

EAGLE LITHIUM RESOURCES (PVT) LTD
versus
PAUL MASAMVU
and
PROVINCIAL MINING DIRECTOR MASHONALAND EAST
(MARONDERA) N.O

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 28, 29 September & 25 October 2023

Urgent Chamber Application

L Uriri, for the applicant
D C Ngwerume, for the respondents

CHITAPI J: In this urgent chamber application, the parties filed heads of argument after the applicant was granted leave to file an answering affidavit and did so. The parties thereafter mutually agreed that I determine the application on the basis of the filed papers and heads of argument without convening a formal hearing.

The applicant and the first respondent as they are named in the heading to the application are registered holders of what the applicant claims to be adjoining mining claims situated in Goromonzi, Mashonaland East Province. The applicants claim which concerns the dispute between the applicant and the first respondent is a called “Step Aside” registered numbers 19948 BM. The first respondent holds title to a mining block called Colga, registration number ME 536G and Colga registered number ME537. The first respondent avers that his mining blocks do not adjoin with the applicant blocks.

The applicant seeks an interdict by way of the court granting a provisional order. The provisional order sought is expressed as follows:

TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms:

1. The first respondent's conduct in mining and extracting lithium ore from the disputed area, being the eastern boundary of Step Aside claim number 19948 BM belonging to the applicant, be and is hereby declared to be lawful.
2. The first respondent shall pay costs on legal practitioner-client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicant is granted the following relief:

1. The first respondent be and is hereby ordered to return the estimated 6,275 (six thousand two hundred and seventy-five) tonnes of lithium ore he caused to be removed from the disputed area which is the subject of an appeal under HC CIA 232/23, situated on the applicant's mining claim, being Step Aside claim number 19948 BM within three (3) days of service of this order upon him.
2. The first respondent or anyone acting through him, on his behalf or otherwise in concert with him be interdicted, barred and stopped from entering upon, conducting blasting and extraction activities upon the disputed area which is the subject of an appeal pending before this Honourable Court under HC 232/23.
3. The first respondent or anyone acting through him, on his behalf or otherwise in concert, with him be interdicted, barred and stopped from entering upon the applicant's claim, namely Step Aside claim number 19948 BM, conducting any mining activities and otherwise interfering with the applicant's use and enjoyment of the same.

The parties are not strangers to the court in this litigation. Under case number HC 4633/23, the applicant filed an urgent application against the same respondents herein. The interim relief sought was the same as *in casu* save that the applicant in case number HC 4633/23 put the figure of tonnes of lithium to be returned to the applicant at 1975 tonnes and at 6275

tonnes in the current applicant. The applicant's contention is that the lithium ore whose return it claims was or has been moved from its claim in which the first respondent has encroached.

Application HC 4633/23 was dealt with by MUNANGATI-MANONGWA J. The learned judge directed the second respondent to deal with and finalize the disputed encroachment of the parties mining claims. The full order dated 17 July 2023 granted by consent of the parties reads as follows:

“IT IS ORDERED BY CONSENT THAT:

1. The second respondent is directed to determine and finalize the encroachment dispute between the parties within 10 (ten) days from the granting of this order
2. Pending the finalization of the encroachment dispute referred to in paragraph 1 above, both parties are prohibited from carrying out any operational and mining activities within 20 metres of either side of the fence erected by the first respondent.
3. The second respondent shall forthwith in the presence of each party's representative confirm and mark the extent of 20 metres mentioned in paragraph 2 above.
4. The first respondent shall not remove, dispose, alienate or otherwise deal with the lithium ore already mined in the disputed area.
5. Costs shall be in the cause.”

The consent order had the effect of regulating the rights of the parties to the disputed area temporarily pending the determination of the dispute by the second respondent within ten days. The second respondent then made a determination on 1 August 2023. The determination was structured in a manner that consisted of ‘The Background’ ‘Findings’ ‘Discussion’ and ‘Determination’. The determination reads as follows:

“4.0 Determination

After taking into consideration all the information provided during the hearing meeting, documentary evidence as well as field evidence:

1. It is not in dispute that Eagle Lithium Resources (Pvt) Ltd is the prior pegged between the two mines. However there is no clear cut evidence from available information to suggest encroachment of Colga1 and Colga 2 into Step Aside block of claims. It's a case of possibly realized mineralization potential on the area which has resulted into allegations of encroachment by Eagle Lithium Resources (Pvt) Ltd.

2. Paul Masamvu's fence is straying outside of his blocks of claims bounds by two (2) metres and is hereby ordered to reposition the fence to match the bounds of his blocks of claims.
3. Eagle Lithium Resources (Pvt) Ltd should get their block of claim surveyed by a competent person and erect permanent beacons."

On 16 August 2023, the applicant, dissatisfied with the determination of the second respondent noted an appeal against the determination to this court under case number CIA 232/23. The said appeal is pending determination. The current application is informed by the summarized background and alleged developments which the applicant alleges to have accused.

The applicant averred that it filed an appeal against the determination of the second respondent. It avers that despite the noting of the appeal which the applicant suggests that it suspends the determination appealed against, the first respondent has continued to unlawfully remove lithium from the disputed area of encroachments. The applicant averred that unless the first respondent is interdicted from removing and in the same vein ordered to return ore removed from the disputed area the appeal would be rendered academic as the area of dispute would have been mined and depleted thus prejudicing the rights of the applicant if the appeal succeeded. The applicant averred that the first respondent's workers had again encroached on the applicants claim and were mining lithium therefrom and removing it. The applicant averred that the provisional order by consent had the effect of excluding from mining a forty metre wide exclusion zone or area being the area in dispute. The applicant then related to the requirements for the grant of the interdict which it seeks.

The second respondent did not oppose the application. The first respondent opposed the application. In the opposing affidavit the first respondent averred that the applicant did not have *locus standi* to seek an interdict against the respondents because its claims and that of the applicant did not share boundaries. The first respondent further averred in this regard that the co-ordinates of the claims of the applicant and those of the first respondent left an island between the two claims of fifty metres that separate the claims. It was averred that the fifty metres area belonged to the "Mining Development" (sic). It is difficult to understand the first respondents' objection to the *locus standi* of the applicant to bring this application against the first respondent. In his heads of argument, the first respondent submitted that its objection to the *locus standi* of

the applicant was not addressed by the applicant. I assume that the first respondent was referring to the point not being addressed by the applicant, I did not find such argument therein. It is I think pertinent to appreciate that the issue of *locus standi* as was raised in the opposing affidavit was denied and addressed squarely by the first respondent on the answering affidavit. Cause of action and defences in application procedure are founded on the three sets of affidavits, the founding, the opposing and the answering affidavit and not in heads of arguments which are intended to facilitate parties to summarize and support their cases with legal authorities which may assist the court to justly determine the matter.

Locus standi in its basic definition denotes the interest of a party to sue or defend the subject matter of litigation. The applicant averred that its mining claim shares a boundary with the first respondent's claims and that the first respondent encroached on its mining claim and continues to illegally extract lithium from the disputed area. It is common cause that MUNANGATI-MANONGWA J in case number HC 4633/23 ordered that the second respondent should determine the encroachment dispute. The second respondent did so as already noted. The determination of the second respondent was inconclusive. The parties were advised by the learned judge to reconsider their positions in the light of the inconclusive nature of the determination of the second respondent and his direction that the applicant should survey its claims and erect permanent beacons to obviously resolve the current and future disputes. For as long the parties accept as it is common cause that there is a disputed boundary or a land mass between their respective claims. Then they both have *locus standi* to institute proceedings and defend such proceedings as the case may be. The fact that their positions on encroachment are polarized does not remove *locus standi* on their part. The determination on encroachment is a matter of factual dispute to be determined to finality. The court has not yet pronounced on the matter by final order or judgment. The point *in limine* on *locus standi* has no merit because the applicants and first respondent both have a real and substantial interest in the dispute before the court. The test of *locus standi* being that a party has *locus standi* if the party has a real and substantial interest is well reversed.

See *Allied Bank Limited v Dengu and Another* SC 52/16

The next point *in limine* raised by the respondent was that the dispute between the parties was already *lis pendens* in case number HC 4633/23 already referred to in this judgment. It will be noted that indeed case number HC 4633/23 has not been finalized. Indeed the applicant was advised to decide on way forward in the light of the determination made by the first respondent pursuant to the order of court on the disputed boundaries of the parties claims. Neither of the parties has taken steps to bring the case to finality. Note was also made on the similarities of the reliefs sought I case number HC 4633/23 and in the current case. The applicant's argument in the answering affidavit was that the interim relief granted in case number HC 4633/23 was premised on the determination of the first respondent being made in terms the interim order given therein. It is common cause that the applicant appealed against that order.

The applicant averred that the current application arises from a different cause of action. The applicant denied that it ignored the letter from the Registrar on the need to take a position in relation to case number HC 4633/23. It attached a copy of its letter to the Registrar dated 17 August 2023 in which it advised that it had noted an appeal against the determination of the second respondent thereby rendering the determination suspended until the appeal is determined. The applicant indicated that it intended to pursue the application unless the first respondent agreed to a stay of the matter pending appeal. I must therefore record that the assertion that the applicant ignored correspondence from the judge on way forward in the matter was false. As case number HC 4633/23 stands, the same stands uncompleted with the applicant having advised that the matter should proceed. A set down date has to be given through the registrar and either party can seek the set down.

As to whether the relief sought herein is *lis pendens* in case number HC 4633/23 I think not after reading the papers and the parties submissions. The relief sought *in casu* is premised upon the alleged blasting, mining and extraction and removal of ore by the first respondent's Chinese proxies or counter parts from the disputed area wherein encroachment is alleged to have taken place. The applicant averred that the activities took place between 15-21 August 2023 when the first respondent moved several truckloads of lithium ore numbering about 170 in total. The applicant estimated the amount of ore moved at 4300 tonnes making it 6275 tonnes making account

of the one already removed at the time of filing application HC 4633/23. The applicant produced copies of loading records for the allegedly removed lithium ore. The first respondent did not challenge the evidence of the removed loads. The first respondent instead mentioned that the applicant was wrongly seeking to interdict the mining over an area which did not belong to it.

The first respondent also took objection *in limine* to the urgency of the matter. He averred that the applicant had after the second respondent's determination of 1 August 2023 failed to set down an application HC 4633/23 and further ignored a letter from the Registrar directing the parties to indicate their intention on the way forward in the matter. It has already been noted that the applicant did not ignore the alleged letter but advised that it intended to pursue the application further unless the first respondent agreed to a stay of proceedings pending appeal. The first respondent averred that the applicant was not compliant with s 363(1) of the Mines and Minerals Act [*Chapter 21:05*] which required that every mining claim holder should point out pegs, notices, beacons and other land marks at the direction or request of the Mining Commissioner. He averred that the applicant did not have a clear right to approach the court and that its appeal CA 232/23 was devoid of merit. The first respondent also averred that the applicant had not abided by the second respondent's determination to erect beacons after proper survey to demarcate to claims. It had not done so. It seemed to me that the first respondent conflated urgency of the application with requirements for the grant of an interdict.

The applicant averred that the need to act arose upon the applicant discovering truckloads of lithium ore being moved by the first respondent from the disputed mining area during the period 15 to 21 August 2023. The applicant then filed this application on 24 August 2023. The first respondent averred that the need for the applicant to act arose when it received the determination of the second respondent on 1 August 2023 and in failing to set down case number HC 4633/23 thereafter. The first respondent averred that the applicant also ignored the Registrar's letter dated 10 August 2023 already referred. The letter as noted was not ignored. It is, however, any view that the need to act must be the events of the resumption of mining and ore removal which had been suspended in the interim consent order granted by MUNANGATI-MANONGWA J in case number HC 4633/23. Case number HC 4633/23 remained unfinalized and remains so. The learned judge asked the parties to indicate how it was intended to proceed with

the case in the light of the determination of the second respondent. The applicant contrary to what the first respondent alleges, communicated its position that it wanted the matter to proceed to finalization.

What is clear to me is that the determination of the second respondent was not formally admitted as evidence in the application HC 4633/23. It still has to be dealt with by MUNANGATI-MANONGWA J and case number HC 4633/23 still remains a partly heard matter of MUNANGATI-MANONGWA J. The applicant took the precaution to note an appeal against the determination aforesaid. The effect of the report if admitted by the court, is a decision of the court and not the parties. The report remains uninterrogated and there is no agreement on its correctness between the parties. The first respondent was and is not entitled to judge the report as correct. It is a function of the court. The same applies to the applicant. Its position that the determination is wrong is only its position. The court which ordered that the determination be made must speak on the report and what the court says is the decision of the court which informs how the matter may be finalized. The respondent was not entitled to consider the matter finalized by the filing of the report without the court making the final decision. In my view, the removal of ore from the disputed area before the court concluded case number HC 4633/23 created a situation that entitled the applicant to approach the court on an urgent basis. See *Andrew John Pascoe v Ministry of Lands & Rural Resettlement & Attorney General* HH 11-17 in which various authorities on urgency are referred to.

It was noted in the *Pascoe case* aforesaid adopting the timeless authority of *Kuvarega v Registrar General & Anor* 1998(1) ZLR 189 that the applicant in an urgent application must act immediately that the wrong against him or her is committed. The applicant must demonstrate irreparable harm actual or potential and that if the court does not address the harm immediately, there would be irreparable harm which cannot be addressed adequately by an alternative remedy. I would not have been persuaded that the applicant has no alternative remedy and adjudged the matter not urgent. There is, however, an issue arising in this application which that is of great concern. It is that the first respondent appears to have usurped the function of the court by acting on a determination of the second respondent before the court which ordered that it be made has spoken on it and finalized the boundary dispute the subject of case number HC 4633/23. A party

should not usurp or undermine the function of the court. Court process must be protected, respected and given effect to. *In casu* this will be achieved by placing the parties in the same position in which they were pending the final determination of case number HC 4633/23 because although the current application relates to loads of ore removed after case number HC 4633/23 had been commenced, the removal appears to be continuation after the moratorium granted in the interim order in case number HC 4633/23.

The applicant prays for an interdict to stop the first respondent from removing ore and mining on the disputed boundary area. The first respondent has argued strenuously that the applicant is non-compliant with the law on pegging and erecting beacons. It has placed the second respondent's determination which MUNANGATI-MANONGWA J ordered it be done, as a basis for impugning the applicant's claim. The first respondent was misguided or ill-advised to make conclusions which only the court can make before the court had made findings on the determination. The first respondent must be stopped from engaging in acts which undermine the judicial process in case number HC 4633/23.

The applicant in seeking an interdict *in casu* averred that it had a *prima facie* right to the relief sought. The *prima facie* right exists warranting protection. There is uncertainty on the right of the first respondent to exploit the ore reserves in an area wherein the court ordered that the boundaries of the applicant's claims vis-à-vis those of the first respondent in determined by the second respondent. The court has still to deal with the matter case number HC 4633/23 to finality. In this regard the applicant has averred that the its pending appeal further provides a *prima facie* right. That may well be so. However, the compelling issue is that the dispute between the parties has not been finalized by the court and the court has an inherent right to protect its processes.

The issue of irreparable harm or no other remedy is also debatable. However, in view of the finding which I have made that the first respondent's conduct if not arrested undermines the process of court in case number HC 4633/23 rendering the decision which may be given therein academic, I consider that an interdict is necessary to be granted for the continued protection of court process. The first respondent has not denied that it is carrying out the mining operations

complained of. The first respondent has instead sought to rely on a determination not formally presented to the court which has not finalized the matter.

It must be noted that at this stage the applicant in terms of r 60(a) of the High Court Rules (2021) only needs to establish a *prima facie* to be entitled to a provisional order which the judge may grant in terms of the draft order or as varied. An appropriate interim order is one which ensures that no mining activity or removal of ore already mined takes place on the disputed boundary area pending the finalization of case number HC 4633/23. Since the applicant filed an appeal against the determination of the second respondent before MUNANGATI-MANONGWA J finalized the application on which she ordered that the determination be carried out to ascertain the disputed boundaries the effect of the appeal is a matter which the learned judge will deal with as a matter of law. The first respondent cannot lawfully arrogate to itself the power to determine the dispute for itself whether or not the determination made was be favourable to him.

In the result, I grant the following interim relief with the provisional order filed by the applicant being varied to that extent:

“Pending the determination of this matter and case number HC 4633/23, the applicant is granted the following relief:

- (i) The first respondent is interdicted from carrying out any mining activities including removal of any mined ore from the disputed area including ore already mined.”

Makonore Attorneys, applicant’s legal practitioners
Ngwerume Attorneys, first respondents’ legal practitioners