

LUCKSON SITHOLE  
versus  
SMELLY DUBE  
And  
PROVINCIAL MINING DIRECTOR, MIDLANDS N.O.

HIGH COURT OF ZIMBABWE  
WAMAMBO J  
MASVINGO, September 2021 and 13 October 2021

*T. Kuchena*, for the applicant  
*E. Mandipa*, for the 1<sup>st</sup> respondent  
*A. Zikiti*, for the 2<sup>nd</sup> respondent

### **URGENT CHAMBER APPLICATION**

WAMAMBO J: This is an Urgent Chamber Application wherein the applicant and 1<sup>st</sup> respondents are embroiled in a tussle over a mine. It is one of the many matters that cross a Judge's desk in this area wherein mining operations have been opened up to syndicates, conglomerates and individuals.

The applicant seeks that 1<sup>st</sup> respondent be interdicted from interfering with his mining operations and also seeks ancillary relief flowing from the assertion that he is the registered holder of a mining block known as Luck Gold and situated in Shurugwi.

1<sup>st</sup> respondent on the other hand avers that in fact it is applicant who has encroached into his mining area which she holds through a tribute agreement with Ngezi Mining Company.

The respective areas claimed by both applicant and 1<sup>st</sup> respondent are adjacent to each other.

Perhaps it is necessary to set out each party's respective positions in more detail. Applicant in his founding affidavit avers as follows:-

He was issued with a mining certificate on 17 June, 2021. The mining certificate is attached to the application and reflects that applicant is a registered holder of 8 gold reefs named

Luck Gold. The northings and eastings of the said claim are endorsed in long hand on the Certificate of Registration No. 31886. Amongst other papers appended to the application is applicant's application for registration of a claim, survey report, a map and pictures depicting 1<sup>st</sup> respondent's head gear established inside applicant's mine.

According to applicant after being granted a certificate of registration he erected mining beacons around 10 July 2021. 1<sup>st</sup> respondent made allegations that applicant was operating in her mine and adamant that this was untrue he invited her to verify the coordinates for the mine, to which she declined.

Around 19 August, 2021 1<sup>ST</sup> respondent enquired from him if he was still operating at the mine. Perturbed by this enquiry he visited 2<sup>nd</sup> respondent's office for clarity and was informed that he should continue with his mining operations.

From 20 September, 2021 onwards the access road passing through 1<sup>st</sup> respondent's mine was blocked and 1<sup>st</sup> respondent started erecting a fence and other developments. Ugly developments followed wherein 1<sup>st</sup> respondent's mine security manager stopped applicant's employees from carrying out operations and fired three gunshots in a threatening gesture.

Applicant avers that he has a clear right being the holder of a mining certificate and he is operating from the given and correct coordinates as provided by 2<sup>nd</sup> respondent. He avers that through 1<sup>st</sup> respondent interventions he stands to lose his mine because for him to apply for his first inspection certificate he has to exhibit clear evidence of work being done on the ground. He avers that the 1<sup>st</sup> respondent has no right to stop him from operating on his mine. He has also approached the police to intervene to no avail.

Innocent Chimona, applicant's mine manager in a supporting affidavit buttresses the version given by applicant and gives more detail on what amounts according to his version to violent acts on the part of 1<sup>st</sup> respondent's employees.

On the other hand 1<sup>st</sup> respondent is firmly opposed to the application. She filed opposition papers. She avers as follows:-

In December 2015 Shabani Mashava Mining Holdings (Pvt) Limited through its subsidiary company Ngezi Mining Company (Pvt) Limited entered into a tribute agreement for 24 gold claims at Tebekwe Mine in Shurugwi with Tebekwe Sands (Pvt) Limited and Matovu Investments. She is one of the Directors of Matovu Investments. In August 2021 applicant

encroached onto two of the tributes held by Matovu namely Tebekwe 45, Registration Number 21351 and Tebekwe 48 Registration Number 21354. She told applicant to stop mining activities at the aforesaid tributes. To buttress these assertions 1<sup>st</sup> respondent attached current inspection certificates and proof of payment for Tebekwe 45 and Tebekwe 48.

Applicant however continued with his mining activities. The erected fence and head gear are erected within Matovu claims. She approached 2<sup>nd</sup> respondent with a complaint about applicant's activities.

The 1<sup>st</sup> respondent avers that she never instructed anyone to be violent towards applicant. She is adamant that this matter falls squarely within the confines of an encroachment dispute or mining boundary dispute.

She suggested that the 2<sup>nd</sup> respondent should be called upon to utilise his expertise to demarcate the boundaries between the parties. *Mr Mandipa* cited the case of *Muchenura v MM Prospects* HB 147/21 as authority for the proposition that the dispute should be referred to the 2<sup>nd</sup> respondent who should carry out a ground visit and assessment and resolve the dispute.

There was also reference to sections 345 and 346 of the Mines and Minerals Act [Chapter 21:05], Section 345 reads as follows:-

“345 (1) *Except where otherwise provided in this Act, or except where both the complainant and defendant have agreed in writing that the complaint or dispute shall be investigated and decided by the Mining Commissioner in the first instance, the High Court shall have and exercise original jurisdiction in every civil matter, complaint or dispute arising under this Act and if in the course of any proceeding and if it appears expedient and necessary to the Court to refer any matter to a mining commissioner for investigation and report, the Court may make an order to that effect*”.

Section 346 clothes the Mining Commissioner with judicial powers “*to hold a court in any part of the mining district to which he is appointed, or at his discretion in such place outside the said mining district as may be convenient to the interested parties*”.

*Ms Zikiti* for the 2<sup>nd</sup> respondent was of the view that given that the dispute is for an encroachment 2<sup>nd</sup> respondent should be given an opportunity to compile a report.

I have pondered over whether applicant have proven that he deserves the relief he seeks. In other words if he has satisfied the requirements for an interdict.

MOYO J in *Pure Treatment Investment (Pvt) Ltd v Brygen Hotels (Pvt) Ltd t/a Grey's Inn* HB 367/15 at page 2 spelt out the requirements of an interdict as follows:-

- “(1) *that the right to be protected is clear and*
  - (a) if it is not clear, it is prima facie established though open to some doubt, and*
- (2) *there is a well-grounded apprehension of irreparable harm if interim relief is not granted*
- (3) *the absence of any other remedy*
- (4) *that the balance of convenience favours applicant per ZESA Staff Pensions Fund v Mushambadzi SC 57/02”*

Applicant has established that he holds a registration certificate for Luck Gold with registration number 31836. This is the very same claim for which he seeks 1<sup>st</sup> respondent to be interdicted from mining and interfering with operations thereat.

1<sup>st</sup> respondent argued forcefully that the claim in question is actually part of Tebekwe and that by determining this matter on the papers it is an exercise in futility as that won't resolve the matter.

I am unable to understand this argument. Applicant has identified the claim by name, by registration certificate and by coordinates. He has averred that beacons are in place demarcating his claim.

If the 2<sup>nd</sup> respondent can assist the parties to determine where Luck Gold extends from and ends it is another matter altogether.

At this stage applicant has proven a *prima facie* right. 1<sup>st</sup> respondent on the other hand avers that the claim in dispute is in Tebekwes 45 or 48 held by 1<sup>st</sup> respondent. The coordinates for the two Tebekwes are not given. It is unclear whether the encroachment according to 1<sup>st</sup> respondent is on Tebekwe 45 or 48 or both.

I also find that there is a well-grounded apprehension of irreparable harm. We are talking of precious minerals which can easily be depleted if 1<sup>st</sup> respondent disrupts or interferes or herself process mining operations at Luck Gold.

According to applicant which averment was not strongly opposed there has been efforts to get the parties to sit down and map the way forward. 2<sup>nd</sup> respondent and the police have been approached to resolve the dispute to no avail.

Considering the positions of the applicant and the 1<sup>st</sup> respondent it appears to me that the balance is in favour of applicant. He stands to suffer more and needs to protect his right to the mining operations.

The allegations of violence towards applicant by 1<sup>st</sup> respondent's employees are also in 1<sup>st</sup> respondent's favour in the circumstances.

In the light of the above I find that applicant has proven the relief he seeks.

On costs the applicant seeks costs on a legal practitioner scale. Costs are not usually granted in a provisional order but are determined on the return date. I find nothing unusual about this matter to depart from this general position. To that end I will grant the order as prayed for by applicant save that paragraph 3 on the interim relief dealing with costs is excised from the order.

*Makururu & Partners*, applicant's legal practitioners

*Mutatu and Mandipa*, 1<sup>st</sup> respondent's legal practitioners

*Civil Division of the Attorney General's Office*, 2<sup>nd</sup> respondent's legal practitioners