SANDAWANA MINES (PVT) LTD
versus
AVOSEH INVESTMENTS (PVT) LTD
and
THE MINING COMMISSIONER-MIDLANDS PROVINCE N.O.
and
THE SECRETARY FOR MINES AND MINING DEVELOPMENT N.O
and
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
THE ENVIRONMENTAL MANAGEMENT AGENCY

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 10 & 11 August 2023

Urgent court application

N Chimuka, for the applicant
L Madhuku, for the first respondent

MUREMBA J: This is an application for an anti-dissipation interdict which seeks to bar the first respondent from extracting and removing lithium ore from its mining claim. Apparently, the applicant which has a registered mining claim 'Lith 15' (Registration Claim GM 8172 BM) is locked in a serious mining dispute of encroachment with the first respondent which has a registered mining claim 'Sandawana AV8' (Registration Number 17332BM). As a result of the encroachment dispute, there is a mining area which is disputed between the two parties which each party claims be its area.

The applicant reported the dispute to the second respondent, the Mining Commissioner-Midlands Province N.O after realising that the first respondent was extracting lithium from this disputed area. After carrying out investigations, on 24 April 2023, the Provincial Mining Director – Midlands Province gave a determination in favour of the first respondent. The major finding was that it was the applicant that had failed to maintain its beacons in breach of s 51(7)

(Beaconing of locations) of the Mines and Minerals Act [*Chapter* 21:05]. The applicant was ordered to confine itself to its original beacons.

Dissatisfied with the decision of the Provincial Mining Director, the applicant filed an application for the review of his decision in this court in HC 3125/23. It wants the decision set aside on the grounds that the Provincial Mining Director has no jurisdiction to determine the dispute and that his findings were grossly unreasonable. The applicant further filed a court application for a declaratory order under case number HC 3572/23 seeking a nullification of the Avoseh claim which is the first respondent's claim. The ground for this claim is that the first respondent's claim was registered on ground which was not open to prospecting and pegging and that the registration was done in violation of the environmental management laws. On the other hand, the first respondent also filed an application for a declarator under HC 4766/23 wherein it is seeking an order for the nullification of the applicant's 'Lith 15' mining claim. The three matters were consolidated under HC 4770/23 and are due to be heard on 18 August 2023 in this court. It is on this basis that the applicant is seeking an anti-dissipation interdict in order to bar the first respondent from continuing with the extraction of lithium pending the determination of these matters. The argument being made is basically that lithium is a finite resource which can be exhausted if the first respondent is allowed to continue mining. There is need for the mineral to be preserved pending litigation.

In its application the applicant stated that it was seeking the following order:

"**It is hereby ordered that**:

1. The application for an anti-dissipation interdict be and is hereby granted.
2. Pending the determination to finality of the matters under case numbers HC 3125/23, HC 3572/23 and HC 4766/23, an anti-dissipation interdict be and is hereby issued barring the 1st respondent from extracting lithium ore from Sandawana AV8 mining claim (Registration Number 17332BM).
3. Pending the determination to finality of the matters under case numbers HC 3125/23, HC3572/23 and HC 4766/23, the first respondent be and is hereby interdicted from transporting and or removing lithium ore from Sandawana AV8 mining claim (Registration Number 17332BM).
4. The 1st respondent shall bear costs of suit on a higher scale of legal practitioner and client."

At the hearing the first respondent's counsel, Mr *Madhuku* indicated that the first respondent was abandoning the three points *in limine* it had raised in its notice of opposition and submitted that the matter should be decided on the merits. With that submission we went straight into the merits of the application.

Mr *Chimuka* for the applicant correctly submitted that the requirements of an anti-dissipation interdict are the same as those for a prohibitory interdict and that they are as follows. The applicant must establish that it has a *prima facie* right, even if open to doubt; that an infringement of such a right is imminent; that it will suffer irreparable harm if the interim relief is not granted; that there is no other satisfactory remedy and that the balance of convenience favours the grant of such an interdict. See *Mine Mills Trading (Private) Limited and Ors* v *NJZ Resources (HK) Limited* SC 40/2014 and *Bozimo Trade & Development Co. P/L* v *Merchant Bank of Zimbabwe & Ors* 2000 (1) ZLR 1 (H). In the *Bozimo* case it was held that all what the applicant has to prove on a balance of probabilities in order to succeed is that it has a *prima facie* case.

In opposing the application, the first respondent averred the following. For it to carry out mining operations at its mining claim, it satisfied all the requirements set out in the Mines and Minerals Act. As such it is carrying out all its mining operations lawfully. An interdict cannot be granted to stop lawful conduct. It has a clear right to the lithium ore that it is mining on its registered claim. It has a legitimate right to the ore. The first respondent further averred that the applicant did not establish how the exercise of its rights on its claim harms it (the applicant). It further averred that the applicant did not establish how the cancellation of its (first respondent's) registration certificate will benefit it (the applicant). It denied that the balance of convenience favours the granting of the order the applicant is seeking. The first respondent however admitted that there is a disputed area between the parties which share a boundary.

In the first respondent's heads of argument, it was submitted that the applicant should have established a clear right on the 24th of April 2023. It was further submitted that had the applicant established a clear right, the Provincial Mining Director would have found in its favour. I hasten to point out that the first respondent's counsel missed the point here because the issue is not about what the applicant should have proven on 24 April 2023, before the Provincial Mining Director. The issue is about what the applicant should establish in the present application for me to grant the anti-dissipation interdict that it is seeking.

I however do agree with the first respondent that it is lawfully carrying out mining operations at Sandawana AV8 mining claim because it registered this claim in terms of the law.

Therefore, it is lawfully extracting lithium from its mining claim. Unless and until its registration has been cancelled or suspended by the Ministry of Mines, it is perfectly entitled to continue with its mining operations. I agree with the first respondent that the applicant did not establish how the exercise of its mining rights on its mining claim harms it (the applicant) and how the cancellation of the first respondent's registration certificate will benefit it, yet it is seeking an anti-dissipation interdict which seeks to bar the first respondent from extracting and removing lithium ore from the whole of its mining claim. It is common cause that the lithium ore that is on the whole of the first respondent's mining claim will never belong to the applicant even if the first respondent's registration certificate is cancelled. On this basis, during the hearing, I asked the applicant's counsel why the applicant was seeking an anti-dissipation interdict which seeks to bar the first respondent from extracting and removing lithium ore from the whole of its mining claim instead of the disputed area only. Paras 11, 19 and 20 of the founding affidavit and paras 2 and 3 of the draft order make it clear that this is the order that the applicant is seeking. In response Mr *Chimuka* made a concession that the order that was being sought was not justified. He then applied to amend the draft order so that the interdict will only relate or apply to the disputed area between the parties. He went on to amend the draft order accordingly.

Pursuant to the amendment of the draft order, Mr *Madhuku* for the first respondent applied that the matter be struck off the roll. His argument was that the amended draft order was not supported by the averments in the founding affidavit. He submitted that when an amendment is made to the draft order, it should still be supported by the averments in the founding affidavit for it to be granted. He further submitted that on this basis there was no need for the matter to be argued on the merits. I however, do not agree with him. This is because the matter was already being argued on the merits. We were already in the middle of hearing the merits of the case and the applicant's counsel had already finished making his submissions. Mr *Madhuku* himself was now making submissions on behalf of the first respondent. Further, it is my considered view that since the matter was already being heard on the merits, the relief he ought to have sought was a dismissal of the application, instead of seeking that the matter be struck off, if he was of the view that the amended draft order was not supported by the founding affidavit.

Be that as it may, in response to this particular issue Mr *Chimuka* argued that the founding affidavit still supported the amended draft order. With this I will consider the averments in the applicant's founding affidavit in order to see whether they support the relief

of an anti-dissipation interdict that relates to the disputed area only. In short, the simple question is, do the averments in the founding affidavit show that the applicant has a *prima facie* case warranting the granting of the interdict now being sought in the amended draft order?

In para 21 the applicant averred that it has a *prima facie* right. It said, "*The Avoseh claim was irregularly registered and therefore it is subject to cancellation. This is an issue that this court will determine under HC 3125/23 and HC 3572/23. In the event that the applicant succeeds in the said causes,* ***all the extracted and unextracted lithium from Avoseh claim (which is pegged within the Mining Lease and Lith 15) will lawfully vest in the applicant****." (My underling for emphasis)*

The applicant further averred that it *"has a right to the determination to finality of causes under HC 3125/23 and HC 3572/23 --- and that the right sought to be vindicated is the preservation of the finite mineral resource in the mining claim the subject of the pending litigation."*

What this paragraph shows is that in dealing with the issue of *prima facie* right, the applicant clearly confined itself to the lithium within the disputed area between the parties. It did not say that it will be entitled to all the lithium in the whole of the Avoseh mining claim if the first respondent's registration is cancelled. It therefore did not make a claim that it has a *prima facie* right in respect of the rest of the first respondent's mining claim. The observation that I make is that it is in dealing with the *prima facie* right requirement of the interdict that the applicant made it clear for the very first time where its interest lies in respect of the first respondent's mining claim. As has already been discussed elsewhere above, before this, it was making averments that showed that it was seeking an interdict to bar the first respondent from extracting and removing lithium ore from the whole of its mining claim. This is a clear demonstration that the applicant's founding affidavit was not well drafted and pleaded. Without having an interest in the whole of the first respondent's mining claim, the applicant had no reason to make averments that show that it was seeking an anti-dissipation interdict that seeks to bar the first respondent from extracting and removing lithium ore from the whole of its mining claim. Right from the onset the applicant had no business seeking such an order. If anything, it is the original draft order which was not supported by the founding affidavit. The amended draft order is perfectly supported by para 21.

What is clear from the papers is that there is a dispute of encroachment between the parties. The starting point is that on the face of it, both parties have mining rights in respect of their registered mining claims. Unfortunately, the beacons of their mining claims are

overlapping and this is what has resulted in the disputed area between the parties. The critical question is, between the two of them, who has the clear right to the disputed area? This is the question that has not yet been resolved and is yet to be resolved. It is the very reason why the parties are before this court. The Provincial Mining Director gave his or her determination, but the applicant was not satisfied. It has since challenged the determination by filing an application for review before this court. It is common cause that the review application is yet to be determined. As long as the dispute has not been determined to finality, what it means is that *prima facie*, the applicant has mining rights that are enforceable in respect of the disputed area. In terms of S 26 of the High Court Act [*Chapter 7:06*], the High Court is empowered to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabawe. Obviously, the Provincial Mining Director in determining the dispute between the parties, he or she acted as an administrative authority. His or her decision is subject to review by this court. Once his or her decision has been challenged, it means that the dispute between the parties has not yet been finalized. It is still pending and ongoing. As was correctly submitted by Mr *Chimuka,* the pending review application is authorised by law which means that it is a legitimate process. The applicant is perfectly entitled to bring an application for review to this court. I am therefore satisfied that the applicant has thus established that it has a *prima facie* right to have the dispute between the parties determined to finality.

The applicant is seeking an anti-dissipation interdict at this stage to preserve the *res litigiosa* pending determination of whether or not the Provincial Mining Director had jurisdiction to determine the dispute, and if so, whether or not he or she was correct in his or her decision that the first respondent is the party with mining rights to the disputed area. At law a party or a litigant may apply to court to preserve *res litigiosa pendente lite*. *Res litigiosa* is property which is the subject matter of litigation or it is the disputed thing between the litigating parties. Clearly the interdict that the applicant is seeking is justified. The interdict is important as it ensures the protection of the lithium ore which is the subject matter of the litigation. The interdict is also important in that it protects the applicant's interests in the mineral pending the outcome of review application. It is common cause that right now the first respondent is continuing to mine on the disputed area. If this continues, lithium being a finite resource will be exhausted. It means that if the judgment in the review matter turns in favour of the applicant, that judgment will be a *brutum fulman*. Therefore, it is my considered view that it is necessary to grant the application so as to preserve the *res litigiosa pendente lite*. If application is not

granted, and it so happens that the applicant then succeeds in the review matter, it is apparent that it will suffer irreparable harm. The first respondent did not dispute that it is extracting lithium ore from the disputed area right now. It even averred that it has 100 trucks that are transporting lithium ore from its mining claim including the disputed area on a daily basis. It is the first respondent's intention to continue to extract and remove lithium ore from the disputed area irrespective of the pending review application. If the situation is not arrested now, there is a great danger that it will result in the dissipation of the finite mineral resource when the rights of the parties over the disputed area have not been determined to finality. This may be to the prejudice of the applicant. Should the applicant subsequently succeed in the review matter, the parties will end up in a more difficult position than they are already in. The parties will most likely end up involved in further litigation which will obviously be very costly to them.

I am satisfied that there is no other satisfactory remedy other than the interdict being sought which will preserve the *res litigiosa* and immediately arrest the harm that the first respondent is causing. Finally, the balance of convenience favours the granting rather than the denial of the application in that the first respondent has not shown in what way it will be prejudiced if the application is granted. If the applicant loses the pending review case, the first respondent will simply resume extraction of the lithium ore on the disputed area. Besides, the first respondent has a total of 24 mining blocks on this mining claim. For now, it can remove its focus from the disputed location and carry out its mining operations on the rest of its mining claim until the dispute between the parties has been resolved. If the application is not granted, the applicant will not be able to recover the lithium ore which would have been extracted and removed by the first respondent, should it then succeed in the pending matter.

In terms of s 176 of the Constitution of Zimbabwe, 2013, this court has inherent power to protect and regulate its own process taking into account the interests of justice. In the interests of ensuring that any judgment that will be rendered in the pending matter will not be a *brutum fulman*, I believe that this is a case where the granting of an anti-dissipation interdict is necessary. The requirements for the granting of the interdict have been met and, in my view, I have properly exercised my discretion to grant the application in the circumstances of the case.

The applicant's counsel failed to make any submission in support of costs on a higher scale that the applicant is seeking. Instead, Mr *Chimuka* ended up submitting that costs can be granted on the ordinary scale. I will therefore grant them as such.

In the result, it is ordered that:

1. The application for an anti-dissipation interdict be and is hereby granted.
2. Pending the determination of the matters under case numbers HC 3125/23, HC 3572/23 and HC 4766/23, an anti-dissipation interdict be and is hereby issued barring the 1st respondent from extracting lithium ore from a 25-hectare block falling within Sandawana AV8 mining claim (Registration Number 17332BM) and within the applicant's "Lith 15" (Registration Claim GM 8172 BM).
3. Pending the determination of the matters under case numbers HC 3125/23, HC3572/23 and HC 4766/23, the first respondent be and is hereby interdicted from transporting and or removing lithium ore from a 25-hectare block falling within Sandawana AV8 mining claim (Registration Number 17332BM) and within the applicant's "Lith 15" Claim (Registration number GM 8172 BM).
4. The 1st respondent shall pay the costs of suit.

Chimuka Mafunga Commercial Attorneys, applicant's legal practitioners
B Chipadza Law Chambers, first respondent's legal practitioners