

DARYL ARCHIBALD
versus
PEE-MONEY ENTERPRISES (PRIVATE) LIMITED
and
THE ENVIRONMENTAL MANAGEMENT AGENCY
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 2, 7 & 15 June 2022

Urgent Chamber Application

Ms P Chimombe, for applicant
Mr PT Muhlekiwa, for 1st respondent
No appearance, for 2nd and 3rd respondents

TAGU J: In this urgent chamber application the applicant is seeking a temporary interdict in which he wants the first respondent to be interdicted from carrying out any mining activities on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe.

On the return date the applicant will be seeking a final relief to the effect that:-

1. The first respondent be and is hereby ordered to cease any form of mining operations on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe, until it has complied with the laws permitting such mining.
2. The first respondent be and is hereby ordered to restore the status *quo ante* prevailing on the environment on the area it occupies on a certain piece of land being two thirds shares of the Remaining extent of Teviotdale, Mazowe prior to the illegal mining operations.
3. For avoidance of doubt the first respondent be and is hereby ordered to fill in any holes or shafts sunk on the area it occupies on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe.
4. Failing compliance the third respondent be and is hereby authorized to restore the status *quo ante* prevailing on the environment on the area occupied by the first respondent on a

certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe prior to the illegal mining operations.

5. For avoidance of doubt, failing compliance with 1, 2 and 3, above the third respondent be and is hereby ordered to fill in any holes or shafts sunk on the area occupied by the first respondent on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe.
6. The first respondent shall bear costs of this application on the higher scale of Attorney and Client.

The factual back ground to this application is that the applicant resides on Teviotdale Farm which is situated in Mazowe on the area just where the Mazowe River begins to form. On this farm lies a natural spring which feeds into Mazowe river and has done so since time immemorial. The farm has been prone to quite a number of legal and illegal mining activities by various and different persons whom this court had occasion to order their evictions in order to protect the non-renewable resource being gold which is what the illegal miners mostly seek after including the first respondent. Sometime in February 2022 the applicant received a call from one Mrs Maregere who is a wife to one of the illegal miners who had invaded the farm for mining under the banner of one Kumbirai Kangai. The group of illegal miners have since been ejected by an order of this court under HC 1604/21. The call from Mrs Maregere was to the effect that she needed help in pulling out her now late father from an about 20 metre hole that had been sunk by illegal miners on the farm. Applicant sadly extended his help but it was too late as the about 70 year old man died a few hours after he had been pulled out the hole. He was buried in Guruve. Irked by this occurrence applicant confronted first respondent's employees and demanded that they produce documentation that would show that mining activities had been sanctioned by the rightful authorities and in particular the second respondent which is in terms of s 97 of the Environmental Management Act clothed with authority to issue an Environmental Impact Assessment Certificate prior to any mining activities ensuing. Applicant cited the section of the law to illustrate the infringement of his constitutionally protected environmental rights. At best the first respondent's employees took to their heels and fled into the thick woods of the Teviotdale farm. Applicant was left with no option but to verify the basis of mining operations by the first respondent. To that

effect he engaged a private investigator to look into the suspicious mining activities by the first respondent.

On the afternoon of 24 May 2022, applicant received a call from the private investigator one Charles Mike whose affidavit he attached in his founding affidavit informing him that he had all the documentation to show that the first respondent was carrying out illegal mining and that it had no blessing from any authority to act as it is doing. On the strength of the private investigator's report the applicant filed the present urgent chamber application for an interdict on 27 May 2022 on the basis that his constitutionally protected environmental rights are being infringed by the first respondent.

The first respondent filed a Notice of Opposition and took two points *in limine*, firstly, that the applicant has no *locus standi in judicio*, secondly, that the matter is not urgent. Both points *in limine* were opposed by the applicant.

NO LOCUS STANDI IN JUDICIO

The first respondent's contention is that the applicant has no *locus standi in judicio* to institute the current proceedings against it. Mr Pride Matangi who is the Managing Director of the first respondent deposed to an affidavit that he is a registered title holder of a special grant SG6333 which is located on the farm. The said farm was acquired by the Minister of Lands & Rural Resettlement in 2001. It is now state land. In 2006, CMAL (PVT) LTD challenged the acquisition of its farm under case number HC 1762/16, but the same was dismissed. He said the applicant is not the owner of Teviotdale Farm. Hence he has no legal relationship with the applicant. Applicant has not demonstrated his locus standi to institute the current proceedings against him. Asked by the court if the deponent to the first respondent's Notice of Opposition knows the Applicant, the counsel for the first respondent indicated that his instructions are that the applicant is not known to the first respondent, if the applicant was really staying at the farm, he ought to have known of first respondent's occupation of the said farm since 2017 and that it had been carrying out mining activities.

In response the counsel for the applicant submitted that the applicant is not related to CMAL (PVT) LTD. She said the applicant is a farmer who resides on the farm and is approaching the court on his own capacity and the company is a legal persona that can approach court individually. She further submitted that the applicant's *locus standi* is derived from s 73 of the

Constitution of Zimbabwe and that he has the right to approach court to seek protection where his environmental rights are being threatened.

Section 73 of the Constitution of Zimbabwe Amendment (No.20) Act 2013 provides as follows:-

“73 Environmental rights

- (1) Every person has the right –
 - (a) to an environment that is not harmful to their health or well- being; and
 - (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecological sustainable development and use of natural resources while promoting economic and social development.
- (2) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the rights set out in this section.”

My reading of s 73 (1) of the Constitution of Zimbabwe shows that every person has a right to an environment that is not harmful to their health, and to have that environment protected from pollution, ecological degradation and have it secured for economic and social development. It follows therefore that anyone who notices a threat to his or her environment has a right to approach the relevant State organs including the courts to make sure that the environment is protected. Applicant stated in his founding affidavit that he resides on Teviotdale Farm. That he witnessed the farm being prone to quite a number of illegal mining activities by various and different persons whom this court had occasion to order eviction in order to protect the non-renewable resource being gold which is what the illegal miners mostly seek after including the first respondent. What irked him is the incident where an about 70 year old man fell into a 20 metre hole and died. He then decided to approach a private investigator to investigate the activities of the first respondent on this farm the only entity he saw carrying mining activities. Nowhere did the applicant say he is the owner of the farm. He said he resides on this farm and never stated his link with CMAL (PVT) LTD. Clearly the applicant had been aware of the presence of the first respondent on the farm and its activities which he assumed were above board. Hence he caused the private investigations on first respondent’s mining activities after the fatal incident and the fact that first respondent’s employees when approached by him to produce relevant documentations fled into the thick bushes of Teviotdale Farm.

In my view the applicant upon realizing that his environment was being threatened, took the action he did in terms of s 73 of the Constitution. A reading of applicant's founding affidavit shows that he referred to violation of his constitutional rights. There mere fact that first respondent's Managing Director did not know the applicant and had no connection with him is neither here nor there. Applicant therefore has *locus standi in judicio* to bring these proceedings against the first respondent. I will dismiss the first point *in limine*.

MATTER NOT URGENT

The attack on the urgency of the matter is that applicant's genesis of urgency is supposedly through the death of a 70 year old person who died in February 2022. It questioned why the applicant launched an urgent chamber application some 5 years later after its occupation of the farm since 2017. First respondent's contention is that the applicant does not state his relationship with the deceased nor the deceased's person's relative who sought assistance to retrieve the old man from the hole. First respondent suggested that this is fabricated case because the deceased did not fall into a hole dug by it. It challenged why the applicant held private investigations instead of relying on the Police investigations if the fatal incident had been reported to it. According to first respondent urgency in this matter is self-created.

The applicant submitted that there was a death of an almost 70 year old man in February 2022 who fell into an unprotected hole dug by miners. He realized there was imminent threat to life from haphazard sinking of holes and a degradation to his environmental rights. He immediately caused private investigations on the activities of the first respondent. He became aware that first respondent's activities are unlawful after being informed of such position and being handed over documents to that effect on the afternoon of 24 May 2022 by the private investigator. He then acted by filing the present application on 27 May 2022. He did not know whom to blame before then.

The facts of the matter are that there had been no death linked to illegal mining since the first respondent started mining in this farm. The unfortunate death occurred in February 2022. The applicant was not sluggard in seeking this interdict aimed at restricting any unlawful mining activities that pose a clear threat to his environmental rights. He became aware that the first respondent's activities are unlawful after being informed of such position and handed over documents to that effect on the afternoon of 24 May 2022. The 25th of May 2022 was a public

holiday and he approached his legal practitioners on 26 May 2022. The current application was filed on 27 May 2022. The complaint by the applicant is not against the presence of the first respondent on the farm but the unfortunate death and the degradation of the environment as evidenced by the death of the old man. The applicant therefore acted when the need to act arose. The delay to file the application has been explained because the private investigator's report was not yet out. In my view the applicant treated the matter with the urgency it deserved. He acted when the need to act arose. The second point *in limine* is therefore dismissed.

This is an application for a provisional interdict in which the applicant is seeking that the first respondent be interdicted from carrying out any mining activities on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe pending the return date. The application was triggered by the fact that sometime in February 2022 a certain 70 year old man fell into a hole sunk by some unknown miners on Teviotdale Farm, Mazowe and subsequently died and was buried in Guruve. The applicant as a resident in the said farm realized that his constitutional and environmental rights were being threatened. He instituted private investigations which revealed that the first respondent was carrying out illegal mining on the farm and that it had no blessing from any authority to act as it is doing hence filed the present application. There requirements for an application of this nature are trite and there is no need to labour on them.

The application is opposed by the first respondent.

In its Notice of Opposition the first respondent opined that there is a third force behind the application and suspects that the applicant might be conniving and colluding with one CMAL (PVT) LTD in bringing this application. It detailed the basis of its suspicions. However, CMAL (PVT) LTD is not a party to these proceedings and has not been mentioned by the applicant in any manner. While such a suspicion may be true or false it just remain a suspicion and the court cannot act on suspicions.

First respondent said it duly applied for and was issued with a special grant in terms of s 291 (1) (b) of the Mines and Minerals Act on 19 October 2017 for one year. It expired and was renewed for another two years and expired in or about 2021. It has not been renewed to date. The special grant SG6333 is located on Teviotdale Farm which was acquired by the Minister of Lands & Rural Resettlement in 2001 hence it is now state land. The first respondent disputed that the 70 year old man fell and died in a hole it sunk and claimed that its mining area is protected.

The undisputed facts from the parties as well as from the report of the private investigator are that the first respondent was once issued with a two year special grant by the Ministry of Mines and Mining Development under SG6333 on 15 May 2019 and the said authority to mine has since expired on 14 May 2021 and has not been renewed. The first respondent has made an application for the renewal of the special grant under SG6333 but it has not yet been renewed. The first respondent is currently carrying out mining operations but has not yet secured an Environmental Impact Assessment Certificate. This was confirmed by the Ministry of Mines and Minerals Development officers who compiled a checklist against the application for renewal of the special grant under SG6333. Counsel for the first respondent conceded that currently the first respondent is operating without a valid certificate pending the determination of its application for the renewal of the special grant under SG6333. He further conceded that the first respondent is currently mining on Teviotdal Farm without a valid Environmental Impact Assessment Certificate. He said in August 2018 it made an application to the second respondent for an Environmental Impact Assessment Certificate and paid the prescribed fee. He was quick to say upon the lapse of sixty days, if the second respondent does not notify it of its decision to the application, the application is deemed to have been approved by operation of law.

While that is the position at law the fact remains that the first respondent is operating without a valid Environmental Impact Assessment Certificate and a valid mining certificate. Now that there has been a death reported on the farm due to the deep holes that are being drilled without a proper sanction of the law and the second respondent has not approved the Environmental Management Plan chances are high that the authorities may not renew the first respondent's licences. Even if they may approve the first respondent's applications the law is very clear that mineral prospecting, quarrying and mining amongst others cannot be done without first obtaining a valid and approved Environmental Impact Assessment certificates. Doing so is in violation of the laws governing the protection of the environment together with persons therein such as the applicant. The applicant therefore has satisfied the requirements for a temporary interdict.

IT IS ORDERED THAT:-

TERMS OF FINAL ORDER SOUGHT

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

1. The first respondent be and is hereby ordered to cease any form of mining operations on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe, until it has complied with the laws permitting such mining.
2. The first respondent be and is hereby ordered to restore the status quo ante prevailing on the environment on the area it occupies on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe prior to the illegal mining operations.
3. For avoidance of doubt the first respondent be and is hereby ordered to fill in any holes or shafts sunk on the area it occupies on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe.
4. Failing compliance the third respondent be and is hereby authorized to restore the status quo ante prevailing on the environment on the area occupied by the first respondent on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe prior to the illegal mining operations.
5. For avoidance of doubt, failing compliance with 1, 2 and 3 above, the third respondent be and is hereby ordered to fill in any holes or shafts sunk on the area it occupied by the first respondent on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe.
6. The first 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:-

1. The first respondent be and is hereby interdicted from carrying out any mining activities on a certain piece of land being two third shares of the Remaining extent of Teviotdale, Mazowe.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served on the respondents by the applicant’s legal practitioners.

TAGU J:.....

R Murambasvina Law Chambers, applicant’s legal practitioners
Muhlekiwa Legal Practice, 1st respondent’s legal practitioners