

AURIGA MINERAL EXPLORATION PRIVATE LIMITED
versus
KORZIM STRATEGIC MINERALS PRIVATE LIMITED
and
ENVIRONMENTAL MANAGEMENT AGENCY
and
SHERIFF FOR ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 10 & 29 November 2023

Urgent Chamber Application

Mr *B Mudhau*, for the applicant
Mr *B Mlauzi*, for the respondent

TSANGA J:

The Background

The applicant, Auriga Mineral Exploration (Pvt) Ltd, a holder of an Exclusive Prospecting Order Number 1806 (EPO 1806) which it says was issued in 2021 for a three-year period has brought this urgent application for an interdict. The basis is that the first respondent Korzim Strategic Minerals (Pvt) Ltd, has dangerously mined across a road by constructing a tunnel underneath it on the Shamva–Nyagande Road. The Applicant says it detected mining activities in its prospecting area on the 3rd of November 2023 through satellite images and went on an investigative mission to the site. It found dangerous workings on site and in view of the tunnel which it says the first respondent had constructed, it approached without delay the Environmental Management Agency (EMA) on the 6th of November 2023. The latter confirmed that the first respondent does not have an environmental impact mining assessment certificate. EMA is said to have recommended that the applicant approach the courts for an order to stop the first respondent from mining.

As a result of the mining activities applicant averred that the road above that tunnel now stands suspended by only 4 metres only of ground above it. A diagrammatical drawing was

provided by the applicant. The road is also said to have already developed a crack on the 13km peg. It is the danger posed not only to the employees of the applicant who use the road to access the exclusive prospecting area, and the public as well as other mining companies in the area, that has spurred the applicant to lodge this application of an imminent environmental disaster. The applicant described the imminent disaster thus:

“The Shamva-Nyagande road is passage to heavy trucks from mining companies such as PPC, Canterbury Mining (Private) Limited and other small scale mining firms such that the continued illegal mining by the 1st respondent threatens the lives of many road users. Equally, the employees of the 1st respondent are in danger of being a statistic to mine collapse as it is clear that no proper right to mine has been sanctioned by the 2nd respondent.”

The application is therefore brought by the applicant as an interested party it says which seeks to protect the environment and to avert a looming danger. What applicant seeks is that the first respondent immediately cease all mining operations. The provisional order sought is couched as follows:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honorable Court why a final order should not be made in the following terms –

- a) The 1st respondent be and is hereby ordered to cease any form of mining operations on an area with defined coordinates, 358267, 8090586, Coordinate system: Arc 1950 zone 36s at Kingstone Nyamakura Farm of Lot 1 of New Brixton Farm, Shamva in Mashonaland Central until it has complied with the laws permitting such mining.
- b) The 1st respondent be and is hereby ordered to fill in any holes or shafts sunk on the area it occupies on an area with defined coordinates, 358267, 8090586, Coordinate system: Arc 1950 zone 36s at Kingstone Nyamakura Farm of Lot 1 of New Brixton Farm, Shamva in Mashonaland Central.
- c) Failing compliance by the 1st respondent, the 3rd respondent be and is hereby ordered to fill-in any holes or shafts sunk on the area occupied by the 1st respondent on an area with defined coordinates, 358267, 8090586, Coordinate system: Arc 1950 zone 36s at Kingstone Nyamakura Farm of Lot 1 of New Brixton Farm, Shamva in Mashonaland Central.
- d) The 1st Respondent shall bear costs of this application on the higher scale of Attorney and Client.

INTERIM RELIEF GRANTED

Pending determination of this matter applicant is granted the following relief:

- (a) The 1st respondent be and is hereby interdicted from carrying out any mining activities on an area with defined coordinates, 358267, 8090586, Coordinate system: Arc 1950 zone 36s at Kingstone Nyamakura Farm of Lot 1 of New Brixton Farm, Shamva in Mashonaland Central.”

In essence what the applicant seeks from the above is that the mining activities by the first respondent cease immediately with the filling up of the tunnel in reality being the subject matter of the final order.

The first respondent vehemently opposed the order sought on the basis that the applicant lacks *locus standi* as it is only the Minister of Mines or the Environmental Agency (EMA) that can stop them from mining. Further it was argued that the EPO 1806 does not permit the applicant to encroach into the space of the first respondent. The applicant was in fact said to have extensively mined gold ore. The first respondent also submitted that it is EMA that should be approached and not the court if the applicant is of the view that the first respondent has violated environmental laws.

I dismissed the preliminary point on applicant’s *locus standi*. The requirements of an interdict are well established: namely a *prima facie* right **even if open to some doubt** or clear right; a well-grounded apprehension of an irreparable harm; an absence of an alternative remedy and the balance of convenience should the interdict be granted or refused. See *Setlogelo v Setlogelo* 1914 AD 221, at p 227; *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 [1] ZLR 289 [SC] at p 391 and *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor* 2000 [1] ZLR 234 [H] at p238. I was also of the view that if this is really an environmental disaster issue with an immediate impact on life and limb that was at hand, it would be limiting to argue that the applicant has no *locus standi* to seek an interdict without hearing the facts fully on whether these requirements are met. I equally proceeded to hear the matter on merits on the basis that it was difficult to make any informed decision without hearing the full gist of the factual spectrum especially since the first respondent revealed from the onset that there were undisclosed facts by the applicant about its activities in the area which in reality had spurred the application.

Submissions on the merits

As far as a *prima facie* right or even clear right is concerned, the applicant’s counsel Mr *Mudhau* re-emphasized that s 73 (1) of the Constitution states that every person has a right to have the environment protected. He argued that application falls under the rubric of “every

person”. Furthermore, he emphasized that having an EPO in fact gives applicant a real right dispensing with the need to show reasonable apprehension of harm. Nonetheless, he highlighted that harm as being that the road was no longer useable or at least the applicant will no longer be able to use that road because of the crack that has developed which was previously not there. He argued that there is no alternative remedy EMA itself having told the applicant to approach the court. In terms of prejudice he pointed to harm to applicant’s employees and the public at large, emphasizing that it might not be able to access the area covered by the EPO which must be used within a particular time frame before it expires. If the road collapses, it would mean time lost to the applicant in terms of the prospecting order.

Mr *Mlauzi* for the first respondent argued on the merits that the requirements of an interdict had not been met. A clear right had not been established because what exists between the parties is a mining dispute. Both are legitimately in the area but for different purposes. He stated that one hundred and sixty-five loads of gold ore had already been mined by the applicant (though it only has a prospecting licence) under the supervision of one Nyamasoka, a member of the Zimbabwe Republic Police and a police constabulary named Nyanjinya. A police report had been made in Shamva.

The application was thus said to have been made to preempt action arising from the report made. Furthermore, the applicant had not cited the Ministry of Mines which it was said has the right to stop the first respondent from mining. EMA itself, it was argued, could not do so unless it consults the Minister of Mines. The applicant was also said to be relying on hearsay evidence as it had not stated who at EMA had said it should approach the courts. In other words, there was no evidence of refusal by EMA to act. Mr *Mlauzi* drew attention to ss 10, 114 and 136 in particular of the Environmental Act which he said give EMA ample power to take action without necessarily approaching the court. As for the diagram submitted by the applicant, Mr *Mlauzi* highlighted that it was unauthenticated and had been produced by a computer with no credentials of its author. It had also not been seconded by EMA who are purported to have said their laws had been violated. He also submitted that the shaft or tunnel in question had in fact been constructed by the applicant itself, now making allegations on what it had created. He emphasized the duty of EMA to make orders and that only the Minister can stop the first respondent from mining. The applicant was thus said to have other remedies, firstly to approach the Minister of Mines, and, secondly to approach

the Administrative Court. Essentially, the applicant was said to be hiding behind this application to merely stop the first respondent from mining.

In response Mr *Mudhau* submitted in return that no appeal could lie to the Minister or the Administrative court because an appeal lies to the Minister if there has to be a decision on the subject matter of determination. In this instance, EMA was said not to have made any determination and therefore there was no basis of appealing the Minister as there is no substantive decision. He emphasized that the first respondent was carrying on its mining activities without an environmental assessment having been made. As for hearsay evidence from EMA, his argument was that it is allowed in urgent applications. On the tunnel having been constructed by the applicant, he argued that it does not detract from the matter before me since the first respondent has conceded carrying out mining operations. He also claimed that the applicant was hearing about the police report for the first time and that there was no evidence that the first respondent had sought to interdict the applicant from mining. However, he did not deny that ore had been mined. The non-joinder of the Minister was said not to defeat the cause of action. In sum, he maintained that there was no basis for not granting the interdict.

Legal and factual analysis

Disputes such as this present challenges for resolution on an urgent basis for a number of reasons. Truth does not come easily where the fight is in reality a scramble for resources. Non-disclosure of facts renders a matter non urgent. I do not believe that the applicant has approached this court driven by the desire to avert harm from occurring. The dispute between the parties was not at all disclosed by the applicant only to emerge from the submissions by the first respondent at the hearing of the urgent matter. The approach of the courts is to discourage urgent chamber applications which are characterized by material non-disclosure, *mala fides* or dishonesty. See *Graspeak Investments P/L & Anor* 2001 (2) ZLR 551 (H). As stated in *Nehanda Housing Co-Operative Society & Ors v Simba Moyo and Ors* HH 987/15:

“...a party that conceals material information must be unworthy of the protection or assistance of the court. If you seek relief, you must take the court into your confidence, laying bare all the relevant facts on the matter, even those that you may perceive to be adverse to the relief that you seek.”

In fact the non-disclosure seems to suggest that the primary motivating factor is stop the applicant from mining so that the applicant can have an upper in mining in the area before the expiry of the EPO. In other words it is about protecting self-interests.

That the parties are in fact quibbling over gold ought to have been disclosed instead of pretending to be an environmental Good Samaritan out to save lives. Ordinarily the basis of an urgent application is to stop irreparable harm from some conduct where *a prima facie* right has been shown. However, where a party approaches the court for an interdict without disclosing material facts, I do not think that those kind of situations merit the granting of a provisional order. The first respondent's revelation that there is a mining dispute involving mining of gold ore is important particularly when looked at against the order sought which is to stop the first respondent from mining.

Even with a *prima facie* right as an environmental "Samaritan" the requirement of a reasonable apprehension of harm is in my view far from being logically addressed by the applicant. The Good Samaritan in fact stands on shaky ground. The first respondent is correct that the diagram in question demonstrating the tunnel is one created by the applicant without requisite supportive credentials. Materially, there no photographs of the dangerous crack on the road that is said to have developed. If indeed the road had developed a crack that is so dangerous to others, the very least that the applicant could have done was to take a picture as evidence. After all it went to the site and made that observation. There is also no outright denial that the tunnel was constructed by the applicant.

It is of course very dramatic to allege imminent collapse of a road in support of the requirement of real harm but it makes little sense if the road is really in danger of imminent collapse, that applicant is not seeking interim relief that the road be not be used since it is used by heavy trucks and other miners as applicant averred. One would have thought that the Samaritan's interim interdict would have been primarily that the road be closed whilst urgent steps are taken to have the tunnel filled. It makes zero sense that a road in danger of imminent collapse and hanging by the proverbial thread albeit in the form of 4 metres of earth, would continue to be used by heavy trucks who are also mining in the area.

As for other remedies, having looked at the provisions cited by the first respondent, I am inclined to agree that the applicant has not taken action to exhaust local remedies before coming

to court. Section 10 of the Environmental Management Act [*Chapter 20:27*] outlines amongst the functions and powers of EMA the power to “serve written orders on any persons requiring them to undertake or adopt such measures as are specified in the orders to protect the environment”. The Minister too in terms of s 114 of the same Act may make orders for the protection of the environment including requiring the rehabilitation of a mining site. Section 136 also enjoins the Minister, the Secretary, the Agency, and the Director-General and any other person or authority to follow the rules of natural justice in particular the right to be heard. It cannot be that a party such as the applicant can seek to shut down a mine whilst neglecting to have the relevant authorities play their part.

It is also not right for agencies with the expert know how such as EMA to abrogate their responsibilities by simply referring a matter to court without taking any action themselves. What is the point of having expert institutions there if indeed as alleged, they simply refer matters to court without so much as an effort to solve a problem from their expert vantage point? It is only proper that the court declines to be abused in such circumstances.

I therefore do not believe that the requirements of an interdict have been satisfied. Whilst the applicant indeed has an EPO, the first respondent also has a valid mining licence. In so far as imminent harm, it is notable that what applicants seeks is the seizure of all mining activities for its own goals. The applicant, as stated has also not exhausted all local remedies. The balance of convenience favors that the application for an interdict be dismissed with costs and that applicant should follow the available remedies in this matter.

Messrs Mudimu Law Chambers, applicant’s legal practitioners
MC Mukome Legal Practitioners, first respondent’s legal practitioners