

MICHAEL JOHN VAN ROOYEN

APPLICANT

Versus

RODNEY USHER

1ST RESPONDENT

AND

LIONEL USHER

2ND RESPONDENT

AND

JOE TSHUMA

3RD RESPONDENT

AND

LUCY HLATSHWAYO

4TH RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 13 SEPTEMBER 2012 AND 20 SEPTEMBER 2012

Mr N Mashayamombe for the applicant
Miss N Dube for the 1st and 2nd respondents

Opposed Application

MAKONESE J: The Applicant and Respondents in these proceedings share a common boundary in the Matobo area, approximately 30 km from Bulawayo in the Matopos area. The Applicant has mining rights to extract minerals from several mining claims, consolidated and commonly known as the Star Group of Mines, whilst the Respondents claim to have ownership rights to occupy land adjoining the mining claims, which they call the "Usher Estate", for agricultural and residential purposes.

On the 14th August 2011 a Provisional Order was granted by this Honourable Court in the following terms:-

"The 1st, 2nd, 3rd and 4th Respondents, jointly and severally, and all those claiming through them:

- (a) be and are hereby forthwith interdicted, barred and prohibited from entering or approaching the perimeter of the Applicant's aforesaid mining claims.

- (b) be and are hereby ordered not to commit any acts of physical violence towards the Applicant or anyone working through him from enlisting the services of anyone to do so.
 - (c) be and are hereby ordered not to harass, threaten, intimidate, verbally or emotionally abuse the Applicant and anyone working through him or from enlisting the services of anyone to do so.
2. That any member of the Zimbabwe Republic Police be and is hereby authorised to enforce the provisions of this interim order.”

The Respondents have opposed the confirmation of the Provisional order, arguing that:

- (a) the Applicant has not satisfied the requirements for a final interdict.
- (b) the relief applicant seeks is of a drastic nature.
- (c) there exists a material dispute of fact which ought to be resolved by going into a full trial.

On the other hand, the Applicant contends that the Respondents are out of court, in that the second to fourth Respondents have not filed any opposing papers and that the first Respondent has no *locus standi* to defend the applications.

Ms *N. Ncube* who appeared for the 1st Respondent confirmed at the hearing of this matter that it was correct that no opposing papers had been filed on behalf of 2nd to 4th Respondents. She advised the court that she held no brief to represent 3rd and 4th Respondents.

I will proceed to deal with the points *in limine* raised by the Applicants’ legal practitioner *Mr Mashayamombe*.

Locus standi

It is clear from the papers filed by the parties that the land occupied by the Respondents falls under the will of the late Mr Usher. The only person who seems to have clear legal rights to make representations arising from the said will is Dorothy Usher who is the appointed Executrix. First Respondent has not been authorised by the Executrix to defend these proceedings and it is evident that 1st Respondent has no *locus standi in judico* to oppose this application. First Respondent has argued that the Respondents are all majors who have a legal right to defend themselves in any proceedings brought against them. 1st respondent contends,

further, that 2nd Respondent was granted a general power of attorney to act on behalf of the “Usher Family” by the Executrix of the “Usher Estate”, and that by virtue of such Power of Attorney, Respondents were “granted” the *locus standi* to defend this matter.

I have examined the Power of Attorney relied upon by 1st Respondent, which is set out in the following terms:

“I, Mrs Usher am Lionel H Usher’s grandmother being the oldest in the family and now blind give Lionel Usher full permission to stand on behalf of the old people the descendants and siblings from any boy or girl to farm, to build and whatever he sees fit to do on the land. He is young and vibrant and able.”

There can be no doubt that the Power of Attorney relied upon by 1st Respondent does not give 1st Respondent the authority to institute or defend legal proceedings. The document purports to grant the first Respondent the mandate to utilise the land and nothing more. The document confers no legal authority upon the 1st Respondent to institute or defend legal proceedings in relation to the “Usher Estate”. There is therefore, no basis for 1st Respondent to advance any argument for and on behalf of the Estate. 1st Respondent clearly has no *locus standi* in this matter and is out of court.

See the cases of : *Tawanda v Ndebele* HB 27/06 and *Zimbabwe Stock Exchange v Zimra* HH 120/06 and *Kudenga v Kudenga* HH 113/06.

The Applicant is seeking confirmation of the Interim Interdict that would, in effect, bar the Respondents from interfering with Applicant’s mining operations and prevent the Respondents from harassing or threatening the Applicant physically or emotionally.

I am satisfied that Applicant has established the requirements for the granting of a Final Interdict. For the Applicant to succeed in this application he must show:

- (i) That Applicant has a clear right.
- (ii) That actual injury has been committed or is reasonably apprehended.
- (iii) the absence of similar protection of another remedy.

WHETHER APPLICANT HAS A CLEAR RIGHT

There is no dispute that the Applicant is the registered claim holder of various mining claims known as the Star Group of mines. The mining claims are issued in accordance with the provisions of the Mines and Minerals Act [Chapter 21:05]. By virtue of the Certificates of Registration in respect of the mining claims, the Applicant has the right to undisturbed access and exploitation of any minerals upon the land in question. Applicant's use and enjoyment of the land is secured by the operation of the law.

See the case of *Minister of Local Government v Mudzuri and another* 2004 (1) ZLR 223(H).

There can be no doubt the Applicant easily satisfies the requirement of a clear right in the property. The Respondents do not dispute that Applicant is the legal holder of the mining claims but argue that the parties should co-exist. I am satisfied, therefore, that the Applicant has established a clear right.

WHETHER OR NOT APPLICANT HAS SUFFERED ANY INJURY OR IF ANY INJURY IS REASONABLY APPREHENDED

The Applicant has strongly submitted that there is empirical evidence of the Applicant having suffered actual injury as a result of Respondent's conduct. The immediate impact of the Respondent's conduct was the unlawful detention of the Applicant on trumped up charges. The Respondents have also trespassed on Applicant's mining claims and have built up structures on the land. They have claimed that they have a right to carry out agricultural activities on such land and they have also been involved in illegal mines operations, premised on the claim that the land is part of an inheritance from the "Usher Estate."

The shorter Oxford Dictionary defines "injure" as follows:

"to do injustice to, to wrong, to do outrage to in speech insult, revile, calumniate. To do hurt or harm; to damage; to impair."

There can be no doubt that the threats of arrest directed at the Applicant by the Respondent, the threats of violent take-over of the mining claims and the subsequent malicious

arrest of the Applicant amount to injury upon the Applicant. The harassment and emotional abuse by the Respondent constitutes injury upon the Applicant.

In any case, even assuming that the injury is not proven or established it is now settled law that as long as Applicant has established a clear right, it is not necessary for the Applicant to prove that he is likely to suffer irreparable harm. The position on the law was aptly addressed by SANDURA JA in the case of *Charisma Blasting and Earthmoving Services (Pvt) Ltd vs Njainjai and Others* 2000(1) ZLR 85 at page 90.

Absence of any remedy

On the basis of the evidence placed before the court by the Applicant there is clearly no other appropriate remedy available to the Applicant. Threats of violence, harassment and physical and emotional abuse as well as the threat of a violent take-over of the Applicant's mining claims cannot be cured by damages or any other relief besides an interdict that can put into check the conduct of the Respondents.

Mr *Mashayamombe* for the Applicant has correctly pointed out that the 3rd to 4th Respondents are out of court for failing to file opposing papers. The first Respondent has no *locus standi* to defend these proceedings.

In the result, the application succeeds and the Provisional order granted by this Honourable Court on the 4th of August 2011 is hereby confirmed with the Respondents paying costs on an attorney and scale jointly and severally.

Mashayamombe and company applicant's legal practitioners
Messrs Mudenda and attorneys respondents' legal practitioners