GENESIS MINING SYNDICATE

Versus

ISAAC PETER MUGUTI (CHIVENDERE)

And

TAWANDA CHIVENDERE

And

THE PROVINCIAL MINING DIRECTOR GWERU, N.O.

And

THE OFFICER COMMANDING ZIMBABWE REPUBLIC POLICE MIDLANDS PROVINCE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 2 DECEMBER 2021 AND 27 JANUARY 2022

Urgent Chamber Application

Ms C. Mugabe, for the applicant
I Mafirakureva, for the 1st and 2nd respondents
B Moyo, for the 3rd and 4th respondents

MAKONESE J: This is an urgent chamber application for an interdict. The matter is opposed. The order sought is couched in the following terms:

> "**INTERIM RELIEF SOUGHT**
>
> Pending confirmation or discharge of the order the applicant is granted the following interim relief:-
>
> 1. 1st and 2nd respondents and their employees, agents or assignees be are hereby ordered to stop milling operations in an area approximately 20.9 hectares within the Mining District of Midlands, as specifically described in Special Grant 8841 dated 12 October 2021.
> 2. Failing which the 4th respondent be and is hereby ordered to enforce this order.
>
> **TERMS OF FINAL ORDER SOUGHT**
>
> 1. That the Provisional Order set out herein be and is hereby confirmed.

2. 1st and 2nd respondent be and is hereby permanently interdicted from:

   (a) interfering in any way with the mining operations of Genesis Mining Syndicate.

   (b) threatening in any manner the applicant or any of its employees, representatives, or agents.

   (c) entering or visiting the area approximately 20.9 hectares within the Mining District of Midlands as specifically described in Special Grant 8841 dated 12th October 2021.

3. Failing which, the 4th respondent be and is hereby ordered to:

   (a) to effect arrest all persons in breach of this order.

4. That costs of this application be borne by 1st and 2nd respondents on an attorney and client scale."

FACTUAL BACKGROUND

On 10th July 2019 applicant, Genesis Mining Syndicate submitted an application for a Special Grant in respect of a mining claim approximately 20.9 hectares situate in Shurugwi, in the Midlands District. The application was granted by the Ministry of Mines and Mining Development on the 11th of October 2021 as Special Grant 8814. By virtue of the Special Grant the applicant was authorised to carry out mining operations in an area more commonly as Boterekwa, Shurugwi. On 14th October 2021 applicant dispatched its employees together with heavy duty machinery to commence mining operations in the area covered by the Special Grant. Artisanal mines acting on behalf of 1st and 2nd respondents also descended on the area commencing mining operations. Applicant's employees confronted 1st and 2nd respondents seeking an explanation. Applicant's employees were threatened with violence. 1st and 2nd respondents made a bizzare allegation that the area had been allocated to them by persons in high places in government. 1st and 2nd respondents failed to produce any documentation proving that they had pegged the area. They failed to produce any registration certificates. On Sunday 17th October 2021 1st and 2nd respondents made threats to the applicant's employees and promised to unleash the dreaded "mashurugwi" (artisanal miners) onto the mining location. Applicant was forced to seek urgent relief for an interdict in this court. On 20th October 2021 an urgent chamber application was lodged in this court. On 22 October 2021, this court granted an order in the following terms:

"1. Pending the finalisation of this matter the parties be and are hereby ordered to cease operations on the mining claims known as Genesis Mining Syndicate

located in a Special Grant approximately 20.9 hectares situate within MID002 in the Mining District of Midlands.

2. 3rd respondent shall file a comprehensive report relating to this dispute within 7 days of the date of this order.

3. The applicant shall take steps to file a Notice of Set Down upon receipt of the report from the 3rd respondent.

4. In the event that any party violates this order the 4th respondent is authorised to enforce the terms of this order."

1st and 2nd respondents opposed the matter and in their opposing affidavits raised certain preliminary points. I shall proceed deal with the points *in limine*.

IN LIMINE

APPLICANT HAS NO LEGAL CAPACITY TO BRING THESE PROCEEDINGS

It was contended on behalf of the respondents that there is no legal entity known as Genesis Mining. It was argued that the cover of the application states that applicant is Genesis Mining. On that basis, and for that reason, it was argued that applicant has no legal capacity to sue the respondents as it does not exist at law. Further respondents averred that the applicant is not a legal *persona* and therefore does not exist. Respondents forcefully argued that the application was fatally defective and ought to be dismissed on that point alone. The point *in limine* does not have merit. Applicant's Founding Affidavit clearly states in paragraphs 1 and 2 that applicant is Genesis Mining Syndicate. In determining whether a party has been properly cited the court must consider the averrements in the Founding Affidavit and how the parties are described. The court will not pay much attention to the cover to the application. The averrements in the Founding Affidavit will bind the deponent to the affidavit as such are made under oath. In any event, Rule 11(3) of the High Court Rules, 2021 provide as follows:

"any error of omission or inclusion shall not afford a defence to the associations."

The point *in limine* is frivolous and ought to be dismissed.

THE INTERIM RELIEF SOUGHT IS FINAL IN NATURE AND THEREFORE FATALLY DEFECTIVE

This point *in limine* was overtaken by events. At the hearing of the matter the applicant had filed an amended Provisional Draft Order. There was no opposition to the

amendment sought. The court granted the amendment. The amendment was filed well before the Notice of Opposition was filed. The second point *in limine* is dismissed.

URGENCY

There was a heart hearted attempt by the 1st and 2nd respondents to persist with this point *in limine*. The matter was clearly urgent. The urgency was clearly established in the certificate of urgency and founding affidavit. The point *in limine* should not have been made at all because at the time of the hearing of the matter there had been violent confrontations involving applicant's employees and agents of 1st and 2nd respondents. The applicant did act when the need to act arose. There was hardly a delay of more than 7 days from the date the 1st and 2nd respondents unlawfully descended on applicant's mining claims. Applicants acted on time to protect their interests. The urgency contemplated by the rules and case law was established by applicant. See *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (HC).

I would, accordingly dismiss the point *in limine* which must have been made without any serious consideration of the facts surrounding the dispute. It must be pointed out that legal practitioners must desist from raising preliminary objections that are made just for the sake of it. Where no serious preliminary objections exist, the courts must not be murdered with considering non-existent points *in limine*.

MERITS OF THE APPLICATION

Following the court's direction that the 3rd respondent must file a comprehensive report relating to this dispute, a report was filed with this court on 2nd November 2021. The court is indebted to the 3rd respondent for preparing a consolidated field verification exercise concerning this matter. A summary of the findings of the 3rd respondent is as follows:

1. The ground coordinates and registration coordinates for Special Grant 8814 do match with one another as per Survey Diagram attached to the report.

2. The coordinates were confirmed with the 7 beacons picked around the Special Grant location.

3. Three cabins were observed on site and these sit around one place at the edge but within the confines of Special Grant 8814 for Genesis Mining Syndicate.

4. There were 2 pits which wholly lie within Special Grant 8814.

5. Records held by 3rd respondent show that Genesis Mining Syndicate submitted their application for a Special Grant on 10th July 2019. The application was granted on 11th October 2021 as Special Grant 8814.

6. The disputed ground is part of the chrome claims ceded to Government as part of the empowerment mining claims by ZIMASCO.

7. Records held by 3rd respondent do not have any application by 1st and 2nd respondents over the same mining location.

8. The pits within the Special Grant 8814 are being claimed by the 1st respondent, however they fall within an approved mining title.

9. The Surveyors field report and official records show that Special Grant 8814 was granted following due process of the Ministry of Mines & Mining Development.

10. 1st respondent is claiming title owing to the fact that these claims are part of empowerment programme by government and had eyed these claims in preparation for submission of his documents.

11. The mining claims in issue had been applied for and an application granted in favour of Genesis Mining Syndicate.

12. The report concluded that the diagrams are beacons pointed to Surveyors by the parties on the ground indicated that the ground position claimed by 1st and 2nd respondents overlay an already approved mining title in favour of Genesis Mining Syndicate.

13. The report recommended that based on the Surveyor's field exercise and the available source documents, applicant has the legitimate claim to the mining title and is located within the ground applied for in 2019.

14. It was recommended that 1st and 2nd respondents must find alternative ceded claims for application in terms of laid down procedure.

WHETHER APPLICANT SATISFIED THE REQUIREMENTS OF AN INTERDICT

The requirements for the grant of an interdict are well established in our jurisdiction. These are:

(a) a right which though *prima facie* established is open to some doubt.

(b) a well grounded apprehension of irreparable harm.

(c) the absence of any other remedy.

(d) the balance of convenience favours the applicant

See: *Zesa Staff Pension Fund* v *Mushambadzi* SC 57-02.

The applicant established a *prima facie* right. The Special Grant number 8814 gave applicant the authority to conduct mining operations on the claims. This assertion has been supported by the report by the Provincial Mining Director. The report is clear and indicates that the 1st and 2nd respondents have no right whatsoever to be on these claims. They are on these claims outside the law. On the second hurdle, the applicant has shown that there is a well grounded apprehension of irreparable harm. 1st and 2nd respondents violently confronted applicant's employees and threatened the use of violence. When 3rd respondent conducted a ground verification exercise on 27th October 2021 it was established that 1st and 2nd respondents had dug some pits within the Special Grant Area. The danger of irreparable harm to the applicant was therefore established. There is no other effective remedy available to the applicant. The balance of convenience favours the applicant. It is not disputed that the report by the 3rd respondent is accurate. Applicant is operating well within the area granted to it by Special Grant. There is no error in pegging. The survey report indicated that 1st and 2nd respondents were deliberately and falsely misrepresenting facts. 1st and 2nd respondents resorted to use physical violence and dug pits in an area not open for prospecting and pegging. In reality 1st and 2nd respondents were acting illegally and violated the law by mining illegally and without any documentation.

Applicant has indeed satisfied all the requirements for the grant of an interdict. 1st and 2nd respondents have failed to show any lawful right for their interference in applicant's mining operations. See also the cases of: *Criksen Motors (Welcom) Ltd* v *Protea Motors &*

Anor 1973 (3) SA 685 (A); *Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 and *Durma (Pvt) Ltd* v *Siziba* 1996 (2) ZLR 636 (S).

DISPOSITION

I am satisfied that the applicant has met the requirements for an interdict. The 1st and 2nd respondents sought to mislead the court. The report by 3rd respondent compiled on 27th October 2021 has not been challenged. The court notes that the report sets out the fact that applicant are legally mining on a Special Grant lawfully granted to it. The 1st and 2nd respondents have sought to employ force and violence to interfere with applicant's lawful operations.

In the circumstances and accordingly, the following order is made:

1. The application is granted in terms of the amended draft.

2. The 1st and 2nd respondents are ordered to pay the costs of suit.

CT Mugabe & Associates c/o Mashayamombe & Co, applicant's legal practitioners
Moyo and Nyoni, 1st and 2nd respondents' legal practitioners