

THULANI SHUMBA
versus
GODFREY CHINAKE
and
PROVINCIAL MINING DIRECTOR (MASHONALAND CENTRAL)
and
PROVINCIAL LANDS OFFICER (MASHONALAND CENTRAL)
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 8 and 14 & 23 June 2021

Urgent Chamber Application-Compelling Order

W. Chinembiri, Mabwe, for the applicant
Z. Kajokoto, for the 1st respondent
B. Moyo, for the 2nd to 4th respondents

MUSITHU J:

BACKGROUND

The applicant seeks a compelling order against the 1st and 2nd respondents. The draft provisional order accompanying the application reads as follows:

“TERMS OF THE FINAL ORDER

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

1. The Provisional Order is hereby confirmed.
2. The 1st respondent is ordered not to interfere with the mining operations of the applicant and to produce a valid and extant offer letter to Plot 40 of the remainder of Barrassie farm to the 2nd respondent.
3. That the 1st respondent be and is hereby ordered to pay costs of suit on an attorney and client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the Applicant is hereby granted the following relief:

1. The 1st respondent and all those claiming rights through him be and are hereby ordered not to interfere with the mining operations of the applicant pending final determination of the farmer-miner dispute by the 2nd respondent.
2. The 2nd respondent is hereby ordered to grant the applicant and his mine workers, rights of access and operations at Pen A and Pen B mining claims pending investigation and final determination of the Farmer-Miner dispute.

3. The 2nd respondent and all those under his control are ordered to allow applicant to remove his gold ore and deliver it to the gold milling points and to carry out any allied operations connected to the mining of gold at Pen A and Pen B mining claims pending final resolution of the farmer-miner dispute.”

I set the matter down for hearing on 8 June 2021. At the hearing, Mr *Moyo* for the 2nd to 4th respondents advised the court that the 2nd and 4th respondents were not opposed to the relief sought. 3rd respondent was however opposing and a notice of opposing would be filed if a postponement was granted. I postponed the matter to 14 June 2021, to allow the parties to conduct an on the spot verification with a view to resolving the dispute amicably. The postponement would also afford me time to consider the 1st respondent’s notice of opposition which was only handed in over the bar.

The parties returned empty handed. They failed to reach a settlement. Applicant had filed an answering affidavit in response to the 1st respondent’s notice of opposition. The 3rd respondent had also filed an opposing affidavit. The matter proceeded to arguments.

Applicant’s Case

Applicant claims to be the registered owner of mining claims known as Pen A and Pen B situated in Bindura. Two certificates of registration were attached to the applicant’s founding affidavit. They are all in the name of an entity known as Future Connections Mining Syndicate. Certificate of registration 46748 was issued on 21 December 2018. It is in respect “*of a block consisting of ten (10) Gold Reef named BASIE.....the situation of which is indicated to be in Barrassie Farm, approx. 3,9 km N. East of trig beacon...*”. Certificate of registration 47117 is in respect of “*a block consisting of 8,32 (EIGHT, THIRTY TWO) GOLD REEF claims, named PEN “A B” the situation of which is indicated to be on Barrassie Farm, Approximately 4,8 km North East of Trig Beacon 25/5 (BINDURA)*”. The applicant also attached two inspection certificates issued in December 2020. They are all in the name of Future Connection Mining Syndicate.

The applicant asserted that the mining claims were situated in a farm known as Subdivision 2 of Barasele Farm in Bindura. The offer letter for that farm is in the name of one E Chitate. It was issued by the then Minister of Lands, Agriculture and Rural Resettlement on 7 August 2003. The applicant claimed that he had been conducting mining operations at the claims since 2018. Applicant further asserted that in March 2021, he made discoveries of rich deposits of concentrated gold ore in an area on the underground gold belt. In came the 1st respondent. He claimed to be the

title holder of the farm where the mining claims are located. He demanded a share of the spoils. Naturally the applicant resisted the demands insisting that the claims were located in Chitate's farm. The applicant claimed that through misrepresentation, the 1st respondent got the 2nd respondent to suspend mining operations at the mining claims pending the resolution of the dispute between the two parties by the 2nd respondent.

The 2nd respondent invited the parties to a meeting on 21 April 2021. Applicant claimed that at the meeting, 1st respondent failed to produce an offer letter to back up his claims that he was the rightful occupant of the farm in which the mining claims are located. Applicant further claimed that at the time that the 2nd respondent suspended his mining operations, he had stockpiled 6 tonnes of gold ore for milling. The gold ore was exposed and being stolen by persons that the applicant suspected to be agents of the 1st respondent. The 2nd respondent failed to resolve the dispute between the parties. The applicant engaged his legal practitioners who also made written follow ups with the 2nd respondent, but all to no avail. Letters were also written to the 3rd respondent asking him to confirm if Chitate's offer letter was still valid. The 3rd respondent did not respond.

The applicant asserted that the need to act arose on 29 May 2021 when he discovered that his mine had been invaded by thieves and illegal gold panners. He made a report at Bindura Rural Police Station on 1 June 2021. The applicant contended that his title was unimpeachable. The certificates of registration remained valid until set aside by a lawful authority. The fact that his gold ore was being pilfered by unknown people made the matter urgent. His equipment was also at the risk of being stolen or vandalized. The likelihood of irreparable harm was not fanciful. It was real. The matter was craving for an urgent determination.

1st Respondents' Case

In opposition, the 1st respondent raised two points *in limine*, that is lack of urgency and the absence of *locus standi*. Regarding the merits, he averred that the applicant did not have a *prima facie* or clear right to the land where the mining claims were located. The applicant failed to produce the written consent that he was given by Chitate to carry out mining operations at the latter's farm. The least he could have done was to get Chitate to depose to a supporting affidavit, or better still cite him as an interested party in these proceedings.

On his part, 1st respondent attached to his founding affidavit, an offer letter dated 1 July 2015, issued by the then Minister of Lands and Rural Resettlement. The offer letter is in respect of “*Subdivision 40 of the Remainder of Barassie in Bindura District of Mashonaland Central Province*”. The farm measures approximately 22.875 hectares. 1st respondent also attached documentation that showed that part of the farm was utilized for maize production under the Government sponsored Command Agriculture scheme. The court was urged to dismiss the application with costs on the higher scale.

1st respondent also alleged that he made a complaint to the 2nd respondent following an influx of artisanal miners at his farm. There was no semblance of order, suggesting that all the activities were illegal. The land degradation was occurring on a large scale, implying that no environmental impact assessment had been done as required by the law. The court was urged to dismiss the application with costs on the attorney and client scale.

Third Respondent’s Opposing Affidavit

The third respondent raised the following *in limine*. Absence of a *prima facie* right, absence of a written consent by the owner of the farm in contravention of section 31(1)(g) of the *Mines and Minerals Act*¹, and fatal non joinder. The absence of a *prima facie* right was related to the offer letter in the name of Chitate, which was attached to the applicant’s founding affidavit. That offer letter was allegedly withdrawn by the Minister of Lands in 2015 for re-planning purposes. Chitate’s farm was further subdivided to create six plots. Subdivision 2 of Barasele Farm, in respect of which an offer letter was granted to Chitate was therefore no longer in existence. The applicant could not rely on a non-existent offer letter to assert rights to the mining claims. The application was therefore fatally defective.

According to 3rd respondent, the absence of a written consent as required by section 31(1)(g) of the Mines and Minerals Act made the application defective. Section 31(1)(g) states as follows:

“31 Ground not open to prospecting

- (1) Save as provided in Parts V and VII, no person shall be entitled to exercise any of his rights under any prospecting licence or any special grant to carry out prospecting operations or any exclusive prospecting order—

¹ [Chapter 21:05]

- (a)
- (g) except with the consent in writing—
- (i) of the owner or of some person duly authorized thereto by the owner, upon any holding of land which does not exceed one hundred hectares in extent and which is held by such owner under one separate title:
Provided that if such owner has one or more holdings which are contiguous and the total area of such contiguous holdings exceeds one hundred hectares this paragraph shall not apply to such holdings; or.....”

As regards non-joinder, it was the 3rd respondent’s contention that Chitate was an interested part in these proceedings. He was the holder of an offer letter which concerned a farm that was at the centre of the dispute. That made him an interested party. The 3rd respondent’s responses on the merits were inextricably tied to the preliminary points raised. The court was urged to dismiss the application for lack of merit.

Applicant’s Reply

In response, the applicant insisted that he had the requisite *locus standi*. He averred that he was the duly nominated representative of a mining syndicate known as Future Connections Syndicate. That explained why all communication from the 2nd respondent was directed to him. The applicant attached minutes of a meeting held by the syndicate members in which they allegedly gave him authority to represent the syndicate in any litigation involving the mining claims. The other two syndicate members were Perpetual Moyo and Tafadzwa Denha. The minutes are dated 9 June 2021.

On the merits, the applicant insisted that his application was meritorious. He dismissed the 3rd respondent’s version that Chitate’s farm was divided following the withdrawal of his offer letter in 2015. The applicant argued that the subdivision could not have happened in the absence of a formal withdrawal of the offer letter issued to Chitate in 2003. Chitate’s offer letter therefore remained valid. If it was still valid, then the applicant’s agreement with Chitate also remained valid. The applicant therefore had a *prima facie* right based on his agreement with Chitate. He insisted that he had made out a case for the granting of the relief sought.

Submissions on the Preliminary Points

Locus Standi

Submissions on this point were heard from counsels for the applicant and the 1st respondent. For the 1st respondent, Mr *Kajokoto* submitted that there was no proper applicant before the court. The certificates of registration were in the name of a syndicate. The certificates did not mention the applicant. He further submitted that even if it were to be accepted that the applicant was a member of that syndicate, the certificates were required to reflect the names of the syndicate members. The fact that the evidence of the syndicate members was tendered in the replying affidavit did not help the applicant's cause. An application had to stand or fall on its founding affidavit. The court was referred to the case of *Bushu v GMB*². The applicant did not have the requisite *locus standi* when he filed the application.

In reply Mr *Chinembiri* argued that the applicant had at all material times acted as the representative of the syndicate. He had at all material times engaged with the respondents in that capacity. His *locus standi* derived from the fact that he had a direct and substantial interest in the subject matter grounded on the certificates of registration. He referred to the case of *Air Zimbabwe Corporation v ZIMRA*.³ He further submitted that the reports produced in court by the 2nd and 4th respondents' counsel showed that the applicant was the registered owner of the mining claims.

Analysis

In *Makarudze & Anor v Bungu & Ors*⁴, MAFUSIRE J said of *locus standi in judicio*:

“*Locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a **direct and substantial interest** in the subject-matter and outcome of the litigation: see *Zimbabwe Teachers Association & Ors v Minister of Education and Culture*⁵. In that case EBRAHIM J, as he then was, stated⁶:

“It is well settled that, in order to justify its participation in a suit such as the present, a party ... has to show that it has a **direct and substantial interest** in the subject-matter and outcome of the application.”

The **direct and substantial interest** test has been followed in a plethora of cases such as those listed in footnote one above. In *Henri Viljoen (Pty) Ltd v Awerbuch Brothers*⁷ it was held to connote:

² HH 326/17

³ HH 6/03

⁴ 2015 (1) ZLR 15 (H)

⁵ 1990 (2) ZLR 48 (HC) See also *Dalrymple & Ors v Colonial Treasurer* 1910 TS 372; *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O); *United Watch Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C); *Deary NO v Acting President & Ors* 1979 RLR 200 (G); *PE Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T); *AAIL (SA) v Muslim Judicial Council* 1983 (4) SA 855 (C); *SA Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O); *Molotlegi & Anor v President of Bophuthatswana & Ors* 1989 (3) SA 119 (B)

⁶ At pp 52 - 53

⁷ 1953 (2) SA 151 (O)

“... an interest in the right which is the subject-matter of the litigation and ... not thereby a financial interest which is only an indirect interest in such litigation.”

CORBETT J, in *United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor*⁸, elucidated it as follows⁹:

“This view of what constitutes a **direct and substantial interest** has been referred to and adopted in a number of subsequent decisions, including two in this Division ... and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (See *Henri Viljoen*'s case *supra* at 167)”.

I associate myself with the sentiments expounded by the learned judges. Direct and substantial interest denotes a significant interest in the subject matter of litigation, as well as its outcome. It must not be fanciful. Court proceedings by their nature are no stroll in the park. A litigant does not just approach the court for fun. They must assert clearly demonstrate their connection to the subject matter before the court. On its part, the court will be slow to deny *locus standi* to a litigant.

When the parties first appeared before the court on 8 June 2021, I raised the issue of the applicant's *locus standi* with Mr *Chinembiri*. The attached certificates of registration were in the name of a syndicate, and there was nothing in the papers connecting the applicant to the syndicate. Mr *Chinembiri* was evasive in his response. The court expected the applicant to explain his relationship with the syndicate in his founding affidavit. Instead the founding asserts that he is the owner of the mining claims in dispute. He attached the certificates of registration in order to back up that claim. Not once did he mention the syndicate in his founding affidavit. This was all despite the fact that the certificates of registration are in the name of that syndicate.

The answering affidavit was not helpful. The applicant attached minutes of a meeting that he claimed was held by the syndicate members. He further claimed that it was at that meeting that the syndicate members agreed that the applicant should represent the syndicate in these proceedings. The minutes of the said meeting are self-destructive. The meeting was held on 9 June 2021. The applicant's founding affidavit was deposed to on 1 June 2021. It therefore meant that at the time that the applicant deposed to the founding affidavit, he had no authority to represent the alleged syndicate members. He was on a frolic of his own. To the extent that the minutes were

⁸ 1972 (4) SA 409 (C)

⁹ At p 415H

intended to prove the source of the applicant's authority to institute the proceedings on behalf of the syndicate, then they ruined the applicant's cause.

I also note that the minutes do not establish a connection between the applicant and the syndicate. Mr *Kajokoto* submitted that a certificate of registration must show the names of the syndicate members. Although he did not refer me to any authority for this proposition, it does make a lot of legal sense in the court's view. I dread to think that 4th respondent would register a syndicate and fail to keep a record of the individual members who constitute that syndicate. How will the 4th respondent resolve disputes in the event that competing claims arise between individuals who assert some rights in a syndicate? Such disputes will be difficult to resolve in the absence of that information.

In the court's view, there must exist some records which reflect the membership status of a syndicate that was issued with a certificate of registration by the 4th respondent. Without that there would certainly be chaos, on the ground. Mr *Chinembiri* submitted that a report tendered in court on behalf of the 2nd and 4th respondents showed that the applicant was the representative of the syndicate. The report was tendered by Mr *Moyo*, and it was admitted into the record by consent. Still, that report does not help explain the applicant's status in the syndicate. It refers to the applicant as the "miner". It does not refer to him as a representative of the syndicate. It does not even mention the word "syndicate".

For the foregoing reasons, this court was unimpressed by the submission that the applicant was the representative or a member of Future Connections Mining Syndicate. He failed to authenticate his *locus standi* to institute these proceedings on behalf of Future Connections Mining Syndicate in whose name the mining claims are registered. The application must fall on that basis. There is no proper applicant before the court. The issue of the applicant's *locus standi* was brought to the attention of his counsel at the very first hearing. The matter was postponed for a whole week, during which time the applicant's counsel ought have obtained the requisite documentation to authenticate the applicant's status in the syndicate. He did not take heed, and chose instead to rely on a report produced by the 2nd and 4th respondents' counsel. The applicant's counsel was nonchalant in his approach.

COSTS

The attitude of the applicant's counsel ordinarily invites an order of costs on the higher scale, as prayed for by the 1st respondent's counsel. He had all the time to regularize the anomaly regarding the applicant's status, especially after the court raised that issue at the outset. He was forewarned, but he chose to remain obstinate. Nonetheless, in the exercise of its discretion, the court decided against striking the matter off of the roll with costs on the punitive scale. Besides, the question of awarding costs on the punitive scale was not pursued with much exuberance by the 1st respondent's counsel.

DISPOSITION

Resultantly it is ordered that:

1. The application is struck off the roll with costs.
2. The applicant shall pay the 1st and 3rd respondents' costs of suit.

B. Chipadza Attorneys At Law, applicant's legal practitioners

Kajokoto and Company, 1st respondent's legal practitioners

Civil Division of the Attorney General's Office, 2nd, 3rd & 4th respondents' legal practitioners