SATOND INVESTMENTS (PRIVATE) LIMITED
versus
MUNASHE SHAVA

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 18 May 2018 & 20 June 2018

Opposed Matter

A. Mangwiro, for the applicant
G. Madzoka, for the respondent

MUZOFA J: This is an application for a final interdict in which the relief sought is the following:

"1. The respondent, his employees, invitees, friends and/or relatives be and hereby permanently interdicted from carrying out any farming activities at Ascot 168 Mine situated on Subdivision 19, Knockmallch Farm, Norton.

2. The respondent shall pay costs of this application on a legal practitioner and client scale.

The following facts are common cause in this matter:

'1. On the 2nd of June 2014 the applicant made an application for a prospecting licence which was issued on the 12th of June 2014.

2. The district administrator was duly notified.

3. The applicant was subsequently issued with a certificate of Registration as a registered holder of a block of reef claims called Ascort 168 situate on Knockmalloch Farm on the 4th of January 2016.

4. On the 4th of December 2014 the Minister of Lands and Rural Resettlement offered subdivision 19 Knockmalloch to the respondent.

5. The land offered to the respondent included 1.8 hectares inside

Ascort 168 mine where the applicant's mining block is situate.

According to the applicant's founding affidavit, both parties have rights over the land. The applicant has mining rights and respondent has farming rights. His mining rights are superior to the respondent's rights.

Further to that it claims that on the 2nd of October 2016 the respondent instructed his employees to plough on the 1.8 hectares of the portion of land inside the Ascort 168 mine. Such presence of the respondent's workers disturbs its mining operations.

In his opposing affidavit the respondent confirms that both parties hold rights over the same piece of land. The respondent claims that the land was not open for prospecting in terms of s 30 of the Mines and Minerals Act ("the Act"). Therefore the applicant was required to comply with Part V and VII of the Act. In essence the respondent challenged the propriety of the certificate of registration.

Further he claims he was offered the land before the registration of the claims therefore his rights supersede the applicant's rights.

In an application for a final interdict as the one sought by the applicant the applicant has to establish firstly a clear right, secondly an actual or a reasonably apprehended injury and, thirdly, absence of any other remedy *Setlogelo* v *Setlogelo* 1914 AD 221. A *prima facie* right can only suffice in an application for a final interdict where there is a likelihood of irreparable harm being suffered if the relief is not granted Molteno Bros and other SA Rlys and Others 1936 AD 321 at 332 cited in *Boadi* v *Boadi and Anor* 1992 (2) ZLR 22 (HC).

In consideration of those factors the court exercises its discretion, in *Eriken Motors (Welkom) Ltd* v *Proten Motors, Warrenton and Anor* 1973 (2) SA 685 (A) HOLMES JA, dealing with the issue on how to assess the factors said the following at 691G.

> "In exercising its discretion the court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive but are interrelated, for example, the stronger the prospects of success the less this need to rely on prejudice to himself. Conversely, the more the element of "some doubt; the greater the need for the other factors to favour him…"

Bearing in mind the requirements set out for an interdict I will consider the merits of this case.

Whether the applicant has a clear right is a matter of substantive law. It must be a right that exists at law and can be protected. A clear right is one that is not open to doubt whatsoever.

The applicant in its founding affidavit indicate that it obtained a prospecting licence on 2 June 2014. It is not in dispute that this licence was obtained before the respondent was offered the land forming the subject of the dispute.

Section 26 of the Act sets out the land open to prospecting:

> "Subject to the provisions and limitations contained in section thirty-one the following land is open to prospecting:

(a) all state land and communal land
(b) all private land in the title to which there has been reserved either to the British South Africa Company or to the Government of Zimbabwe the right to all minerals or the power to make grants at the right to prospect for minerals.
(c) all enactment or agreement whereby such person is entitled to obtain from the state title thereto on the fulfilment by him of the conditions prescribed by such enactment or agreement."

The applicant armed with the prospecting licence had the right to prospect on land as defined in s 26. The land in dispute was open for prospecting.

Respondent argued that it was not open for prospecting because if was land under cultivation in terms of s 31 of the Act. I do not agree with this interpretation.

According to s 30 of the Act, "land under cultivation" is defined as

"(a) land which has been *bona fide* cleared or ploughed or prepared for the growing of farm crops;
(b) ploughed land on which farm crops are growing;
(c) ploughed land from which farm crops have been reaped, for a period of three years from the date of completion of such reaping;
(d) land which has been *bona fide* prepared for the planting of such permanent crops as orchards or tree plantations, and land on which such crops have been planted and are being maintained;
(e) ploughed land on which grass has been planted and maintained for harvesting rotation of crops or stock feeding, for a period of six years from the date of planting;
Provided that if any land such as is described in paras (a) and (d) is not utilized for the growing of farm crops or of such permanent crops as orchards or tree plantations within two years of its having been *bona fide* cleared or ploughed or prepared for such crops, such land shall forthwith became open for prospecting."

In casu, it was not shown that by 2 June 2014 the land was under cultivation in terms of s 30. In fact by the respondent was not a holder of any rights in respect of the land in dispute. There was a suggestion by the respondent that the land was under cultivation of a plantation. No proof was provided to support this averment, it remained a bare allegation.

On the other hand the applicant attached a map of Ascot 168 showing that the area "F" the disputed land was a forfeited mine.

I accept therefore that at the time of prospecting there was no plantation. The land was open for prospecting.

To that extent there was no requirement for the applicant to comply with Part V and VII of the Act as submitted for the respondent.

Consequent upon getting a prospecting licence, the applicant had the right to prospect and search for minerals, mineral oils and natural gases and of pegging *inter alia* in terms of s 27 of the Act.

It is trite that such processes, to prospect, search for minerals and peg precede the granting of the certificate of registration in terms of the Act see also *Zimba* v *Mining Commissioner & Ors* HH 10/16.

However the prospecting licence itself gives certain rights which respondent cannot dispute for it is a matter of law.

For the respondent therefore to argue that he was supposed to be advised of these processes is untenable. By then he had no rights. The land in dispute was prospected before he was offered the land by the Minister. Clearly the respondent was offered the land when all the preliminary work for a certificate of registration had been done. What was outstanding was the actual certificate. This is clear from the dates. The certificate of registration is dated 4 January 2016 and the offer letter is dated 4 December 2014. The prospecting licence was issued on 2 June 2014, which licence was the first step towards the acquisition of the certificate of registration.

Even the priority argument raised by the respondent cannot succeed. It was the applicant who pegged the land for mining first.

The respondent's defence that his right is superior is also without merit.

Indeed it is not in dispute that the respondent has farming rights over the land in dispute. The question which exercises the court's mind is which right supersedes the other.

Section 179 of the Act settles the matter, it provides

> "Saving of rights of landowner over mining location
> Subject to subs (12) of section one hundred and eighty, the owner or the occupier of land on which a registered mining location is situated shall retain the right to graze stock upon or cultivate the surface of such location in so far as such grazing or cultivation does not interfere with the proper working of the location for mining purposes.". (my emphasis)

Section 180 (12) speaks to a situation where a scheme to cultivate the surface of mining location has been approved by the board. *In casu* there is no scheme referred to by the applicant.

For the avoidance of doubt, s 179 of the Act gives a landowner lesser rights than the miner's rights. In other words the miner's rights are superior to the farmer's rights thus where two competing rights on a piece of land exist, one of a miner and a farmer the farmer's rights are subordinate or should accede to the miner's rights. The farmer can only exercise his rights as long as such exercise does not interfere with the mining activities.

In *casu* the applicant therefore has a clear right that is not open to doubt in terms of section 179 of the Act. It does not matter that the offer letter is still extant. It being extant, the

land belongs to the state and was open to prospecting and therefore susceptible to be a mining location. The right held by the respondent is therefore a limited right in terms of section 179 of the Act.

Irreparable harm

The applicant demonstrated that it will suffer irreparable harm if the respondent is not interdicted. In paragraph 11 of the applicant's founding affidavit, it is stated;

> "On or about the 2nd of October 2016, the respondent instructed his employees to plough on the 1.8 hectares of the portion of land inside Ascort 168 Mine."

This fact was not disputed, therefore it is taken as admitted. The applicant further averred that the presence of the respondent's employees at the mining location disturb the smooth operation of its business. This too was not disputed. To that extent clearly where the mining operations are being disturbed there is a threat or a real likelihood of irreparable harm.

Remedy

Mr *Madzoka* for the respondent submitted that an interdict is not the only remedy. He said the applicant should have proceeded in terms of s 32 of the Act. Section 32 of the Act does not envisage a dispute between a landowner and a miner. It envisages a dispute between a landowner and a prospector, this is before the prospecting, pegging and the issuance of the certificate of registration. In this case the dispute is between a landowner and a holder of a certificate of registration, a miner so to speak. In terms of s 345 (1) of the Act, the High Court has original jurisdiction in every civil matter, complaint or dispute arising under the Act, unless the parties agree in writing to the mining commissioner's jurisdiction.

Clearly an interdict is the only remedy to protect the applicant's interest in the mining location. There is no alternative remedy. Mr *Madzoka* for the respondent argued that lawful conduct cannot be interdicted. Can respondent's conduct be said to be lawful in light of s 179 of the Act? I do not think so. Clearly the respondent's right must give way to the applicant's mining rights to the extent that the respondent's rights interfere with the mining business of the applicant. It is my considered view that, that which is unlawful, is that which goes against the tenets of an applicable law.

In the circumstances of this case, the applicable law is the Mines and Minerals Act. The Minister of lands offered state land to the respondent. That land was open to prospecting in terms of the Mines and Minerals Act. That Act regulates the relationship of a landowner and a miner. To the extent therefore that the landowner does not comply with the Act, his conduct becomes unlawful.

The respondent as the landowner is interfering with the mining operations by cultivating the land pegged for mining. His conduct is therefore unlawful. The founding affidavit therefore meets the order sought.

From the foregoing, the applicant has satisfied the requirements for an interdict. The applicant seeks costs on a legal practitioner client scale. There was no justification for such costs. I will therefore grant costs on an ordinary scale.

Disposition

It is ordered that;

1. The respondent, his employees, invitees, friends and/or relatives be and are hereby permanently interdicted from carrying out any farming activities at Ascot 168 Mine situated on subdivision 19 Knockmallch Farm, Norton.
2. The respondent shall pay costs of this application.

Mangwiro Law Chambers, applicant's legal practitioners
Wintertons, respondent's legal practitioners