

BETMON INVESTMENTS (PRIVATE) LIMITED
versus
VICTOR CHIMUTSA
and
G AND W INDUSTRIAL MINERALS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 9 and 24 November 2021

Urgent Chamber Application

N Madzivire, for the applicants
T .Makanga, for the respondents

MUNGWARI J: This is a chamber application filed on urgency. The applicant seeks an order in the following terms:

“A. **TERMS OF FINAL ORDER SOUGHT**

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

1. That the provisional order be and is hereby confirmed.
2. That the respondents and all those claiming authority through them be and are hereby permanently interdicted from taking occupation of ,clearing the road and conducting any mining operations whatsoever on the applicant’s mining claims known as Rugare AB and Rugare AC Dolomite Claims situate in Rushinga
3. The respondents and all those claiming authority through them be and are hereby interdicted from interfering with the applicant’s business operations on the said mining claims
4. The respondents shall pay costs of suit.

B. **TERMS OF INTERIM RELIEF SOUGHT**

That pending the determination of this matter, the Applicant is granted the following relief

1. The 1st and 2nd respondents and all those claiming authority through them be and are hereby barred and interdicted from conducting any work or mining operations on the applicant’s mining claims known as Rugare AB and Rugare AC Dolomite Claims situated in Rushinga until the dispute that is pending before the Ministry of Mines and Mining Development has been determined.
2. That pending the Ministry of Mines and Mining Development’s determination, the respondents are interdicted from issuing any forms of threats or violence and interfering with the applicant’s mining operations on the dolomite claims.
3. The respondents shall pay costs of suit.

The applicant a registered company is in the business of mining dolomite. It is a registered holder of certain dolomite claims known as Rugare AB and Rugare AC. Both claims are located in Rushinga district. The dolomite claims are registered with the Ministry of Mines and Mining Development under claim registration numbers 41445BM and 41446BM. The applicant has been conducting mining operations at this site since 2017. It contends that on the 31st of October 2021 one Victor Chimutsa and another unidentified man purportedly representing the respondent's company gate-crashed its mining claim. They were driving an earth moving machine colloquially called a front-end loader. The two men forced entry into applicant's premises after ignoring protestations from applicant's security guards.

Upon entry, they immediately went to work and started clearing and cutting bushes. They subsequently created an access road through applicant's premises being Rugare AB and Rugare AC dolomite claims.

It is noteworthy at this stage that the parties have an ongoing dispute regarding the ownership of the claims. That dispute was registered with the Ministry of Mines and is pending determination. The respondents hold nine dolomite claims known as Rugare 3 and 10 dolomite claims known as and Rugare 4 registered under 22758 BM and 22757BM respectively. In the dispute the respondents contend that the mining claims that the applicant claims as its own are in actual fact theirs.

Despite determination of the registered dispute remaining pending there are allegations that respondents continue to threaten to take over the applicant's dolomite claims.

The applicant's apprehension now is that the 31 October 2021 invasion of his claims by respondents is a precursor to their intention to fulfil those threats and completely take over his claims. It is as a result of that apprehension that the applicant now approaches this court on an urgent basis for an interim interdict.

The respondents on the other hand do not deny having accessed applicant's mining claims. Their only point of departure is that there was no forced entry as alleged by the applicant. Curiously, they say nothing about the allegation that they brought a front-end loader and a white Mazda vehicle with registration number ADK 3132 on the day in question. It is their argument that if the interdict sought by the applicant is granted it would substantially prejudice them as to do so would effectively mean barring them from their premises. They would not be able to conduct their mining operations which they have been involved in since

2017. They filed an opposing affidavit to the application in which they raised essentially three points *in limine* namely that;

- a. Application is not urgent
- b. Applicant has not exhausted all the available remedies
- c. Material misjoinder of the first respondent

A. **Application is not urgent**

The respondents contend that the application is not urgent primarily because the dispute arose in 2017 and was placed before the provincial mining director for determination. According to them, this is when the need to act arose, as it was then that respondents started accessing its mining claim through the same entry point as applicant. This access was without any resistance from applicant.

In attending to the issue of urgency the respondents deliberately failed to address the concerns raised by the applicants regarding their alleged forced entry into applicant's premises on 31 October 2021 with the Mazda car and the front- end loader in tow and their subsequent clearing and creation of an access road within the premises. In hearing the arguments an attempt was made by the court through counsel for the respondent to ascertain if the vehicle and the machine were not at the premises on the day in question. That enquiry did not yield a meaningful response. The only inference that can possibly be drawn from that is that indeed this occurred. The front-end loader worked on the applicant's premises on the said day clearing bushes and mapping an access road against the applicant's will. That in essence translates to forceful conduct.

On the other hand, applicant has made it clear that what has prompted this application are the events that unfolded on 31st of October 2021 and that prior to that the applicant had enjoyed peaceful occupation and mining activity at his claim.

The creation of the access road is therefore a recent occurrence. Two days after it occurred the applicant filed this application on an urgent basis and it was issued by the Registrar of the High Court on the 2nd of November 2021, exactly two days after the incident occurred.

It turns out that at the time that the applicant realised the need to act, they did not wait but quickly sought assistance through the courts.

This was an occurrence quite unlike the others. It gave rise to a reasonable apprehension that the dispute between the two had escalated to levels where the respondents

had now resorted to unorthodox means to resolve the pending registered dispute and to gain control of the applicant's premises and dolomite claims.

In defining urgency this court in the case of *Documents Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 said:

“...urgent applications are those where if the court fails to act the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversibly so to the prejudice of the applicant.”

Clearly, the point *in limine* is without merit. Applicant's need to act arose not in 2017 but on the 31st October 2021 following which they immediately approached the court for relief.

I therefore entertained the application on an urgent basis.

B. Applicant has not exhausted all the available remedies

The parties both contend that the Ministry of Mines and Mining development has been seized with their dispute since 2017. Both parties contend that they have attended at the Ministry's offices seeking a resolution of their dispute as recent as September 2021. Clearly the issue for determination by the Ministry is that of ownership and boundaries of the mining claims. This however is not the domain of this court in this case.

Before the court is an urgent cry for help by the applicant to restrain the respondents from continuing with their unusual actions of the 31st October 2021. The applicant wants to be protected from such future conduct pending the determination of the parties' rights by the Ministry. Any determination by this court therefore will not serve to interfere with the Ministry's actions but will retain the *status quo* pending the determination of the dispute.

The need for exhausting all available remedies does not apply in this instance as the Ministry is not empowered to make such court orders.

This point *in limine* must also fail.

C. Material misjoinder of the first respondent

The respondent contends that there was a material misjoinder of the first respondent Victor Chimutsa to the proceedings, because whatever access and operations the first respondent may have conducted on the mining claims in issue were done by first respondent in his capacity as second respondent's employee and during the course and scope of his employment. Chimutsa cannot therefore be personally answerable for such misconduct

Rule 32 (11) of The High Court Rules, 2021 states that:

“... no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

Cognisant of this rule I decided that it was not necessary for this matter to be stalled on the issue of whether Victor Chimutsa an employee of the second respondent ought not to have been joined to the proceedings.

This point *in limine* has no substance and once again falls under.

I move on to the merits of the application.

What is clear from the papers is that the applicant has valid certificates of registration in respect of 23 dolomite claims known as Rugare AB and 23 dolomite claims known as Rugare AC. Annexures B and C and the inspection certificate in Annexure E which is valid until the year 2022 speaks into applicant's rights over these claims.

These are the same claims where interference by the respondent occurred. It would be foolhardy for respondents to suggest that the 31st October 2021 incident did not occur as it then raises questions on why the applicant would after 4 years of peaceful co-existence with the respondent just rush to court and seek an interdict when respondent has not done anything untoward such as interfering with the applicant at his operations.

The law is well laid out that in applications of this nature the applicant is required to establish the essentials of a temporary interdict namely;

1. A *prima facie* right, even though it may be open to some doubt.
2. Well-grounded apprehension of harm or injury
3. The absence of any other ordinary remedy
4. Balance of convenience favours the granting of an interdict.

See the case of *Airfield Investments (Pvt)Ltd v The Minister of Lands, Agriculture & Rural resettlement and 4 Ors* 2004(1)ZLR 511(s)

In casu the applicant has demonstrated that he is a holder of a registered mining claim and also shown proof that the mining dispute between the two parties is currently before the Provincial Mining Director and is pending determination. It has therefore established a *prima facie* right.

According to the evidence presented the respondents interfered with the applicant's operations. They forcibly entered its mining claims and used the front end loader that they had bought to clear bushes and create an access road. That conduct was unlawful and amounted to self-help. Even more significant was the threat of more harm and injury being caused to the

applicant after creation of the access road. This is reasonable especially since it emanates from circumstances where previous threats have been hurled at applicant by the respondents and where there is a dispute on ownership of the mining claims. This established a well-grounded apprehension or fear of further harm and/injury.

While the mining commissioner has jurisdiction to resolve mining disputes it occurred to me that in the circumstances of this matter that could not be regarded as a possible remedy because the dispute has been pending since 2017. The commissioner does not seem to be able to quickly rule on the matter. More importantly the exigencies of the matter call for urgent action which the commissioner is incapable of providing.

The balance of convenience therefore favours the granting of the interdict. There will no be prejudice occasioned by maintaining the status quo. If it is not granted, the invasion causes harm to applicant's operations.

The respondents have to follow lawful means of dislodging the applicant instead of resorting to what one can reasonably perceive as self-help.

I am therefore satisfied that the applicant has made out a case for the relief it seeks. At this stage there can be no basis for the applicant to pray for costs. In any case no justification for such was given.

Accordingly it is ordered that:

1. The 1st and 2nd respondents and all those claiming authority through them be and are hereby barred and interdicted from conducting any work or mining operations on applicant's mining claims known as Rugare AB and Rugare AC Dolomite Claims situated in Rushinga until the dispute that is pending before the Ministry of Mines and Mining Development has been determined.
2. Pending the Ministry of Mines and Mining Development's determination, the respondents are interdicted from issuing any forms of threats or violence and interfering with the applicant's mining operations on the dolomite claims.
3. The costs of this application shall be costs in the cause.

Masiya-Sheshe and Associates, applicant's legal practitioners
Dube, Manikai and Hwacha, respondents' legal practitioners