

T & M MINING SYNDICATE
versus
STEWARD NYAKOTYO
and
PROVINCIAL MINING DIRECTOR MASHONALAND CENTRAL

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 22 September, 6, 7 and 13 October 2021

Urgent Chamber application

N.T. Mazungunye, for applicant
T.B. Ziriri, for 1st respondent
F. Gustin, for 2nd respondent

TAGU J: The applicant approached the court on a certificate of urgency seeking the following Provisional Order.

“TERMS OF THE FINAL ORDER SOUGHT

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

- a) The 1st Respondent is hereby ordered to vacate the Applicant’s mining Block Loveless 01 in Concession.
- b) 1st Respondent is ordered to pay cost of suit.

TERMS OF THE INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the terms of the final order, Applicant is hereby granted the following relief:

1. The 1st Respondent or anyone acting through him be and are hereby interdicted from interfering with Applicant’s mining operations on Loveless 01 in Concession and or act in any manner likely to interfere with Applicant’s mining operations thereon.

SERVICE OF THE PROVISIONAL ORDER

Service of the Provisional Order shall be effected to the Respondent by the Sheriff or his lawful deputy.”

THE PARTIES

The Applicant is the registered owner of a certain Block of Mine consisting of 10 (ten) gold reef namely Loveless 01 registration number 48364 the situation of which is indicated to be on State land approximately 3 km Southwest of Trig Beacon 617/5 of 1486.8m in Concession registered in May 2021. It has at all material times since its registration been peacefully carrying mining operations on the said Block. The first respondent is Steward Nykotyo a male adult who is a holder of an Offer of Land Holding under the Land Reform and Resettle Programme (Model A2 Phase ii) offered to him on 30 October 2008 at Subdivision 4 of Ivador of Farm 8 of Howick in Mazoe, District of Mashonaland Central Province measuring 128.00 hectares in extent for agricultural purposes. The second respondent is the Provincial Mining Director Mashonaland Central Province Bindura cited herein in his official capacity.

WHAT PROMPTED THIS APPLICATION

What prompted the Applicant to approach this Honourable Court seeking urgent temporary interdict as gleaned from the applicant's founding affidavit is that on the 13th day of September 2021, the first respondent came to the applicant's mine claiming that the mine is situated in his land and chased the Applicant from the mine and barring Applicant from carrying mining operations. The first respondent was in the company of his worker known as Trison Chiyangwa and other two men who claimed to be soldiers and they turned violent. They were armed with Golf sticks and wooden logs and they threatened to attack the applicant's employees in the event that they did not comply. The first respondent and his gang took over the applicant's mine without a court order. The applicant's employees were not given an opportunity to remove their mining equipment and ore which remained in the open.

On 20 September 2021 I received the file and duly and promptly set it for hearing on 22 September 2021 at 14.15 hours. On the set down date the applicant did not attend court but the respondents attended. A perusal of the Sheriff's returns showed that the applicant had not been served with the notice of set down as the applicant was not located at the given address. Resultantly, I removed the matter from the roll and indicated that the applicant was to reset the matter if it was interested in pursuing the case. The respondents were duly advised and excused.

The matter was reset for 6 October 2021 at 14.15 hours. The first respondent applied for the matter to be postponed to 7 October 2021 at 14.15 hours claiming that they had just been served with the application and were not ready to argue the matter. By consent of the parties the matter was rolled over to 7 October 2021 at the same time.

Just before the hearing the court was served with the first respondent's Notice of Opposition. The first respondent raised two preliminary points. The first preliminary point was that the matter was not urgent and that there were non-disclosures of facts by the applicant. The second preliminary point was that the relief being sought by the applicant was incompetent. The second respondent indicated that they did not have any preliminary points no submissions on the merits but would abide by the court's decision. I will dispose of the preliminary points first before dealing with the merits of the application.

URGENCY AND NON-DISCLOSURES OF FACTS

Madam *T.B. Ziriri*, counsel for the first respondent submitted that the issue is not urgent because the cause of action between the parties did not arise on 13 September 2021. She submitted that the dispute between the parties arose way back in 2019 when the applicant attempted to enter the first respondent's farm without a mining licence claiming to have inherited some mining claims from former miners. She conceded that the applicant eventually managed to secure a mining licence from the second respondent without doing a field visit and this resulted in the applicant's mining activities falling within the prohibited parameters in terms of s 31 (1) of the Mines and Minerals Act in that the mine is less than 450m from the principal homestead and is falling within the first respondent's cultivated land and water source (borehole). The first respondent resisted the blasting and drilling close to his home stead that disturbed his peace. This caused the applicant to approach the second respondent on 2 July 2021 but the second respondent to date has not yet resolved this matter because he is constrained financially to conduct a field visit. She said all these facts had not been disclosed and submitted that the tradition of the court is to frown upon litigants who do not disclose all the material facts and keep the court in the dark. For this contention she cited the case of *Nehanda Housing Cooperative Society v Moyo and others* HH-469/15. Hence she submitted that the cause of action did not arise on 13 September 2021. It was her contention that the applicant misrepresented the facts. Further, she said the application is not urgent because

this same matter having been set down for hearing on 22 September 2021 the applicant did not turn up for reasons best known to himself showing that the applicant is not in any irreparable harm. According to her there are no changed circumstances.

Mr. *N.T. Mazungunye* opposed the point *in limine*. He submitted that the matter is very urgent. In short he submitted that the events of the 13 September 2021 triggered the need to act. Before that there was no need to approach the court. He said the first respondent has no right to stop mining operations since the applicant has a valid licence to operate. It was his contention that if the first respondent want to stop mining operations there is a legal route to do so. Commenting on the location of the mine he denied that the mine is located less than 400m from the homestead. Besides the mining is being carried out on a mountain and there is no cultivation taking place. He said after the applicant engaged the second respondent, the first respondent was not forthcoming to have the dispute resolved hence took the law into his own hands. He maintained that on 13 September 2021 the first respondent with his worker and some unidentified soldiers indeed visited the mine and chased applicant' employees away. As to the fact that the applicant had not disclosed all the background facts he submitted that it is not a matter of not disclosing all facts, but failing to disclose material facts. According to him the material facts are on the founding affidavit.

Having heard the submissions from the counsels it is indeed correct that a dispute has been raging for some time between the applicant and the first respondent. However, what must have jolted the applicant to approach the court are two incidents. Firstly, the applicant approached the second respondent to resolve the dispute. The second respondent has been dilly dallying. When second respondent wanted to resolve the issue the first respondent was not forthcoming. I am not persuaded that the applicant was not chased from the mining location. On page 10 paragraph 10.1 of the Opposing affidavit the first respondent has this to say-

“This is denied. The Applicant has never been denied access to enable him to get his equipment for safe keeping until this matter is logically concluded. The truth of the matter is that the Applicant was using artisanal mining methods and equipment such as shovels and hoes and when he left the farm, his workers carried their equipment.”

What comes to the court's mind therefore, is that the applicant was indeed carrying mining operations peacefully. The question then is if they were not chased away why did the workers leave the farm? As I said earlier, it is not in dispute that there has been a longstanding dispute between the Applicant and the first respondent that necessitated the applicant to write a letter of

complaint to the second respondent. I agree with the counsel for the applicant that it is not a matter of failing to disclose all facts, but failed to disclose material facts. For example the issue that in 2019 the applicant attempted to mine without a licence is not material because the Applicant subsequently obtained its licence and started mining legally. The applicant cannot be blamed for not attending court on 22 September 2021. The circumstances leading to the applicant's non-attendance was brought to the attention of the parties who attended, particularly that the Sheriff's returns showed that the applicant was not located and not served with the notice of set down. It does not mean the applicant deliberately defaulted court. If the applicant did not treat this matter as urgent, then upon realizing that the Sheriff had failed to locate them, they caused this matter to be reset.

What constitutes urgency has been stated in *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 and followed in many other cases as follows-

“What constitutes urgency is not only the imminent arrival of the day of reckoning: a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules.”

In casu the need to act arose following the events of 13 September 2021. These events jolted the applicant to approach this court on an urgent basis. The urgency was not self-created. I therefore find no merit on the first point *in limine*.

INCOMPETENT RELIEF

The contention by the first respondent is that the applicant is requesting this court to grant a relief that will allow it to conduct mining activities using a license that has been issued *ultra vires* s 31 of the Mines and Minerals Act, albeit temporarily. It was submitted that anything done outside the law is a legal nullity. If the court is to grant the relief sought, it will be sanctioning an illegality. Further, the applicant cannot seek to have the first respondent vacate from his property as he is the legally recognized land owner under the new land tenure system of Zimbabwe after the Land Reform Program, through an offer letter. He said the law is clear that a miner has no surface rights but has underground rights to the extent that he has to extract minerals after which he has to vacate such land. It was submitted that the Mines and Minerals Act actually provides for working schemes and these are to enable the farmer to be able to make use of the surface rights and use the land covered by a mining block to the extent that it does not interfere with the mining

activities. The applicant can only use the surface to the extent that he can access the minerals underground but he has no right to claim ownership over ground covered by his mining block to the extent of demanding the court to issue an order against the land owner to permanently vacate from land covered by such mining block.

In response to this point *in limine* the applicant submitted that the point *in limine* must be dismissed for the following reasons. It was the applicant's contention that what it is seeking is a temporary relief. The surface rights which the first respondent talks of, he must make an application so that they co-exist. All the issues pertaining to the illegality of the mining permit is an issue that must be debated on the return date. As things stand the applicant has a license that has not been declared illegal. As to the schemes provided for in the Mines and Minerals Act, the applicant submitted that in terms of section 108 both or either of the two can approach second respondent.

I think the second point *in limine* has not been raised with seriousness. The applicant is a holder of a mining licence that is *prima facie* valid. It has not been declared illegal. The applicant is not seeking that the first respondent vacate the land permanently. A look at the final order being sought will reveal that the applicant is seeking that the first respondent be ordered to vacate the applicant's mining Block Loveness 01 in Concession. The provisional order also seeks that the first respondent or anyone acting through him be interdicted from interfering with applicant's mining operations on Loveless 01 in Concession and or act in any manner likely to interfere with applicant's mining operations thereon. Nowhere is the applicant seeking to cause the first respondent to vacate permanently the farm he acquired lawfully. The issue of the illegality of the mining permit are issues to be deliberated on the return date whether to confirm or discharge the provisional order. I will therefore dismiss the second point *in limine*.

AD MERITS

In casu the applicant has a *prima facie* valid mining permit. It is not in dispute that the applicant has been mining on the strength of the mining permit. This is even confirmed by the first respondent when he said it was the drilling and blasting that disturbed his peace. In the notice of opposition the first respondent did not expressly deny that on 13 September 2021 he and others approached the applicant's mine location and chased away the employees. It is the first respondent's mere say so that the first respondent will dispute visiting the mining location on the

day in question. The circumstances under which the applicant is said to have vacated the mine location has not been explained by the first respondent. In its founding affidavit the applicant chronicled the events of 13 September 2021. The events were confirmed by an employee Tineyi Tomu who stated what happened on 13 September 2021. I have no reason to doubt him. I am persuaded that such event did occur.

The applicant is seeking a temporary interdict. In an application of this nature the applicant has to satisfy the following-

- i) A *prima facie* right though open to some doubt. *In casu* the applicant is a holder of a mining licence that has been declared illegal. It therefore has established the right to be mining at the Block in question.
- ii) Injury actually committed. The applicant has been chased away. Gold ore and equipment has been left at the mercy of gold panners. Once extracted gold cannot be replaced. This second point has been satisfied.
- iii) Absence of any other remedy. The Applicant complained to the second respondent to no avail. The only remedy available is an interdict against the 1st respondent. The first respondent's actions are clearly illegal since he resorted to self -help without an order of the court.

This court has no option than to grant the urgent relief for a temporary interdict against the first respondent.

IT IS ORDERED THAT

TERMS OF THE FINAL ORDER SOUGHT

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

- a. The first respondent is hereby ordered to vacate the Applicant's mining Block Loveness 01 in Concession.
- b. First respondent is ordered to pay cost of suit.

TERMS OF THE INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the terms of the final order, Applicant is hereby granted the following relief:

1. The first respondent or anyone acting through him be and are hereby interdicted from interfering with Applicant's mining operations on Loveless 01 in Concession and or act in any manner likely to interfere with Applicant's mining operations thereon.

SERVICE OF THE PROVISIONAL ORDER

Service of the Provisional Order shall be effected to the first respondent by the Sheriff or his lawful deputy.

Chikwangwani Tapi Attorneys, applicant's legal practitioners
Zuze Law Chamber, 1st respondent's legal practitioners
Civil Division of the Attorney General, 2nd respondent's legal practitioners