

GIOVANNI MARANO
versus
AGREEMENT MINING SYNDICATE
and
TINASHE SHUMBA
and
ORDIOUS CHABUDAPASI MAKAMBAYA
and
CLAUDIUS MAVHENGERE
and
PROVINCIAL MINING DIRECTOR, MIDLANDS N.O
and
SECRETARY FOR MINES AND MINING DEVELOPMENT
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
THE OFFICER COMMANDING, ZIMBABWE REPUBLIC
POLICE, MINERALS, FAUNA AND FLORA UNIT-
MIDLANDS PROVINCE

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 28 September & 7 December 2021

Opposed Application - interdict

G Madzoka with W. Jiti , for the applicant
E. Mubaiwa for the 1st to 4th respondents
No appearance for the 5th – 7th respondents

MUZOFA J. The applicant is the holder of a mining location known as Jumbo 8 in Mberengwa. According to the applicant on the 17th of August 2020 the second respondent in the company of a group of violent youths invaded Jumbo 8. Efforts to resolve the dispute amicably were unsuccessful. During the process, he discovered that the fifth respondent had granted the first respondent mining rights in the area covering Jumbo 8 under the name Jumbo A. The applicant approached the court on an urgent basis for a prohibitory interdict. The provisional order was granted under HC 4550/20 interdicting the respondents from interfering with the applicant's mining activities.

The matter comes for confirmation of the provisional order granted.

The first to the fourth respondents opposed the application. A notice of opposition was filed on behalf of the fifth respondent. Regrettably, such notice was filed out of time. No application for condonation was made. It is trite that condonation cannot be granted where it is not sought. The fifth respondent is therefore barred. The fifth respondent's opposition incorporated evidence favourable to the first respondent's case. Faced with the non-availability of such evidence, the respondents applied to adduce further evidence. The application was granted under HC 680/21. The first respondent then filed the fifth respondent's affidavit and the attachments. For convenience reference to respondents in this matter shall be reference to the first to the fourth respondents only since the rest of the respondents were not before the court.

In opposing the application, the respondents raised two preliminary points, that there are material disputes of facts that cannot be resolved on paper and that the applicant has not exhausted the available domestic remedies. An application was made to strike out certain documents filed for the applicant. On the merits the respondents aver that they are registered holders of a certificate of registration in respect of Jumbo A. Jumbo 8 and Jumbo A are separate and distinct mines with different locations and coordinates. They did not conduct any mining activities on Jumbo 8. Their mining activities are confined to Jumbo A.

I shall address the preliminary points first.

Disputes of fact

Mr Mubayiwa for the respondents submitted that there are material disputes of fact. This matter must be resolved on viva- voce evidence. He highlighted that the founding affidavit refers to the Jumbo 8 coordinates and the respondents have referred to different coordinates. The court cannot tell where the claims are situate in the absence of such evidence particularly from the fifth respondent.

In response, the applicant through counsel averred that the dispute in this matter is illusory. Despite the different coordinates given, the court must accept the coordinates provided by the applicant. The coordinates provided by the respondent were generated by the fifth respondent using the Global Positioning System (GPS) which is computer based and an unreliable system. Further to that, the fifth respondent has been impartial in favour of the applicant. The court was referred to some discrepancies in the fifth respondent's survey diagrams as evidence of such impartiality.

The applicant's counsel referred to useful authorities on the approach that a court must take in coming to a decision whether there is a material dispute of fact incapable of resolution on paper. A material dispute of fact arises in circumstances where,

"... material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence"

Per *Supa Plant Investment (Pvt) Ltd v Edgar Chidavaedzi* 2009(2) ZLR (H) .In what has become the *Plascon – Evans* rule it was noted

'...where it appears to the court that the respondent's defence is a bare denial or raises fictitious disputes of facts or is palpably implausible or farfetched or untenable it can grant relief on the papers. See *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623.

The court has to consider the material facts relied on by the applicant in light of the respondent's defence and decide if it can resolve the dispute on affidavits.

In this case the respondent has relied on an affidavit by the fifth respondent that sets out coordinates for Jumbo A and Jumbo 8. The coordinates are different from those alleged by the applicant. In essence the evidence from the fifth respondent is that there is no over pegging. The two mining claims are on different locations. The applicant's submission is that the fifth respondent's affidavit is of no probative value. It must be disregarded.

Clearly a dispute exists. The court must be satisfied where Jumbo 8 is positioned and where Jumbo A is positioned. This can only be done by way of coordinates. In my view the documentary evidence is adequate for the resolution of the dispute. The court can take a robust approach and resolve the dispute.

The point taken is dismissed.

Exhaustion of domestic remedies.

The respondent submitted that in terms of s354 of the Mines and Minerals Act the Commissioner of Mines has jurisdiction to deal with mining disputes. This is the correct position of the law. However, the existence of internal remedies does not oust this court's jurisdiction. Litigants are indeed encouraged to use domestic remedies which provide a mechanism to expeditiously resolve disputes at a lessor cost. However, where the domestic remedy appears to the litigant to be ineffective the party is at liberty to approach the court. In this case the applicant has alluded to certain conduct by the fifth respondent that borders on impartiality as against the applicant. It is within his right to approach this court for relief.

It is my view that the failure to use the available domestic remedy cannot be a bar to the applicant's case. The preliminary point is without merit.

Expulsion of documents

The first document objected to is marked annexure 11. Annexure 11 is an Exclusive Prospecting Order (EPO) issued to Teamblock Investments (Pvt) Ltd. Teamblock is not part of these proceedings. However the EPO was issued by the fifth respondent and is *prima facie* evidence of what is obtaining on the ground. In my view it is the value attached to the evidence that is important not the admissibility. There is no merit in the point taken.

Annexure AA1 is the applicant's founding affidavit under case number HC2153/20 wherein he sued one Lizwe Moyo and others. Annexure AA2 is the opposing affidavit by Lizwe Moyo. According to the applicant, the annexures show that the second respondent who is a member of the first respondent invaded the applicant's mine. The averment is factually incorrect. The second respondent was not a party under HC 2153/20. He was not even referred to in the applicant's founding affidavit. I agree with the respondents, the documents are irrelevant in the determination of this case and are therefore struck off.

Annexure AA3 is said to introduce new issues. I do not think so. The documents show the boundaries of the EPO 48/08. The applicant referred to this EPO in his founding affidavit. The documents simply substantiate what was already traversed. The existence of the EPO was not controverted by the respondents. Their issue is that the applicant cannot rely on the EPO to challenge their certificate of registration since it does not relate to him. The point taken is misplaced. The documents are properly before the court.

In their heads of argument the applicants raise the issue that the respondents have failed to comply with the provisional order therefore they must not be heard. No further submissions were made on this issue. The court therefore shall not make a determination on it.

In order to succeed in such an application for an interdict the applicant must establish a clear right, the apprehension of an injury and unavailability of an alternative remedy. All the requirements have to be met in order for the relief to be granted. See *Setlogelo v Setlogelo* 1914 AD 221, *Flame Lily Investment Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) and Another* 1980 ZLR 378 *Chirenje v Vendifin Investment P/L and Other* HH 4/05 and *Airfield Investments (Pvt) Ltd v Minister of Lands and Ors* 2004 (1) ZLR 511.

Whether a right exists is a matter of substantive law. Whether the right is clear is a matter of evidence.

In this case the applicant has shown that he is the lawful holder of mining rights over Jumbo 8. The certificate of registration was attached to the founding affidavit. The applicant referred to the coordinates in the founding affidavit. He also attached a geographical map to demonstrate the over pegging. The geographical map does not show the coordinates. It simply has markings of where Jumbo 8 is positioned with Jumbo A almost completely superimposed over it.

Before addressing the respondent's defence the applicant must establish his right. The applicant referred to coordinates in his founding affidavit. It is common cause that Jumbo 8 registration number 7247BM is a re-peg of Jumbo 8 registration 5464. The applicant did not attach any official document to substantiate his averments. The evidence on the coordinates remained a bare averment. The geographical map attached to the application has no coordinates. Its origins were not stated. At this stage the applicant is required to establish a clear right on a balance of probabilities. Section 51 of the Mines and Minerals Act provides for the beaconing of locations Subsection (7) thereof mandates every holder of a mining location to make a certificate to the mining commissioner that such beacons are in good order and condition and that they comply with the requirements of this Act. The applicant could not even attach such a report. From the applicant's documents it is unclear where Jumbo A is located. There are no coordinates for Jumbo A. The applicant only attached a map that does not assist the court. The real dispute between the parties is resolved by a clear articulation of where Jumbo 8 is and Jumbo A is in terms of the coordinates. This is missing from the application and fatal to the applicant's case.

I am cognisant to the applicant's persuasive submission that his version of the coordinates must be accepted as opposed to the respondent's evidence. In my view the court can only consider the veracity of the defence where the applicant's case has somewhere to stand. In this case whether the GPS system is unreliable and renders the fifth respondent's evidence unauthentic cannot be subject to determination when the applicant has failed to establish his case. The court cannot tell from the applicant's case where Jumbo 8 is positioned and where Jumbo A is positioned. Consequently the applicant has failed demonstrate that there is an over pegging over Jumbo 8.

Since the applicant has failed to establish a clear right, it becomes unnecessary to consider the other requirements for an interdict.

My finding on the failure to establish a clear right is closely linked to the relief sought for the cancellation of the respondents' certificate of registration. Since the applicant has failed to establish the clear right the respondent's certificate of registration cannot be cancelled. In addition the respondent's certificate of registration cannot be cancelled based on the EPO issued to Teamblock. There is no evidence of any litigation or objection by Teamblock against the respondents' certificate of registration in respect of Jumbo A. The true nature of the positioning of the EPO and Jumbo A is not an issue before this court. Teamblock is not party to these proceedings and the applicant holds no brief for Teamblock.

Accordingly the following order is made.

The application be and is hereby dismissed with costs.

Jiti Law Chambers, applicant's legal practitioners
Maphosa and Ndomene, respondent's legal practitioners