BAILZONE MINING (PVT) LTD
versus
JOHN RUSHINGA
And
MILLION RUSHINGA
And
GIDEON RUSHINGA
And
GARIKAI GARAUZIVE
And
PRIDE GARAUZIVE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO,18 & 25 July, 18 September & 17 November 2023 &19 March 2024

Opposed application: Interdict

G. Madzoka, for the applicant
L. Matapura, for the respondents

ZISENGWE J: The applicant seeks a final interdict barring the five respondents from interfering with its mining operations on pieces of land situate in on communal lands in the Zaka District of Masvingo Province. Through the affidavit deposed to by its director, Boysen Mutembwa, it alleges that the five respondents are conducting illegal mining activities on some of its registered mining blocks, a claim which the respondents deny. It further avers that it is the registered holder of mining claims known as Bvuma Mining project which it obtained sometime in 2017 and 2018. It has since affected developments thereon pursuant to its intention to embark on gold mining, installing relevant machinery and infrastructure in the process.

It also avers that it has duly compiled with all the necessary Environmental Impact assessment processes amongst other statutory requirements. It further claims that it has been well received by the local Chief who has granted "permission" for it to commence its mining operations in the area.

It however claims that sometime in 2021 respondent alongside other artisanal miners invaded the its claims under Bail 1 and Bail 2 and commenced illegal operations and only temporarily stopped upon the intervention of the police at its (i.e. applicant's) behest.

It is further averred that on the 26th of January 2022, a memem of the local community alongside the respondents under the Garanizire mining syndicate approached the Provincial Mining Director, Masvingo for …….. However, the determination was on applicant's favour who wherein it was determined that the applicants he allowed to continue exercise its mining rights in respect of Bail 1 and Bail 2 mines. According to applicant the determination brought some brief respite and the progression of its project resumed. However this was to be short lived as in August 2023, another invasion on his mining claims took place which invasion was only halted by the police which he reported. He also averred that some of the perpetrations were ordered and hurled before the courts facing criminal charges.

This again apparently turned to be a temporary respite as according to the applicant ….. mining operations were again interrupted by yet in this regard that on the 10th of February 2023, the respondent claimed to have mining rights oner his claims. It was only the arrival of the police that saw the respondents leaving the mining site for a only a few days between 11-13 February 2023. Only to reappear on 18 February 2023 to resume mining operations.

It was then that the applicant approached this court on an urgent basis seeking an interim interdict against the respondents.

The application was opposed. However, at the conclusion of the hearing the following interim order was made on the 20th of February 2023.

INTERIM RELIEF GRANTED

Pending the confirmation of the provisional order, an interim relief is granted on the following terms:

1. Pending the return date the 1st, 2nd, 3rd, 4th and 5th respondent, their agents, employees or proxies or anyone claiming rights through them be and are hereby

interdict from mining on Bail Mining blocks belonging to the applicant located in Chiromo, Zaka also known as the Bvuma Gold Mining project.

2. To the extent that it becomes necessary the Sheriff of the High Court or his lawful deputy with the assistance of the Zimbabwe Republic police should there be need be and is hereby authorized and empowered attend recover the 1st, 2nd, 3rd, 4th and 5th respondents, their agents, employees or proxies as well as equipment, tools and machinery from the applicant's claims stated above.

3. 1st, 2nd, 3rd, 4th and 5th respondents shall pay costs of sum on an Attorney and client scale.

It so happened that in the interim the Provincial Mining Director issued an order suspending all mining operations pending investigation which his office had instituted. When this matter was set to resume on the return date, this development was bought to the attention of the count by *Mr Matapura*, counsel for the respondents who then proposed that the matter be referred to the Provincial Mining Director for a report on his findings. According to him this was in light of what he termed the technical nature of the dispute. Although *Mr Madzoke* protested against such a course of action ultimately the court, for the reasons given, gave an order in the following terms:

IT IS HEREBY ORDERED THAT:

1. The dispute is hereby referred to the Provincial Mining Commissioner in terms of section 345 of the Mines and Minerals Act *[Chapter 21:05]* to determine-
   (a) Whether or not the mining block are situated in homesteads of each of the respondents and if so whether their consent was granted in terms of the law.
   (b) Whether any of the respondents are carrying out any illegal mining activities on the applicant's mining blocks;
2. Pursuant to 1 above, the Provincial Mining Commissioner is directed
   (a) To hear the parties when conducting its investigations as contemplated in (1) (a) and (b) above.
   (b) The Provincial Mining Commissioner to file and serve its report within 21 days of this order
   (c) The Provisional order granted on granted 27 February 2023 by this court is extended until the hearing of the application.

(d) The applicant to set down this matter for hearing within 10 days of filing of the Provincial Mining Commissioner report.

3. Costs are in the cause.

The Provincial Mining Director's determination was subsequently availed. It is dated 10 October 2023.In his report the Provincial Mining Director pointed out that an on-site visit was conducted on the 5th and 7th of September 2023 and on both occasions several preferably from his office were present. Further he pointed as what in arriving at his determination he relied on the report from the Mine survey and representation by the parties and records from Masvingo Provincial Mining Office.

Some of his chief findings were that the homestead and field claimed by the fourth and fifth respondents are located on Bail 3 mine held by the applicant and that it is the same field claimed by one Margaret Zivanai (fifth respondents' mother).

The first respondent's field on the other hand is located within Bail 6 mine also held by the applicant. Meanwhile the third and fourth respondents' homestead and field are located within Bail 12 also held by the applicant.

Further, Chiromo area of Zaka District is in the communal lands but that the respondents did not demonstrate that they occupied any portion of that communal land in their individual capacities only laying claim thereto by virtue of it being their ancestral lands. He concluded that the communal land is occupied as a village (rather than as individual holdings). That being the case, according to him it was the consent of the Rural District Council of the area concerned that needed to be sought as contemplated in section 31(1) (h) of the Act before prospecting and pegging would commence and not the consent of the individual respondents (or occupiers of such communal land).

As to whether the applicant did obtain the consent of the Rural District Council, reference was made to registered mail slip whose serial number was produced purportedly demonstrating that the applicant sought the consent of Zaka Rural District Council under whose jurisdiction the communal land in question lies.

Apparently, no response was forthcoming from the Rural District Council. According to the Provincial Mining Director, the custom (he calls it *"traditional practice"*) as within his Ministry is that proof of the sending of registered mail to the Rural District Council notifying of the intention

to prospect and peg in a portion of communal lands, in the absence of written objections therefrom constitutes tacit consent on the part of the rural district counsel.

Seemingly in support of the granting of the application sought, the Provincial Mining Director referred to section 58 of the Act which precludes a challenge to registration of a mining location upon the effluxion of two or more years after such registration.

He also made observed that illegal mining activities were taking place most probably by the respondents. He referred to the mining equipment he observed concealed in the immediate vicinity of their individual homesteads or fields and the shafts thereon which according to him undoubtedly pointed at recent mining operations.

Ultimately the PMD recommended that given that applicant had discovered gold deposit in the area covered by his registered mining blocks and had proceeded or peg the mining locations as far back as 2017 and 2018, nothing was to be gained by revoking its mining titles. According to him the inevitable consequence of such a course of action would be a flood of applications for the registration of mining titles for the same mineral. He also gave other recommendations which are outside the purview of the present application.

The applicant maintains that it is entitled to the relief sought. On the question of the existence of a clear right, it avers that it has an unimpeachable right as evidenced by the extant certificates of registration over the mining claims. It further avers that it cannot be unjustifiably divested of those claims without the prior cancellation of those licences.

It further avers that the invasion of its mining claims accompanied by the illegal mining activities conducted thereon constitutes continuing injury or harm justifying the granting of an interdict. Additionally, it asserts that conduct on the part of the respondents is ruinous to its mining venture, particularly if regard is had to the fact that gold is a finite resource which continues to deplete with each act of illegal mining activity.

The application stands sternly opposed by each of the respondents. The high-water mark of their defence to the claim is that the applicant has failed to establish that it enjoys a clear right it being a pre-requisite for the granting of a final interdict. Secondly, the respondents deny having conducted any mining covered by the applicant's claim implying that there is no injury committed by them or suffered by the applicant or reasonably apprehended.

The respondents initially raised a number of preliminary issues which were however either overtaken by events or abandoned by them during oral arguments in court.

The respondents insist that the applicants mining claims are situated on communal land which has since 1962 has been used for grazing and farming purposes and that therefore their written consent was required before prospecting could be done which consent was neither sought nor granted rendering applicant's title defective. They insist that they are not "invaders" but *bona fide* occupiers of the communal land in question. They claim therefore that applicant has no right to dispossess them of their land.

The respondents also question the propriety of a blanket order covering all 60 claims regardless of where they are located potentially covering homesteads, graveyards and "sacred" areas something which would prejudice the occupiers of such land.

Questions were also raised over the applicant's environmental impact assessment certificate and contend that those do not cover all the areas covered by the claims.

Whether or not the requirements for an interdict have been satisfied

For an application for a final interdict to succeed, the following prerequisites have to satisfied:

1. The existence of a clear right
2. Actual or reasonably apprehended injury; and
3. Absence of any other remedy by which applicant cab be protected with the same result.

See *Flame Lily investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378, *Setlogelo* v *Setlogelo* 1914 AD 221

Whether the applicant managed to establish a clear right

This term has been interpreted to mean *"right clearly established at law"* in Erasmus *"Superior Court practice"*, 2nd edition at D6-12-13, the following is stated:

> "It is submitted that what is meant by the phrase (clear right) is a right clearly established. Whether the applicant has a right is a matter of substantive law, whether that right is clearly established is a matter of evidence. In order to establish a clear right, the applicant has to prove on a balance of probability the right he seeks to protect."

In *Flame Lily investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd* (*Supra*) it was held that a clear right need not be incontrovertible but definite.

Finally, in *Masimba Charity Huni Fuels (Pvt) Ltd* v *Kadurira & Anor* SC 39-22, a "clear right" as it relates the granting of a final interdict was explained in the following terms:

> "...the word "clear" relates to the degree of proof required to establish the right an should strictly not be used to qualify the right at all …. A clear right must be established on a balance of probabilities….. From the authorities it is clear that where a final interdict is sought, a clear right as opposed to prima facie right must be established by evidence on a balance of probabilities."

The crisp question which begs is whether the applicant's mining right are impaired by the absence of written consent by either the respondents themselves or the Rural District Council of the area concerned before any prospecting or mining operation could ensue as required by section 31 of the Act. Should that be the case, the question that follows is whether the applicant's position is rescued by section 58 of the Mines and Minerals Act, [Chapter 21:05] ("the Act"). The said section as a general principle protects a mining registration from impeachment if it has been in existence for two or more years.

There are divergent views on the question of whose consent is required before prospecting can commence on communal land in question. The respondents argue that it was their consent as occupiers of the land that was required in term of section 31 (1) (a) (ii) of the Act. The Provincial Mining Director on the other hand stated in his determination that it was the consent of the Rural District Council in terms of section 31 (h) of the Act. According to him this is on account of the fact that none of the respondents was able to demonstrate that they occupied a portion of the communal land in his individual capacity, but claimed that this was their ancestral land.

Whichever position one takes, the applicant's position is impaired by the absence of written consent before he could commence any prospecting activities which led to registration of his mining claims, see Mt Grace.

The slip for registered mail produced cannot substitute written consent as required by section 31 it only remains proof of the sending of registered item the contents of which cannot be verified it is accepted that the registered mail contained a request for the written consent to commence prospecting in the Chromo area of Zaka District, there is certainly no proof that such request was granted.

The insistence by the legislative for unwritten consent is to obviate the potentially of dispute on whether or not such consent was granted. Both the applicant and the PMD took a giant leap of faith in assuming that the absence off a response from the district council translated tacit

consent. There was no proof that the request was even received by the Rural District Council, let alone approved. The applicant was not entitled to make such an disruption particularly given the magnitude of this venture and its potential fundamentally disrupt the lives of the ……. Of this area.

The PMD refers to a custom which it says has since developed in the industry to the effect that proof of the sending of registered mail translates to tacit consent in the absence of response from the Rural District Council. No evidence was shown of the existence of such a custom. Custom as a source of law cannot override the provision of a statute. For a custom to give rise to legal rule, it must be generally complied with in the locality community or industry in question, in the belief that it is binding, although it needs not be particularly old; be definite and certain, be fair and reasonable; and not be inconsistent with the law. Here, the purported custom would undoubtedly be in conflict with the law which requires written consent of the Rural District Council for the area concerned.

One would envisage that a venture of such a magnitude would require the request to be tabled before a council meeting the matter thoroughly debated and a resolution passed. One also wonders why the applicant would restart to sending registered mail of all methods of communicating his request, and particularly given that the then prospective mining claims are *"a stone throw"* from the offices of Rural District Council. But then I digress! The point is that there is no written consent from either the respondents should section 31 (1) (g) (ii) be applicable should section 31 (1) (b) be applicable.

Whether the applicants' position is rescued by section 58 of the Mines and Minerals Act

Section 58 of the Act reads:

58. Impeachment of title when barred

> *"When a mining location or a secondary reef in a mining location has been registered for a period of two years it shall be competent for any person to dispute the title in respect of such mining location or reef on the ground that the pegging of such location was invalid or that provisions of this Act were not complied with prior to the issue of the certificate of registration."*

This provision does not always provide an impregnable shield to the holder of defective title. Section 50 of the Act for instance allows the cancellation of a certificate of registration notwithstanding the provision of section 58. In *Barrington Resources (Pvt) Ltd v Pulserate*

Investments (Pvt) Ltd HH 446-23 MUTEVEDZI J pointed that the bar in section 58 of the Act is not all embracing, but is circumcised by the acts by which title may not be impeached.

All that is being said in the context of this application is that the applicants' right is far from "clear". At most it is *prima ficie*.

The defence mounted by the respondents challenging the applicants' title cannot any stretch of the imagination be regarded as "collateral" as a referral by *Mr Madzoka* for the applicant the applicant having put forward his certificates of registration as the main basis for the existence of his right, the respondents were equally entitled to impugn the property of the obtainment of those certificates.

In the final analysis I believe the applicant fails on the question of the existence of a clear right it being of the requirements for regarding of a final interdict.

Costs

The general rule is that the successful party is entitled to their costs. However, no proper basis was laid by the respondents for costs on the punitive that they seek and therefore costs will be awarded on the ordinary scale.

Accordingly, therefore, the application for a final interdict is hereby dismissed with costs and the provisional under granted on 27 February 2023 and extended on 25 July 2023 is hereby discharged.

Zimudzi & Associates, applicant's legal practitioners.
Mafongoya & Matapara, respondent's legal practitioners