

KNOWLEDGE TICHIVANGANI
versus
ROSEMARY MACHUWAIRE
And
THE PROVINCIAL MINING DIRECTOR, MASVINGO PROVINCE

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 2 and 10 September 2021

C. Ndlovu, for the applicant
T. Bhunu, for the 1st respondent
A. Zikiti, for the 2nd respondent

URGENT CHAMBER APPLICATION

WAMAMBO J: This is an Urgent Chamber Application wherein applicant seeks the following relief:

“INTERIM RELIEF SOUGHT

- (1) That the first respondent be and is hereby ordered to immediately cease mining operation at Coronation 30 B Mine Masvingo pending the outcome of the application.

TERMS OF FINAL ORDER SOUGHT

- (i) The first respondent be and is hereby ordered to stop mining activities at Coronation 30B Mine which is in the applicant’s field under Village Machaka, Chief Charumbira, Masvingo.
- (ii) The first respondent be and is hereby ordered to remove all her mining equipment from Coronation 30B Mine which is in the applicant’s field at village Machaka Chief Charumbira within seven days from date of this court order.
- (iii) The first respondent be and is hereby ordered to fill in all the shafts she was working in at Coronation 30B Mine which is in the applicant’s field at village Machaka, Chief Charumbira, Masvingo.
- (iv) First respondent is ordered to pay costs.

SERVICE OF PROVISIONAL ORDER

The Deputy Sheriff is authorised to serve the copies of this provisional order on the respondents.”

The applicant resides at Village Machaka, under Chief Charumbira. She seeks the above order against the first respondent. She avers that she holds title of a field in the village where first respondent has registered her gold claim. The applicant says she is a sister of the deceased owner of the land in question and that after the demise of her brother Felix Ncube Tichivangani the land in question is now family land. She avers that she needs to till the land but cannot do that as first respondent is sinking mining shafts on the field. First and second respondent both opposed the application.

First respondent raised a number of points *in limine* but abandoned them leaving only one. The point *in limine* that he persisted with is that there are material disputes of fact. I adopt a robust approach in this matter and I am of the view that the matter is capable of resolution on the papers filed before me. I will thus dismiss the point *in limine* and delve in to the merits presently.

The applicant in her papers and as expanded upon in oral argument by Mr *Ndlovu* laid the following basis for the application: The land in question was allocated to applicant’s family by the village head. Applicant has been in occupation of the said land since her birth. She is the one who took control of the land upon her late brother’s demise. The village head in a document supporting the application confirms the same.

The letter by the village head is addressed to the applicant’s legal practitioners and bears Chief Charumbira’s date stamp. It is however penned in long hand and signed by Machaka Fukai the Village head. The letter is regurgitated below:

“Ndlovu and Hwacha Legal Practitioners

Subject: The Late Felix Cubed Tichivangani’s Field Registration of Gold Mine.

I write to confirm that the Felix Ncube Tichivangani is the bona-fide honour (sic) and we regard Mrs Machuwaire gold claim as an inclusion (sic) and illegal in terms of procedure no Mining claim can be registered without the consent of the village head. In this instance I was never consulted by the Ministry of Mines and E.M.A.”

Mr *Ndlovu* also cited section 12(1) (d) and (g) of the Traditional Leader Act [*Chapter 29:17*] which reads as follows;

“12 (i) It shall, be the duty of a village head-----

- (d) subject to the Communal Land Act [*Chapter 20:04*] to consider in accordance with the customs and traditions of his community, requests for settlement by new settlers in consultation with the village assembly to make recommendations on the matter to the ward assembly -----
- (g) to ensure that all land in this area is utilised in accordance with any enactment in force for the use and occupation of communal land or resettlement land and -----”

The above section was cited ostensibly to support the submission made that the village head is in charge and begets that power from the aforementioned section, among others.

Section 7 (1) of the Communal land Act [*chapter 20:04*] is also cited. It reads as follows:-

“7 (1) subject to sections ten and eleven no person shall occupy or use any portion of Communal Land----

- (c) unless he or she is a spouse dependant, relative, guest or employee of a person who occupies or uses communal land in terms of paragraph (a) or (b)

Reference was also made to various legislation, notably sections 38(2) section 58, section 30 of the Mines and Mineral Act [*Chapter 21:05*]. The effect of the above cited sections is as Mr *Ndlovu* submitted that the registration of a mine which has been registered for a period less than two years can be disputed (section 58). A prospector should give an intention to do so in the case of communal land “to the rural district council established for the area concerned” (section 38(f))

The argument is that if such notice as per section 38 (f) of the Mines and Mineral Act [*chapter 21:05*] had been given the village head would have been consulted. That the village head was not consulted means that such notice was not given as per section 38 (f) above.

The provision to section 30 of the Mines and Mineral Act [*Chapter 21:05*] was also cited by Mr *Ndlovu*. It reads as follows:

“Provided that if any land such as is described in paragraphs (a) and (d) is not utilised for the growing of farm crops or of such permanent crops as orchards or tree plantations within two years of its having been bona fide cleared or ploughed or prepared for such crops such land shall forthwith become open to prospecting”

The argument raised is that the land in question at the time. First respondent registered her claim was not yet open for prospecting as it had not been left idle for two years. It was further argued that applicant respondent did not comply with section 97 of the Environmental Management Act [*Chapter 20:27*] which provides among other things that first respondent should have obtained but did not obtain an environmental impact certificate. Following

therefrom is the implication that first respondent is operating a mine illegally. Mr *Ndlovu* argued forcefully that if the relief sought is not granted applicant will suffer irreparable harm as time is of the essence in farming. Further that applicant cannot prepare her field for tilling because first respondent's mining activities stand in her way.

The balance of convenience was said to be on applicant's side. It was argued that applicants has been in control of the land since birth. The applicants is said to have written to second respondent seeking a solution but was unable to get one. Thus so it was argued she has no other remedy, thus this application.

Mr *Bhunu* was of the view that deceased Felix Ncube (as per death certificate) and Felix Ncube Tichivangani may be different people. That the field in question has not been defined by applicant with any precision. No beacons or coordinates have been cited for the court to be satisfied that first respondent's mine is indeed in applicant's family field.

Mr *Bhunu* submitted that first respondent has supplied Annexure 2 which defines the borders of the gold claim's location. In first respondent's opposing papers she also attached Certificate of Registration in her name which certificate reflects that she is a registered holder of a block covering of 2 gold claims named Coronation 30 B "the situation of which is indicated to be on Victoria Farm 0, 6 kilometres North West of Eldorado, trig beam 476/7. The licence number is 054455AA."

Annexure 3 is a letter by the Forestry Commission. The mine owner is identified as first respondent. It comments on a number of issues among them land use, cropping, potential and problems. Notably in paragraph 2, 4 of Annexure 3 it is noted that the mine was once used long back as indicated by some very old unused mine shafts and some indigenous trees with an average height of two metres. The second respondent filed a notice of opposition.

The opposing affidavit by second respondent notes as follows:-

The land in question was not under cultivation. The second respondent's officers carried out a ground survey and were satisfied that the land was open for prospecting. A survey report forms, part of the opposing papers. The survey report bears 1st respondent's name, the location mark number, the prospecting record number and coordinates. The area is given as two hectares. The survey report is also verified as correct. Against these official documents giving title to first respondent and proof of processes undertaken in support thereof the applicant insisted that they had proven their case and thus satisfied the requirements of an interdict.

It is the applicants who have made an application. It is the applicants who bear the burden of proof. The proof they have provided is basically the Village Head's support and letter

of complaint addressed to the second respondent and a death certificate of one Felix Ncube from South Africa. I note the difference in names of Felix Ncube and the fuller names with Tichivangani as a surname. The difference has not been explained. I take it however that this does not change the complexion of the matter. The family of Felix Ncube (Tichivangani) are apparently represented by applicant in this case. Applicant's support from the headman is not enough in my opinion. I have not been referred to any section of the Mines and Minerals Act [*Chapter 21:05*] which provides that the consent of a village head is required before the registration of a mine.

The assertion by the village head that the gold claim by first respondent is illegal is not supported by the relevant ministry represented by second respondent. Second respondent supports the first respondent's case. Second respondent is the responsible authority in the registration of a mining claim. Second respondent has issued a registration certificate to first respondent. The land in which the gold claim is situated is described in full including the coordinates thereof. Applicant contends that the same area where the mine is situated is her field. Her field is not described with any precision. For purposes of this application I am not persuaded that applicant has even proven that the mine in question is on her field. The Forestry Commission report Annexure "3" talks of old unused mine shafts. This is hardly an area where cultivation can be done or was done in the recent past. There is also a description of indigenous trees averaging two metres in height. To that end I am not agreeable with Mr *Ndlovu's* submission that the land in question was recently under cultivation.

The first responded armed with a registration certificate and formal recognition as the registered owner of the mine stands to be harmed irreparably if the operations are stopped. On the other hand applicant who to my mind has not proven that applicant is on her land does not lose much, in any case the land she claims she intends to till has old disused mine shafts and tall trees, hardly an area where cultivation can be carried out. I am satisfied that the balance of convenience favours the first respondent.

The question of whether applicant has an environmental impact certificate and other concerns by applicant have not been proven. In any case the responsible ministry has issued a registration certificate to the second respondent. The requirements to be satisfied before issuance of a registration certificate one assumes to have been satisfied before it was issued. In any case from the tenor of second respondent's stance the applicant's certificate of registration is proper and was issued in accordance with the relevant law.

In light of the above I find that applicant has not established a *prima facie* right, irreparable harm nor has he tilted the scales in his favour on the balance of convenience. Considering the full circumstances of the matter I find the application unmeritorious. To that end I order as follows:

The application be and is hereby dismissed with costs.

Ndlovu & Hwacha Legal Practitioners, applicant's legal practitioners
Bhunu and Associates, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners