LAYEDZA MINES & CONSTRUCTION (PVT) LTD

Versus

DGL INVESTMENTS NO, 19 (PVT) LTD

And

DGL INVESTMENTS NO. FIVE (5) (PVT) LTD

And

FRANSISCO MARCONATTI

And

JAMES MADZIVANYIKA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 12 JUNE 2021; 28 FEBRUARY; 22 MARCH &
20 AUGUST 2022 & 27 APRIL 2023

Urgent Chamber Application

T. Tavengwa for the applicant
S. Chamunorwa for the 2nd to 4th respondents

TAKUVA J: This is an urgent chamber application for *Mandament Van Spoliie* and an interdict wherein the applicant seeks the following relief:

"1. 2nd to 4th respondents be and are hereby ordered to immediately restore possession of the red changfa compressor to applicant.
2. In the event of failure to comply with (1) above, the Sheriff of High Court be and is hereby ordered to take possession of the property mentioned in (1) above and restore applicant to such possession. The costs of such execution to be borne by the 2nd – 3rd respondents.
3. 2nd – 4th respondents together with their assignees/agents/employees be and are hereby interdicted from entering the premises of Morven 9 mining claim registration number 40264 and Sarah 20 mining claim registration number 40312 without a valid court order.
4. 2nd – 4th respondents together with their assigness/agents/ employees be and are hereby ordered not to unlawfully disturb applicant's peaceful possession of Morven 9 registration number 40264 and Sarah 20 mining claims registration number 40312.
5. T2nd – 4th respondents to pay costs of suit on attorney - client scale."

At the hearing of this application *Mr Tavengwa* for applicant applied to amend the draft order by deleting paragraphs 1 and 2 and re-numbering paragraphs 3, 4 and 5 as paragraphs 1, 2 and 3 respectively. The reason for the amendment was that the compressor was now in the applicant's possession. Since the amendment was not opposed it was granted.

Applicant's case

According to the applicant's founding affidavit, Layedza Mines & Construction (Pvt) Ltd (Layedza) owns mining rights at Morven 9 mining claim registration number 40264 and Sarah 20 registration number 40312. Applicant has been in lawful possession of the claims as it has been carrying out mining activities thereat.

Sometime in 2011 applicant and 1st respondent entered into an agreement of sale of mining claims. It appears the sale involved Morven 9 and Sarah 20. Transfer was however not effected but despite that 1st respondent sold its interest to the 2nd respondent. A dispute arose which has since not been resolved. On 25th June 2021 2nd respondent invaded applicant's mining claim namely Morven 9 and forcefully and unlawfully took possession of a red channgfa compressor that was used by the applicant for its mining operations. Further, they threatened the employees with violence. The 3rd and 4th respondents were armed with guns.

An employee of the applicant deserted employment in fear of his life due to the threats made upon his life by 3rd-4th respondents. The respondents had no lawful right to disturb applicant's lawful operations at Morven 9 and Sarah 20. Further, and most importantly, the 2nd respondent must be ordered to restore possession of the compressor to the applicant. Applicant also prays for an order of an interdict against respondents. They must be ordered not to interfere with applicant's operations at Morven 9 and Sarah 20 mining claims.

Applicant stated that it believed it has met the requirements of a "spoliation remedy and accordingly prays for an order of restoration of property" and that 2nd – 3rd respondents be interdicted from disturbing applicant's peaceful possession of the mining claims." (my emphasis)

Respondent's case

The application was opposed by 2nd – 4th respondents. In its opposing affidavits 2nd respondent averred as follows:

1. The issue of the compressor has been resolved in that it was released to the applicant prior to the institution of these legal proceedings. The relief sought in the 1st and second paragraphs of the draft order has been overtaken by events.
2. The respondents never invaded the applicant's mining claims as alleged or at all. The applicant is trying to mislead the court as regards the true nature of the dispute between the parties. There is a boundary dispute which the applicant has presented to the court as a dispute over ownership or possession of Sarah 20 mine and Moevern 9 mine. The issues that applicant relates regarding the purchase of these two claims are irrelevant to this matter.
3. The applicant, its agents and or employees have unlawfully commenced mining operations on a mining claim in which the 2nd respondent has interests. This mine is known as Gamecock and is located between Sarah 20 mine and Morven 9. See attached map marked annexure B. The 2nd respondent's rights over this mine are contained in agreement of sale between 2nd respondent and one Wessel Chrissteyn – see annexure C.
4. The applicant, its agents and or employees attempted to unlawfully occupy Gamecock mine in 2020 and 2021 but they vacated upon being told that they had encroached into Gamecock. Meanwhile 2nd respondent started removing water from a shaft in Gamecock. After removing water, the applicant, its agents or employees returned to Gamecock and commenced mining operations. The matter was reported to the Ministry of Mines and to the police.
5. Upon confronting the applicant, the 2nd respondent seized their compressor and delivered it to the police. This was done to prevent them from carrying out unlawful mining activities at Gamecock mine. At no time whatsoever has the applicant been in undisturbed occupation of Gamecock mine as same has always been under the control of the 2nd respondent.
6. It was further contended that before deciding on this matter, the court ought to refer same to a mining commissioner/director in terms of section 345 of the Act to investigate and compile a report on the boundaries between the three mining locations in view of the point taken that the applicant is now mining at Gamecock mine and that this dispute is all about boundaries to the respective mining claims.

It became clear to me that the real and substantive issue was the boundary dispute between the parties' claims. It also became apparent that this issue was incapable of resolution without the input of the Provincial Mining Director for Matabeleland North Province. Counsel for applicant did not object to the suggestion by the 2nd respondents' legal practitioner.

Accordingly, I then made the following order on 14 July 2021:

"1. The matter be and is hereby referred to the Provincial Mining Director, Matabeleland North for purposes of carrying out a survey of the disputed areas.
2. The Provincial Mining Director be and is hereby ordered to compile a report within 21 days of receipt of this order.
3. All the parties and or representatives including legal practitioners participate in the above exercise.
4. The Provincial Mining Director be and is hereby ordered to submit a report mentioned in paragraph 2 above to the Registrar of this court within 21 days of receipt of this order.
5. Thereafter the matter will be set down for hearing."

The Provincial Mining Director compiled his report on 20 August 2021 but was only received in November 2021. However the report had numerous inaccuracies and omissions that necessitated a remittal of the matter to the Provincial Mining Director for rectification. This was done and on 28 February 2022 the Provincial Mining Director produced another report correcting his report dated 20 August 2021. In this comprehensive report, the Provincial Mining Director listed the following observations;

"Observations

1) In an attempt to comply with section 51 of the Mines and Minerals Act Chapter 21:05, Gamecock installed permanent beacons on the ground to demarcate a block shaded in blue colour. In a similar attempt Morven 9 installed beacons on the ground to demarcate a block shaded in green colour. (see attached survey map)
2) Both ground positions, i.e. for Gamecock and Morven 9 are not a correct representation of their registered positions as shown on their maps.
3) On the ground, the disputed shaft appears to be on the area of overlap common to both blocks, that is the blue and green blocks;
4) The two blocks do not overlap in reality since the ground positions are wrongly positioned.
5) According to the original docket maps, the disputed shaft falls within the Gamecock block of claims as registered.
6) Morven 9 has gained unduly by enjoying mining rights at the wrong location." (my emphasis)

Further, the Provincial Mining Director made the following recommendations;

"1. Both parties should install permanent beacons on the ground as depicted on their respective maps originally issued as at registration. They are advised to engage competent persons to correctly interpret their documents.
2. After installation of new permanent beacons, parties should invite the surveyors from the Ministry of Mines for inspection in terms of section 206 of the Mines and Minerals Act Chapter 21:05.
3. Morven 9 title holder should cease all mining and related activities at the disputed shaft forthwith and relocate to their registered position shaded in orange colour.

Conclusion

There is no genuine dispute save to say that failure to interpret maps resulting in confusion of ground positions of the respective mining locations." (my emphasis)

One would have thought the matter ends here but *alas*, applicant would have none of it. It hired one Constant Tshuma who calls himself a "Consultant in Geophysics and remote sensing and GIS)" to prepare a report on the dispute. The consultant was hired to "verify and validate the recommendations which were given. Under section III which is the concluding section the consultant remarked thus;

"whilst investigation should be done, the conclusion which is driven (*sic*) from the assessment the present ground location of Morven 9 is geometrically correct."

As a result of applicant's efforts, the court now has two reports before it. The question becomes which one should be regarded as helpful in the resolution of the live boundary dispute between the parties. In my view the court must rely on the Provincial Mining Director's report and disregard that of Constant Tshuma for the following reasons;

1. The Provincial Mining Director is mandated by law to keep records of all mining locations in Zimbabwe as appears from section 48 (4) (c) of the Act. He is also reposed with the duty of maintaining records of all plans and maps of running sites under his jurisdiction.
2. There are no allegations that the docket positions as kept by the Provincial Mining Director have been unlawfully altered or otherwise distorted as to make them unreliable.
3. In terms of section 48(2)(b) of the Act, the appropriate scale that ought to be used is "not less than 1:25 000", yet Constant Tshuma has in flagrant disregard of this

provision used a scale of 1:6 000 with the result that the positions of the mining locations have been distorted.

4. Commenting on paragraph 4.3 of the consultant's report, the Provincial Mining Director states;

"The consultant engaged by the applicant and his professional credentials are unknown to the Provincial Mining Director. The source document for all authentic coordinate data is the original map issued as at registration of the claims. Applicant's consultant claims to have used secondary sources and has appropriately written a disclaimer probably aware of lack of reliability of his sources and the inevitable lack of credibility of his report.

The consultant completely ignores to comment on the absent positions of the blocks but prefers to dwell on someone else's subjective descriptions of the same. Interestingly, the consultant concurs that the co-ordinates obtained on the ground by the Provincial Mining Surveyor are correct. He then avoids consideration of the docket positions which are the actual registered locations. The Provincial Mining Office has the original docket maps which could have been analysed by the consultant upon request … Applicant has not obtained the copies of docket maps to date. Obviously, applicant has had no access to the maps as source documents from which to obtain the correct boundary coordinates of he registered mining locations in contest.

Secondly, the descriptions on the certificate of registration that the consultant claims to rely on are very subjective approximation that only serve as indicative directions not measured by any instrument. They neither have specifically marked points of references like the specific corner beacons to which the distances and directions from the homestead relate, nor relative lines from which angles or directions are determined.

These are non-scientific/technical units of measure which therefore cannot be used to establish exact locations. For example, a standard block has rectangular dimensions measuring 500m x 200m. Placed on a Cartesian plane part of the block can be on the south east and part on the south west depending on the points from which observation is being made. For example from the consultant's diagram, point B for Gamecock (in yellow) is to the south east of EB56 (Gamecock) whereas point D is to the south-south east of ED56. The respective distances are similarly different as measured from EB56."

5. Further, at page 7 of this report, the consultant suggests that he had not completed his work before compiling his report. He states that "whilst further investigation should be done, the conclusion which is driven from the assessment of the present ground location of Morven 9 is geometrically correct."
6. He does not state in his report why he has reached such a conclusion before carrying out the further investigations which he refers to.

7. The consultant has not sufficiently established his qualifications to carry out a survey of the mines. In terms of section 5(1) of the Act a mine surveyor ought to hold qualifications prescribed by the Minister in a Statutory Instrument. Neither Constant Tshuma not the applicant allege that he is a mine surveyor and that he holds the requisite qualifications.
8. On the other hand, the Provincial Mining Director's report is conclusive. He carried out all investigations required of him and produced his report.

From the above reasons I conclude that the docket position of the mines supersede any opinion and in particular the opinion of Constant Tshuma. Further and for the same reasons, I reject Constant Tshuma's report and accept that of the Provincial Mining Director.

Coming to the rest of the issues, the applicant initially insisted that its prayer was for both spoliation and an interdict. However in its "Answering Affidavits" it appears to have shifted and focus more on the remedy of spoliation. In view of this prevarication the court will consider the merits of each prayer separately.

As regards an interdict, it is trite that the following are its requisites:

(a) A clear right or if not clear, the right is *prima facie* established, though open to some doubt;
(b) That if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeded in establishing his right;
(c) That the balance of convenience favours the granting of interim relief; and
(d) That the applicant has no other satisfactory remedy – see Set*logelo* v Set*logelo* 1914 AD 221; *Flame Lily Investment Co. P/L* v *Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378.

As regards the 1st requirement, it is trite that the right to carry out mining activities is regulated by statute in that one can only carry out mining activities in respect of a mining claim where they enjoy a certificate of registration. It follows that where a boundary dispute ensues it ought to be resolved as it is intertwined with the right to mine.

In casu, the disputed shaft has always been in the possession of the 2nd respondent its owner and was being drained of water and was a source of water for the 2nd respondent's sister company, Goldmore Mine. Also, the Provincial Mining Director's findings show that the shaft falls within Gamecock mine and not Morven 9 or Sarah 20. It is alien to our law that a person can be allowed to enforce a right that he/she does not have. Quite clearly, the applicant has no rights over minerals located in Gamecock mine. The evidence before me shows that applicant occupied Gamecock mine which it erroneously or otherwise believed to be part of Morven 9 mine.

In our law, it goes without saying that interdicts are based on rights, that is rights which in terms of the substantive law are sufficient to sustain a cause of action, or a delict it may be founded in the common law or on some or other statute, it may be a real right or personal right. Therefore an applicant for an interlocutory interdict must show a right which is being infringed or which he apprehends will be infringed and if he does not do so, the application must fail – see *Coolair Ventilation Co. SA (Pvt) Ltd* v *Liebenberg & Anor* 1967 (1) SA 686 (W). Applicant has totally failed to establish a strict legal right that might be infringed. In the result the 1st requirement has not been satisfied neither a clear right nor a *prima facie* right has been shown to exist.

Irreparable harm

Where the right is only *prima facie* established, an applicant must show that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right. The applicant failed to allege and show that it will suffer irreparable harm. The entire founding affidavit is silent on such allegation. In my view this renders the application for an interdict defective.

Other satisfactory relief

The applicant has not alleged nor shown that it does not enjoy alternative relief that is adequate. Indeed, the correct position is that the applicant had other satisfactory remedies in the form of submitting its case to the Provincial Mining Director for a determination including an interdict in terms of section 354 of the Act. Such an application can in terms of section354 (2) be made on 24 hour's notice. Another remedy is provided for by the Provincial Mining Director in his recommendations.

I take the view that the applicant has dismally failed to prove all the requirements for a final interdict.

I now turn to the application for a spoliation order. Applicant contends in its answering affidavit that the relief it seeks is one of a spoliation order. This however contradicts the draft order and the founding affidavit. In paragraph 18 of the founding affidavit it is stated that applicant further prays for an order of an interdict against the respondents. They must be ordered not to interfere with applicant's operations at Morven 9 and Sarah 20 mining claims. (my emphasis)

The legal requirements for a spoliation order are:

(i) The applicant was in peaceful and undisturbed possession of the thing; and
(ii) It was unlawfully deprived of such possession.

Applying these principles to the facts of this matter, applicant has not shown that it was in peaceful possession of the shaft in dispute. Simply put, the applicant cannot sustain the argument that he has been deprived of Morven 9 and or Sarah 20 mines. On the evidence the respondents have shown and are corroborated by the Provincial Mining Director's report that in fact applicant had encroached into Gamecock mine. According to the 2nd – 4th respondents, applicant would occasionally stray into Gamecock mine. In fact this is supported by the Provincial Mining Director's diagram/map that shows that what applicant believed to be Morven 9 on the ground is actually Gamecock mine. This is the confusion the Provincial Mining Director speaks to in this report. The applicant is simply carrying out mining activities at the wrong place. In my view, the infrequent forays applicant made into Gamecock (which forays were immediately repelled) cannot by any stretch of imagination termed "peaceful and undisturbed possession". See *Banga & Anor* v *Zawe & Ors* SC-54-14.

It follows that the applicant was never unlawfully deprived of property that was at any stage in its peaceful and undisturbed possession. See *Kama Construction P/L* v *Cold Comfort Farm Co-Op & Ors* 1997 (2) ZLR 19 (S).

Disposition

Either applicant is deliberately misleading the court or is mistaken. If it is the latter then he should accept guidance from the Provincial Mining Director and move on. In mining

disputes, the warring parties should take their time to study the technical issues that arise before making voluminous but meaningless submissions. The same applies to their lawyers.

Order

The application for *Mandament Van Spolie* and interdict be and is hereby dismissed with costs.

Mutuso, Taruvinga & Mhiribidi applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 2nd -3rd respondents' legal practitioners