SUMMERSET MINING SYNDICATE
versus
KINGSTONE NYAMAKURA
and
GOODWELL NYAMAKURA
and
TINASHE NYAMAKURA
and
PROVINCIAL MINING DIRECTOR

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 28 July & 8 August 2023

Judgment

Mr Kajokoto, for the applicant
Mr Chihuta, for the respondent

MANGOTA J: I heard this application on 16 November, 2022. I delivered an *ex tempore* judgment in which I struck the matter off the roll with costs.

On 2 June, 2023 the respondents wrote requesting written reasons for my decision. These are they:

The applicant filed this suit through the urgent chamber book. It moves me, in the interim, to interdict the respondents from interfering with, or disturbing, its mining operations, in particular diamond drilling and explorations which are going on at its claims which are Dennis Registration No.33970 BM, Dennis 2 Registration No. 33971 BM and Shamva 154-5. These, it claims, are located within the respondents' farm which is in Shamva. It moves me further to interdict the respondents and all those who are acting through them from hiring thugs, rowdy mob and gold panners from invading, robbing it of its ore as well as from disturbing its peace at its mining claims.

Its narrative is that it has legal mining rights over the registered area in Shamva which is within Lot 1 of New Brixton Farm with a total size of 68 hectares in extent. It states that what

the respondents did some four days which precede 5 November, 2022 compelled it to file this application on an urgent basis. The respondent, it claims, invaded its mining claims, raided its gold ore from its mining locations and took the same to a mill for its own benefit. It alleges that, on 1 November 2022, the respondents returned to the mine with a group of machete wielding persons and started cutting down trees around the claims alleging that they won the dispute at the police because the farm from which mining is taking place belongs to them. It claims that the respondents threatened to close the whole mining plant and refill all the excavation pits, shafts and exploration holes and put the whole area under cultivation. It avers that the respondents cut down trees mercilessly. It states that on 2nd and 3rd November, 2022 the respondents brought a mob of machete wielding persons to the mine and threatened to return and take over everything by 15 November, 2022 unless the applicant vacated the area on its own volition and removed all its machinery from the area. It expressed its inability to dismantle and /or demobilize its machinery from the mine within the short period which the respondents dictated to it. It avers that it is compelled to leave behind its valuable machinery including three rigs each of which is valued at USD70 000. It claims that on 5 November, 2022 the second and third respondents returned to the mine with a group of persons and started taking away the remaining ore. Its employees, it states, tried to resist but ran away and left everything behind when the respondents threatened to shoot them. It avers that the respondents took the ore and vowed to return and carry on with the same exercise till it vacates their farm. It describes the alleged conduct of the respondents as barbaric and terrifying. It moves me to grant its application as it prays for it in the draft order.

The first, second and third respondents ("the respondent') oppose the application. The fourth respondent who is the Provincial Mining Director did not file any notice of opposition. My assumption is that he intends to abide by my decision.

The statement of the respondent is that the first respondent owns Lot 1 of New Brixton Farm ("the farm"). The farm, it alleges, is in Shamva and it was, according to it, invaded by illegal miners amongst them the deponent to the founding affidavit. It states that it approached the fourth respondent with coordinates of its farm to ascertain from him if he could detect any registered mining claims on the farm. The response which it received was in the negative, according to it. It avers that the fourth respondent advised it that the claims which were close to

its farm were in the remainder of New Brixton Farm and Hiddenis Farm which two farms are neighbours to its own farm. It alleges that it applied to evict the illegal miners who were on its farm. The application for the eviction of those, it states, is at p 26 of the applicant's founding papers and is still pending at court. It claims that it does not believe in violence as a way of resolving disputes. It denies what the applicant alleges against it. It challenges the authority of the deponent of the founding affidavit to sue for, and on behalf of, the applicant. It disputes the allegation that the applicant has mining rights within its own farm. It claims that the deponent to the founding affidavit who was illegally mining on its farm roped in the applicant with a view to getting sympathy of the court. It alleges that it served the eviction application upon the deponent and not upon the applicant. It denies having ever raided the applicant's ore. It insists that, if it stole the ore, the applicant would have reported it to the police. It denies having ever ploughed on the applicant's claims. It states that the land which it is farming has always been under such use since 1997 when it acquired the farm. It denies that the application meets the requirements of an interdict when it did not attach any coordinates to define its claims *vis-à-vis* its farm boundary coordinates. The issue, it insists, is not whether the applicant has mining rights but where it should exercise such rights as considered from the perspective of its farm's boundaries. It states that the applicant's certificates of registration do not show the exact location where it should enjoy its mineral rights. It claims that, in the absence of coordinates, the applicant cannot be said to have established a *prima facie* case. It insists that the applicant's rights are not within its farm. It challenges the applicant to ascertain coordinates of its mining claims and to cease any mining activities pending the ground verification exercise in its presence by the fourth respondent.

This application is for a temporary interdict. An interdict is a remedy which is available to an applicant whose right is under threat from the unlawful conduct of the respondent. An applicant for a temporary interdict must allege and prove, on a preponderance of probabilities, that:

i) he (includes she) has a *prima facie* right;

ii) there is a well-grounded apprehension of irreparable harm to him if the interim relief is not granted and ultimately succeeds in establishing his right;

iii) the balance of convenience favours the granting of the relief to him-and

iv) he has no other remedy which remains open to him: *Steel Engineering Industries Federation & Others* v *National Union of Metal workers of South Africa* (2), 1993 (4) SA 196 (T)at 199 G – 205; *Setlogelo* v *Setlogelo*, 1914 AD 221 at 227; C.B Prest SC *The Law and Practice of Interdicts*, (Juta) pp 50-51.

The existence of the applicant' right is, in my view, a pre-requisite to the granting of the application for an interdict whether temporary or final. It follows from the stated matter that where the right which the applicant claims is not attached to him, the interdict which he seeks cannot be granted to him. It cannot be granted because he has nothing to protect. Similarly, where his right is not established vis-à-vis the respondent or the latter's property, the application for an interdict against the respondent remains misplaced and cannot therefore be granted. The existence of the right of the applicant as measured against the unlawful conduct of the respondent largely determines the success or otherwise of the application. It is, in my view, not necessary for the court to plough through the other requirements of an interdict where the applicant fails to show the existence of a right which attaches to it. It is that right which the court must protect. Where, for instance, the applicant shows a right whose activities are, in terms of location, separate and different from those of the respondent, the application for an interdict cannot succeed unless the applicant shows that the respondent encroached into its area of operation and acted against its interests in an unlawful manner. The existence of a right which operates in favour of the applicant therefore remains a *sine qua non* aspect for the consideration of the remaining requirements of an interdict by the court.

The applicant's statement, as contained in para 10 of its founding affidavit, is that its claims are in Lot 1 of New Brixton Farm which is in Shamva. Lot 1 of New Brixton Farm, Shamva belongs to the respondent. The question which begs the answer is whether or not the claims of the applicant are in the respondent's farm. The answer appears to be in the negative.

The applicant attached its claims to its founding papers as Annexures A, B, C1, C2 and D. These respectively appear at pp 15, 16, 18, 19 and 20 of the record. Claims A, B and D, it is observed, are in Hiddennis Farm and claims C1 and C2 are in New Brixton Farm. None of those claims are in Lot 1 of New Brixton Farm which belongs to the respondent. The applicant cannot have me believe that Lot 1 of New Brixton Farm is the same as New Brixton Farm. The two farms are separate and different from each other. The applicant was therefore being economic

with the truth when it alleged, as it did, that its claims are on Lot 1 of New Brixton Farm, Shamva. The reality of the matter is that they are not on the farm of the respondent. They are far removed from that farm.

That Lot 1 of New Brixton Farm belongs to the respondent requires little, if any, debate. Reference is made in the mentioned regard to Annexure H which the applicant attached to its application. The Annexure is at p 24 of the record. It is an application by the respondent to evict from its farm persons whom it described as illegal miners whom it alleged were illegally mining on its farm. Attached to the eviction application which the respondent filed under HC 6552/22 is a deed of transfer which is in the name of the respondent. The deed is at p 31 of the record. Among the persons whom the respondent is evicting from the farm is the deponent to the applicant's founding affidavit one Clemence Makanya. He is the ninth respondent in the eviction application which is still pending at court.

In this application, the respondent challenges the deponent to the founding affidavit to produce proof that the applicant authorised him to sue for, and on its behalf, as he is doing. The deponent does not produce any proof of authority of the applicant. His non-production of the authority makes the application to remain in a still-born condition. It stands on no leg. It is not clear if the deponent does or does not have the authority of the applicant to sue.

What comes out of the respondent's assertion is that the deponent is on a frolic of his own. The assertion is, in my view, more probable than it is otherwise. It is more probable for two reasons. These are that the deponent was allegedly mining at the respondent's farm from which he and others are being evicted under HC 6552/22. He, on his part, does not controvert the respondent's challenge that he was illegally mining at the respondent's farm. Nor does he produce any proof which shows that he has the authority of the applicant to sue the respondent as he is doing. It is therefore on the basis of the above-analyzed set of circumstances that the application remains in the balance.

Given the finding which I made which is to the effect that the claims of the applicant are not on the farm of the respondent, the latter cannot possibly be said to have interfered with the applicant's right to its mining claims. The allegation appears to have been a matter which the deponent to the founding affidavit cooked up as a way of persuading me to allow him and others to illegally mine at the respondent's farm. He must have used the applicant's claims to further his

own interests on the respondent's farm. His machinations, unfortunately for him, appear not to have been thought through in detail. He failed to realize that the claims which are removed from the respondent's farm cannot support the allegation that the respondent was interfering with the applicant's mining rights which are not in any way connected to the respondent's farm. He, in short, failed to prove a *prima facie* case which would have entitled him to a temporary interdict.

The striking of the application off the roll turns the same into an ordinary opposed application which pends the return date. It is at that stage, and not before it, that the applicant is allowed, if it is the one suing, to produce further evidence which shows that its claims are within the respondent's farm. Whether or not it will succeed on the matter depends, in a large measure, on whatever evidence is available to it which will satisfy the court that the same has merit. For the interim, however, it has not shown any right which it wants to protect.

The applicant failed to prove its case on a balance of probabilities. The application is, accordingly, struck off the roll with costs.

Kajokoto and Company, applicant's legal practitioners
Gumbo and Associates, respondent's legal practitioners