DRAGON MINING SYNDICATE (PVT) LTD
Versus
CRG QUARIES (PVT) LTD

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE 28, 29 February and 18 September 2024.

Urgent Chamber Application

T W Nyamakura with *Manjoro*, for the applicant
G Madzoka, for the respondent

TAKUVA J: This is an urgent chamber application in which the applicant seeks the following relief:

FINAL ORDER SOUGHT

That you show cause if any why a final order should not be made in the following terms;

a) That the provisional order be and is hereby confirmed
b) The removal of mined granite blocks from the boundaries of the Applicant's Mining Claims situated in Mutoko Gold29 Reg No 40520 BM and Mutoko Gold Reg No 37016 BM be and is hereby declared to be unlawful.
c) That the Respondent be and is hereby ordered to compensate the Applicant the value of the mined granite blocks that it removed from the boundaries of the Applicant's Mining Claims on 17 December 2023 and 19 December 2023 being the granite mining blocks with the following registration numbers; AEZ 9753 Block Number 3460; AEU 5054 Block Number 3410 and AGJ 1512; Block Number 3427and AEJJ 1552 Block Number MGW 2733

INTERIM RELIEF SOUGHT

a) Pending the determination of the action in the matter under HC 3813/23, the applicant be and is hereby interdicted from removing mined granite blocks which are situated within the boundaries of the Applicant mining claims in

Mutoko, Mashonaland East Mining Province being Mutoko Gold Registration Number 40675 BM Mutoko GOCD Registration number 37016 BM.

b) The Respondent, its employees and its invitees and all those acting through it be and are hereby interdicted from selling to any third parties, or in any way disposing of the mined granite blocks referred to in paragraph 1 above.

c) The Sheriff or his lawful Deputy be and is hereby empowered and authorized to serve and enforce this order with the assistance of the Zimbabwe Repubblic Police if need be.

SERVICE OF THE PROVISIONAL ORDER

(a) The provisional order shall be served on the Respondent by the Sheriff or his lawful Deputy with the assistance of the Zimbabwe Republic Police if need be.

BACKGROUND FACTS

The Applicant is the owner of certain mining claims situated in Mutoko Mashonaland East Mining Province being Mutoko Gold 32 Registration Number 40675 BM, and Mutoko Gold registration Number 37016 BM [hereinafter referred to as the Mutoko Gold Claims]. The Respondent is the owner of certain mining claims which are also in the Mutoko area.

The Applicant and Respondent are engaged in a dispute in respect of 503 granite mining blocks which the Applicant alleges the Respondent mined from the boundaries of the Applicant's Mutoko Gold Claims. The dispute is currently pending under HC 3813/23 in terms of which the Applicant seeks the following relief:-

"(i) That the 503 granite blocks mined by the Respondent be declared to belong to the Applicant in respect of the Applicant's Mutoko Gold Mining Claims.
(ii) That the Respondent be ordered to return 40 granite blocks that it removed from the Applicant's Mutoko Gold Mining Claims or that alternatively, it pays an amount of US$ 159 600- 00 to the Applicant as compensation for the said blocks and costs
(iii) Costs of suit."

Whilst the action in HC 3813/23 is still pending, on 17 December 2023 the Respondent's employees uplifted four mined granite blocks; AEZ 9753 Block number 3460; 5054 block number 3410 and AGJ 1512 block number 3427. Applicant's legal practitioners wrote to Respondent's legal practitioners on 18 December 2023 demanding that the Respondent desist from dissipating the granite blocks as they are *res litigiosa* in respect of the pending action matter.

Despite this, the Respondent continued to remove Block number AGJ 1542 Block number NGW2733. On 20 December 2023 the Respondent's staff returned and took four Blocks with the

following numbers: AFQ 1526, MGW 3396, AEZ 9753, MGW 3433, AEU 5054, MGW 9753 and AGT1512, MGW 3425 Irked by this conduct, Applicant filed this Application.

APPLICANT'S CASE

Applicant contends that it is unlawful for the Respondent to dissipate *res-litigiosa* in the manner that it is doing. It is Applicant's argument that the Respondent be interdicted from removing any of the mined blocks which are still within the boundaries of the applicant's mining claim until the main dispute between the parties which relates to the ownership of those blocks has been determined by this court. It is Applicant's contention that the recent conduct by the Respondent from 17 December 2023 to date in terms of which it has removed nine (9) mined granite blocks from the boundaries of Applicant's claim by entering unlawfully and extracting such granite blocks warrants the sanction of an interdict against the Respondent.

If the conduct of the Respondent continues unchecked, it is apparent that by the time the litigation is concluded that there is a real risk and possibility that the Respondent will have removed most if not all the mining blocks which would render the proceedings in HC 3813/23 academic.

Applicant submitted that the application is urgent warranting the granting of urgent relief by this Court for the following reasons;

1. Before 17 December 2023 Applicant was in peaceful and undisturbed possession of the granite blocks.
2. However on 17 December 2023, the Respondent removed three (3) granite stones from Applicant's claims. It returned on 19 December 2023 and removed one block after which it removed four (4) blocks on 20 December 2023.
3. Clearly if not stopped by an order of Court, Respondent would continue to defeat the litigation which is pending in HC3813/23.
4. Applicant has no other satisfactory remedy other than to approach this Court.

Upon discovery of the Respondent's act of the 17th December 2023, the Applicant immediately engaged its legal practitioners who wrote to the Respondent on 18 December 2023. See Annexure B, there was no meaningful response to this letter. Instead, Respondent continue to remove another granite mining block on 19 December 2023. It was further argued that Respondent mined unlawfully in breach of both civil and criminal laws. A police report was made under RRB 55762/19 but their attitude was that they cannot intervene as there is pending litigation in the High Court over the same matter. This, it was submitted left the Applicant with no other satisfactory

remedy. Also there is need for this Court to protect its own proceedings under HC3813/23, and only way to do so is to grant an interdict to prevent the removal of the granite blocks.

Applicant further argued that the possible alternative remedy of a claim for damages is not satisfactory in this matter in that granite, in the most other minerals are finite resources. Once they have been mined they can never be replaced. Also, several economic fundamentals may take place so that by the time the applicant finally gets an award for damages, the award will not be worth the piece of paper it would be written as the applicant will not be able to recover without what is due to it.

Finally it was submitted that Applicant has already instituted proceedings to claim ownership of these granite blocks and therefore ought a prima facie to the relief sought and the blocks in question given the factual matrix of this matter at this stage. The Provincial Mining Director of Masholand East has already found in favour of the Applicant in the circumstances.

<u>RESPONDENT'S CASE</u>

The application is vigorously opposed by the Respondent. Three points *in limine* were raised by the Respondent as follows:

1. The urgent chamber application was a nullity as it was issued by a nonexistent person. The argument that the heading of the chamber application in casu states that the applicant's name is "DRAGON MINING AND SYNDICATE (Pvt) Ltd. There is no company registered under the name of DRAGON MINING AND SYNDICATE (Pvt) Ltd. It follows that the application is null and void *ab initio*.
2. <u>DEFECTIVE CERTIFICATE OF URGENCY</u>

   The contention is that since the certificate of urgency by Wellington Magaya States that it was made in terms of "Rule 223 A of the High Court Rules 1971," it was a nullity because it was made in terms of "repealed court rules" Respondent submitted that this certificate is defective and should be struck out. Without the certificate of urgency, there is no urgent chamber application before this court. The application must therefore on this basis be struck off the roll of urgent matters.
3. <u>THE APPLICATION IS NOT URGENT</u>

   Responded argued that applicant has been aware as far back as March 2023 that the Respondent was removing and would continue to remove the blocks in question. By letter dated 7 March 2023, Applicant advised Respondent that any

further attempts to remove blocks from the disputed claims would result in approaching the court for an urgent order to stop Respondent from removing them. On 15 March 2023 Respondent removed five (5) granite blocks from its "storage." Despite threatening to file "an urgent interdict" on 16 March 2023, they did not do so.

Respondent continued to remove blocks on 6 April 2023 and Applicant did not seek an interdict. It is Respondent argument that it mined the granite blocks and it has always been in possession of the same as of the date of the decision of the Provincial Mining Director in March 2023. A further load of blocks was loaded in May and June 2023 with the full knowledge of the Applicant. In view of the above, Respondent submitted that the need to act arose on 9 March 2023 upon receipt of the letter from Respondent lawyers advising the Applicant's lawyers that it should not interfere with the Respondent removal of is blocks. If this is not the case, the next earliest date on which the Applicant ought to have acted was after the load of blocks on 10 June 2023.

Applicant issued summons in the 3813/23 on 9 June 2023 and filed an urgent chamber application under case number HC 3858/23 which was ruled not to be urgent. Applicant did not prosecute this matter. It was never withdrawn and is still pending.

Accordingly, the removal of granite blocks by the Respondent on 17 December 2023 cannot create an urgency justifying the interference by the court on an urgent chamber basis. The Applicant had several opportunities to act but did not over the course of several months.

Finally Respondent submitted that these proceedings are all but self-created urgency and should be removed from the roll of urgent matters with costs.

MERITS

Respondent denied that before 17 December 2023, the Applicant was in peaceful and undisturbed possession of the granite blocks in question. It is also denied that the Applicant has no other satisfactory remedy in that it should prosecute the application filed under HC3858/23. It is further denied that Applicant has a *prima facie* right to the granite blocks since the Respondent moved the blocks at its own costs and expense and a t a time when the Applicant had not notified the Respondent of its mining rights. Further it was contented that the blocks were moved within the confines of the Respondent registered mining claims. Having mined in accordance with the rights that existed at the material time and still exist, by operation of law, the Respondent is the owner of the minerals won and Applicant has no valid claim thereto.

Respondent also argued that the blocks cannot be a subject matter of litigation when the Mines and Minerals Act provides that the Respondent is the owner. The fact that the blocks are the subject of court proceedings does not, in any event stop the Respondent as owner from exercising its full rights as the owner. In any event some of the blocks were not mined in this disputed area and therefore have nothing to do with the Applicant. Only blocks mined between November 2022 and February 2023 were mined in this area.

As regards irreparable harm Respondent submitted that none will be suffered by the Applicant in that the Mines and Minerals Act excessively regulates the entitlement to minerals mined in a disputed area. Therefore, Applicant has an alternative remedy of damages which are easy to compute. Damages would be an adequate remedy as all the Applicant would be entitled to is the market value minus the costs of mining each block incurred by the Respondent.

Respondent further contend that the balance of convenience favours the dismissal of this application in that in view of RES 11-RES 14 hereto, the applicant has no prospects of success in proving ownership of the blocks in HC3813/23. The Respondent is also challenging the Mining Director's determination – see HC 252/23 an application for review. Most of the blocks had already been sold to various purchasers and were awaiting delivery. If Respondent is barred from removing the blocks, it will be sued by several purchasers for breach of contract. Respondent has not conducted any mining operations in the disputed area since it stopped in February 2023 when the dispute was raised.

Finally, Respondent submitted that records of blocks that are removed are kept and that all blocks are sold through the Minerals and Marketing Corporation of Zimbabwe where all sales records are kept so as to enable the applicant to know the amount made on each block. Respondent prayed for dismissal of the urgent chamber application with costs.

Applicant filed an answering affidavit which it dealt with all the issues raised in the opposing affidavit.

THE LAW

C. B. PREST The Law and Practice of Interdicts Juta and Co 9th impression 2014 at pages 50-57 quoting *CORBETT in L.F. Boshoff Investments* (PTY) LTD v *CAPE TOWN MUNICIPALITY* 1969(2) SA 256 (c) at 267 A-F, states the requirement as-:

> "Briefly these requisites are that the application for such temporary relief must show:-
> (a) That the right which is the subject he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established, through 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 immediately succeeds in establishing his rights;
> (c) That the balance of convenience favours the granting of interim relief and
> (d) That the applicant has no other satisfactory remedy."

Before applying these principles to the facts *in casu*, let me deal first with points *in limine* raised by the Respondent.

(a) Urgent Chamber Application a nullity. This point *in limine* is a red herring in that the entity that was mentioned in the urgent chamber application is an existing party called DRAGON MINING SYNDICATE (Private) Ltd. There was a typographical error in adding, "and" on the face of the application but the rest of the papers clearly state that the applicant is DRAGON MINING SYNDICATE (Private) Ltd. Also, in the founding affidavit, the Applicant identifies itself as DRAGON MINING SYNDICATE (Pvt) Ltd, therefore the point *in limine* lacks merit.

The need for proper citation of parties is stated in CILLIERS Acetal in Herbstein & Van WINSEN the Civil Practice of the High Court of South Africa 5th volume page 143 as follows;

> "Before one cites a party on a summons or in application proceedings, it is important to consider whether the party has *locus standi* to sue or be sued (*legitimia persona standi in judicio*) and to ascertain what the correct citation is."

Peter van Blerk in Legal Drafting Civil Proceedings Juta and Co. Ltd 2014 puts it more succinctly thus:

"Generally speaking it is the practitioner representing the plaintiff who is required to take the initiative in identifying parties to the action. This function must also receive the consideration of the defendant's legal practitioner. It happens from time to time that to use the coloquial expression, the plaintiff has sued the "wrong party" or even although less frequently, "that the wrong plaintiff has sued." A practitioner faced with one or the other of these situations must identify precisely what has occurred. In the case of the so-called wrong defendant the first question to be asked is on whom the summons was served. Is it the party cited in the summons? If so the second question is whether the cause of action relied upon by the plaintiff is one that lies against the defendant cited by the plaintiff? If the party served with the summons is correctly

described (ignoring spelling errors or minor immaterial mistakes), then one should admit the alterations concerning the identity of the defendant -------."

See also *GARIYA SAFARIS (Pvt) Ltd* v *Van WYK 1996 (2) ZLR 246. Van Vaurer v BRAUN S& Saunders 1910TPD* 950 STEWART SCOTT Kenedy v Mazongororo SYRINGES (PVT) LTD 1996(2) ZCR 565(S)

In the present matter the error is immaterial in that it is a purely harmless typographical error. Secondly, the founding affidavit correctly describes the Applicant. Thirdly, the cause of action between the parties who are no strangers clearly and concisely spelt out. Fourthly, the Respondent understood the Applicant to be "DRAGON MINING SYNDICATE" and not DRAGON and MINING SYNDICATE. This is why the Respondent has filed an Opposing Affidavit on the merits. It fully comprehended the cause of action between the parties notwithstanding the misdescription of the Applicant's name. The identity of the Applicant was never an issue for the Respondent at the stage it prepared its defence. Clearly, the Respondent was not prejudiced by this immaterial addition to the Applicant's name. For these reasons I take the view that the Applicant was not a nonexistent entity at the time the application was filed. In the result this point *in limine* is resolved in favour of the Applicant.

b) DEFECTIVE CERTIFICATE OF URGENCY.

The gist of the argument is that the fact that the certificate of Urgency was made in terms of the "repealed Rules" renders it defective. I disagree. The mere fact that the certificate of urgency states that it was made in terms of the 1971 rules does not render it defective. It is a procedural requirement that the application be supported by a certificate by a legal practitioner setting out the legal practitioner's belief that the matter is urgent. The reason is that the court is only prepared to act urgently in the matter where the legal practitioner is involved. This is the true purpose of the certificate. *In casu* this purpose was fulfilled. The 2021 High Court Rules have not altered the reason and context of what constitutes a certificate of urgency. In my view there remains a valid certificate which complies with the rules of this court. Therefore this point *in limine* lacks merit. It is accordingly dismissed

c) LACK OF URGENCY

I take the view that what makes this matter urgent is the Respondent's conduct on 17 December 2023. I disagree that the need to act arose in March 2023 because while it is correct that

the Respondent removed blocks in March, April and June, 2023 the Applicant responded by issuing summons on 9 June 2023. After this date, the Respondent did not resort to dissipating the *res litigioiosa* for close to six months until the 17th of December 2023 when Respondent resumed removing blocks subject to litigation. During the period 11 June 2023 to 16 December 2023, the respondent did not remove any blocks. The need to act *in casu*, cannot therefore have arisen in March 2023 as the Responded respected the court process and refrained from self-help for more than five months. It is the sudden resurgence of the removal of the blocks in December 2023 that created the need to act.

In my view, before the actions taken by the respondent on the 17 December 2023, the Applicant was in peaceful and undisturbed possession of the granite blocks located within the boundaries of Applicant's mining claims. Its rights were not under threat, as the blocks that are the subject of the litigation were still in the same place within its mining claims until the 17 December 2023 created a new cause of action.

In *Documents Support Centre* ***v*** *Mapuvire* 2006 (2) ZLR 240, the court stated in relation to urgent chamber applications,

> "Urgent Applications are those where if the courts fail to act the applicants may well be within their rights to dismissively suggest to the court that it should not be there to act subsequently as the position would have become irreversible and irrevocably so to the prejudice of the Applicant."

In *Kuvaregar* v *Registrar General* & *Anor* 1998 (i) ZLR 188 (H) CHATIKOBO J stated

> "What constitutes urgency is not only the imminent arrival of the day of reckoning a matter is urgent if at the time the need to act arise, the matter cannot wait."

In casu, the Applicant did not waste time when it discovered that the Respondent was engaging in illegal removal of the blocks and it filed this urgent chamber Application. Accordingly, I find that the matter is urgent. I now deal with the merits of the matter.

PRIMA FACIE RIGHT

That Applicant is the registered owner of certain mining claims is common cause. It is also not in dispute that the Respondent also own mining claims in the same area. A dispute arose between the parties as regards ownership of 503 blocks of granite. This dispute was referred to the Provincial Mining Director for Mashonaland East Province who concluded that the Respondent had over pegged and it is during that period that Respondent whilst in unlawful occupation of Applicant's claims, mined the granite blocks in question. Respondent accepts and knows that it

mined on claims which did not belong to it. Faced with litigation, it has resorted to remove those mined granite blocks, not from its own claims, but from the boundaries of the Applicant's claims. It denies that the Applicant was in peaceful and undisturbed possession of the claims and yet surprisingly it accepts that the claims are within the boundaries of the claims which the Provincial Mining Director for Mashonaland East Province found to belong to the Applicant.

The Respondent filed an application for review against the decision of the Provincial Mining Director which Application is pending before this Court. Respondent has also filed an appeal to the Ministry of Mines and Mining Development on the same issues. The matter is pending. Surprisingly such, a party wants to continue removing, selling and literally making off with the same granite blocks that are clearly *res litigiosa* from June 2023.

In my view, the Applicant has a *prima facie* right to the granite blocks depicted on the Annexure "E1 to E5". The *prima facie* right to the blocks remains until at least the litigation has been determined by this Court. The pending litigation proceedings are to determine who owns the granite mining blocks in question. For now ownership of the mining claims from which the Respondent unlawfully mined the blocks grants applicant the *prima facie* right. See Certificate of Registration attached to the founding affidavit as Annexure C2- C4

<u>WELL GROUNDED APPREHENSION OF IRREPARABLE HARM:</u>

There is a real risk of irreparable harm to the Applicant in that even if this court were to find for the Applicant in the main matter by that time the Respondent may have removed and sold all the blocks. The test for reasonable apprehension of injury is an objective one. The onus of proof is upon an Applicant to establish that there exist an actual or well-grounded apprehension of injury. In my view there is actual injury *in casu*. Applicant has shown on a balance of probabilities that there is a well grounded apprehension of irreparable harm arising from the Respondent's conduct of removing granite blocks from applicant's claim.

<u>THE BALANCE OF CONVINIENCE</u>

The essence is to try to assess which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found at the end of the trial. Put differently the balance of convenience is the test whereby a court considers the potential injustice to the Respondent if the relief is granted. The course to be taken is that which would involve the least risk of ultimate injustice, having regard to the actual

and pontential rights and liabilities of the parties on both sides. See CB Prest supra at pages 69 and 72.

In the present matter the court will look at who is more likely to be inconvenienced by the refusal to grant the interdict. In my own opinion, the balance of inconvenienced favours the applicant because the Applicant was in peaceful and undisturbed possession of the mined granite blocks. Quite clearly, it is the Applicant that will suffer injustice if the relief is not granted. On the other hand, the Respondent will suffer less harm if the order is granted. The fact that the Respondent may sued for breach of contract by other companies is of no consequence in this matter in that Respondent recklessly engaged other companies before the final determination of the matter. It should have waited for the determination of the matter before engaging with other companies.

NO OTHER SATISFACTORY REMEDY

Where there is an existing remedy with the same result for the protection of the applicants, an interdict will not be granted. The mere fact that an interdict would cause inconvenience and expense to the defendant is never in itself a sufficient ground for confining the plaintiff to damages – *Boiler Efficiency Services Cc* v *Coalcor* (Pvt) Ltd and ors (3) 1989 SA 460 (c) at 475G.

The bulk of the authorities show that the Court will not in general grant an interdict when the applicant can obtain adequate redress by an award of damages. The test of the adequacy of damages is, however, not conclusive. Even where an injury maybe capable of pecuniary evaluation and compensation the court will generally grant an interdict where:

"(i) The respondent is a man of straw- Mandela v Falati 1995 (i) SA 251 (w) at 260 D-E

(ii) The injury is a continuing violation of the applicant's rights.

(ii) The damages will be difficult of assessment. It has, for examples frequently been stressed how difficult it is to prove damages in cases of continuing contractual breaches or continuing delictual wrongs-----or.

(iv) if the value of a damages award for several years' time would be of questionable adequacy because of high inflation and the claimant's inability to obtain prer judgment interest on the damages'See CB Priest supra pp 46 -47

Further, generally the courts are reluctant to apply strictly the requirement relating to an adequate alternative remedy and to seek refuge in the more elastic and equitable approach of the demands of fairness and justice. This reluctance was most clearly demonstrated in the comment of

SACHS LJ in *Evans Marshal* and *Co.LTD* v *Bertola* SA 1973, ALER992 (CA) while dealing pertinently with the enquiry as to whether damages were an adequate remedy said:

> "the standard question in relation to the grant of an injunction, are damages an adequate remedy? Might perhaps, in the light of the authorities of recent years, be rewritten; is it just in all the circumstances, that the plaintiff should be confined to his remedy in damages?"

In casu, the Respondent contented that an award of damages provides a just and satisfactory remedy. I disagree for the following reasons:

(a) The injury here is a continuing one.

(b) The damages are difficult of assessment

(c) Damages are an inadequate remedy in the circumstances

(d) It is not just in these circumstances that applicant be restricted to its remedy of damages.

All in all, I find that applicant has discharged the onus cast on it on a balance of probabilities. It has managed to prove all the requirements for a provisional interdict.

DISPOSITION

In the circumstances it is ordered as below:

INTERIM RELIEF GRANTED

Pending the determination of the action in the matter under HC 3813/23, the applicant be and is hereby granted the following relief:

(a) The respondent, its employees and its invitees and all those acting through it be and are hereby interdicted from removing any mined granite blocks which are situated within the boundaries of the applicant mining claims in Mutoko, Mashonaland East Mining Province being Mutoko Gold Registration number 40675BM , Mutoko Gold 29 Registration Number 40520BM and Mutoko Gold Registration Number 37016BM.

(b) The respondent, its employees and its invitees and all those acting through it be and are hereby interdicted from selling to any third parties, or in any way disposing of the mined granite blocks referred to in paragraph (1) above

(c) The sheriff or his lawful deputy be and is hereby empowered and authorized to serve and enforce this order with the assistance of the Zimbabwe Republic police if need be.

<u>SERVICE OF THE PROVISIONAL ORDER</u>

a) The provisional order shall be served on the Respondent by the Sheriff or his lawful deputy with the assistance of ZRP if need be.