

EPTIDE TRADING (PVT) LTD

Versus

MORGEN MOYO

And

THE MINING COMMISSIONER N.O

And

**THE OFFICER IN CHARGE
FORT RIXON POLICE STATION N.O**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 9 JULY 2012 AND 9 AUGUST 2012

Advocate S. Nkiwane for applicant
Advocate H. Moyo for 1st respondent

Opposed application

NDOU J: The applicant seeks an order in the following terms:

“IT IS ORDERED THAT

- (1) The Applicant be and is hereby declared to be the rightful owner of certain mining claims known as Aboyne 20 situate at Mount Royal Farm, Fort Rixon.
- (2) The 1st Respondent be and is hereby permanently interdicted from interfering with Applicant’s claim known as Aboyne 20, situate at Mount Royal Farm, or part thereof of the mining claim.
- (3) The 1st Respondent is hereby ordered to vacate Aboyne 20, in Mount Royal Farm, Fort Rixon within 48 hours of this order or any parties thereof failing which the Deputy Sheriff Gwanda is authorised with the help of the 3rd Respondent to evict 1st Respondent and his workers from Aboyne 20 situate at Mount Royal Farm, Fort Rixon.
- (4) 1st Respondent be and is hereby ordered to pay costs of suit on an attorney client scale.”

The salient facts of this matter are the following. The applicant is the registered owner of a mining claim known as Aboyne 20, consisting of 10 Gold Reefs, situate in Mount Royal

Farm, Fort Rixon. The claim's coordinates are detailed in the Registration Certificate Number 46698 dated 9 June 2011 as "on Mount Royal Farm about 700m West of homestead EP57 and about 2.8km North west of homestead EP34."

The first Respondent is the registered owner of a mining claim known as Aboyne 5 consisting of 10 Gold Reefs situate in Mount Royal Farm. This claim's coordinates are detailed in the Registration Certificate Number 37533 dated 12 July 1996 as "on Mount Royal Farm approximately 500m West of Dodoreen Mine adjacent to Aboyne Dump to North East."

Sometime in July 2011 a dispute arose between the applicant and the first Respondent when the first Respondent contended that part of the applicant's Aboyne 20 claim was pegged on or encroached on first Respondent's Aboyne 5 claim. Thereafter the applicant sought the intervention of the Bulawayo Mining Commissioner, the second Respondent, in the dispute. The latter started a process of resolving the dispute. In the process on 7 November 2011, second Respondent communicated to the parties in the following terms:

"APPEAL AGAINST DECISION: ABOYNE CLAIMS

This office has received an appeal from Eptide Trading P/L against the decision to award Mr Morgen Moyo Aboyne mine.

In view of the foregoing, a survey is required to determine the boundaries and put this matter to rest.

Your usual co-operation is required.

Thank you

(signed)

C. Mujuru

Acting Mining Commissioner."

This application was instituted before the finalisation of the above internal remedy which the applicant had initiated. It is not clear why the applicant chose to abandon the proceedings it had instituted before the second Respondent. Before the second Respondent completed the process, the applicant had a change of mind and decided to challenge the jurisdiction of the third Respondent to preside over the matter. Advocate *Nkiwane*, for the applicant filed supplementary Heads of Arguments arguing strongly that the second

Respondent has no jurisdiction to determine the issues between the parties. The simple question is why did the applicant refer the matter to the second Respondent in the first place if it was of the view that the latter has no jurisdiction? As alluded to above, it is the applicant which referred the matter to the second respondent and the first respondent consented to the second Respondent assuming jurisdiction in the matter. In any event on what basis can I resolve this boundary dispute without evidence of the surveyor? The papers filed are not helpful as evinced by what the first Respondent stated in his above-mentioned letter on the need for a survey to be carried out. These legal technical arguments raised by Advocate *Nkiwane* cannot resolve such a boundary dispute. This is a misplaced and unnecessary application. An award for costs on a punitive scale is, therefore, called for. The applicant should first exhaust his pending matter before the second Respondent.

Accordingly, the application is dismissed with costs on the legal practitioner and client scale.

Messrs Cheda and partners' applicant's legal practitioners
Joel Pincus, Konson & Wolhuter, 1st respondent's legal practitioners