The harm is real and irreparable.

Short of resorting to self-help, the applicants have no alternative remedy at their disposal to protect their rights. The only remedy available to the applicants is the interference by this court. The applicants have successfully proven the requirements of a final interdict.

## **DISPOSITION**

The applicants have proven the requirements of a final interdict and are entitled to the relief sought save for paragraph 4 [four] of the draft order. It is not the function of the Police Service to execute High Court orders on behalf of a successful litigant in a civil claim. That is the preserve of the Sheriff of the High Court and his or her lawful Deputies. The Police mainly must maintain law and order in a non-partisan way. That is their Constitutional obligation. They do not need a Court order to do that.

## **COSTS**

The contesting parties have respectively prayed for costs against the unsuccessful party on a punitive scale. The 1<sup>st</sup> respondent appears to have appreciated from the word go that he did not have a case to resist the applicants' application. He has abused the Court process. He knew that he had no case but persisted on regardless. It is the responsibility of this Court to guard against abuse of its processes. The 1<sup>st</sup> respondent's conduct attracts censure through punitive costs.

## **ORDER**

- 1. 1st Respondent be and is hereby interdicted from conducting any mining or mining-related activities at Plant Site 682 [Registered Number 32866] located at Royal Family claims and at all other mining claims owned by the Applicants in Filabusi pending the finalization of the Summons action instituted by the 1<sup>st</sup> Respondent under cover of Case No. HC 1086/21.*
- 2. 1<sup>st</sup> Respondent be and is hereby ordered to cease any mining or mining-related activities that he had commenced at the Royal Family claims in Filabusi and belonging to 1<sup>st</sup> Applicant including but not limited to plant Site 682 mentioned in paragraph 1 above until such a time as the suit in case number HC 1086/21 will have been finalized.*

3. *1<sup>st</sup> Respondent be and is further interdicted from interfering with Applicants' mining activities and operations at Plant Site 682 mentioned in paragraph 1 above, and at any of the mining claims registered in the names of the 1<sup>st</sup> Applicant until the suit in case number HC 1086/21 will have been determined.*
4. *1<sup>st</sup> Respondent shall pay the costs of this application at an attorney and client scale.*

***NDLOVU J.***

*Messrs, Moyo and Nyoni Legal Practitioners, Applicants' Legal Practitioners.*

*Nkomo & Sibanda Legal Practitioners, 1<sup>st</sup> Respondent's Legal Practitioners.*