

ROBERT KAGANDI

versus

DENIES MUZUNZE (N.O.)

(In his official capacity as Executor Dative of Estate late EPHRAIM TICHAONA MUZUNZE)

And

THE MASTER OF THE HIGH COURT (N.O.)

HIGH COURT OF ZIMBABWE

WAMAMBO J

MASVINGO, 23 OCTOBER, 2020 and 6 NOVEMBER, 2020

Urgent Chamber Application

T. Tabana for the applicant

R.C. Chakauya for 1st respondent

No appearance for 2nd respondent

WAMAMBO J: The applicant seeks the following Order.

“TERMS OF THE FINAL ORDER SOUGHT”

That you show cause to this Honourable Court, if any, why a final order should not be made in the following terms;

- 1. That the first respondent or any person acting on his behalf for the purpose of furthering the interests of the first respondent be and are hereby ordered to refrain from in any way interfering with the applicant’s possession or occupation of Coronation 2 situated approximately party (sic) on Bruceham Farm (6 Hectares) party (sic) on Victoria Park Farm (1 Hectare) approximately 137m North of Coronation School and approximately 500m north east of trig Beacon 475/1 RE Pegs 4697 & 4718 Masvingo and shall be so interdicted and/or restrained from any such future interference save (sic) may be authorized by a binding and operational order of competent jurisdiction.*

2. *The first respondent shall pay costs of suit if he opposes the application.*

TERMS OF INTERIM RELIEF GRANTED

That pending the finalisation of this matter the first respondent is restrained and interdicted as follows:-

Pending the determination of the applicant's application for a declaratory order of case number HC 263/20, the first respondent or any other person(s) acting on his behalf be and are hereby interdicted and restrained from doing any acts likely to interfere with the applicants' mining operations, peaceful possession and/or occupation of Coronation 2 Mine, Masvingo"

The background is pieced together by the applicant as follows. The applicant is a member of Enfield Syndicate and thus a joint holder of rights emanating from Certificate of Registration Number 5244 in respect of a mining location styled Coronation 2 Mine.

On 12 October, 2020 first respondent visited Coronation 2 Mine and threatened applicant's employees for mining at the said mine. First respondent instructed certain persons to enter the mine and also removed ore produce from applicant's a shaft and sold the same.

First respondent threatened to continue visiting Coronation 2 Mine daily to disturb applicant's mining operations announcing that he has the sole rights to mine at the said mine.

This Urgent Chamber Application was filed with the Registrar of this court on 21st October, 2020.

The first respondent opposes the application and avers as follows:-

He is the Executor Dative in his late father Ephraim Tichaona Muzunze's Estate. Coronation 2 Mine has always been under the sole control of his late father. There is no partnership agreement or certificate of transferor and transferee culminating in the formation of Enfield Syndicate.

Applicant should have produced a Certificate of Registration after transfer reflecting that after the registration of Coronation 2 there was transfer of rights to applicant. A Certificate of Registration after transfer of Enfield Syndicate's name with a transfer number and not a registration number should have been produced. The Certificate of Registration is irregular. A lot is alleged on alleged irregularity of the Certificate of Registration.

First respondent also avers that applicant has no direct and substantial interest in Coronation 2.

First respondent also avers that he has never seen applicant at the mine and that the workers thereat used to work for Sarah Mutema. He further avers that he has never removed gold ore from Coronation 2 Mine.

The second respondent submitted a report. It confirms that Ephraim Tichaona Muzunze's Estate was registered with their office in September 2017 under DRMS 219/17. Coronation 2 Gold Mine Registration No. 5244 is listed on the preliminary inventory among other assets of deceased.

The second respondent avers that her office is not privy to the percentage of the gold claim owned by deceased since the Executor is yet to file the Executor's Inventory in terms of Section 38 of the Administration of Estate, Act [*Chapter 6:01*]. The estate is yet to be finalised.

The first respondent however raised a point *in limine* to the effect that the matter is not urgent. The reasons given are that his alleged interference at the mine happened on 12 to 13 October, 2020 yet this application was lodged on 21 October, 2020, which is an unreasonable delay.

It is further alleged that this application is brought so that applicant can have access to Coronation 2 Mine and extract as much gold ore as possible to the extent of depleting the gold ore.

It is further alleged that applicant seeks through this application to extract gold from Coronation 2 Mine pending the hearing of the matter wherein he applies for a declaratory order (HC 263/20).

Mr Tabana was of the view that it has become fashionable that points *in limine* are raised in Urgent Chamber Applications. He argued that an 8 day delay was not inordinate. He gave an account of how applicant had to brief a Harare based legal practitioner, the preparation of papers and filing them at Masvingo High Court.

I need not be detained by this point *in limine*. I am not convinced an 8 day period amounts to an inordinate delay in the circumstances of this case. I have considered the distances between Masvingo and Harare and the need for communication between applicant lawyers and movement of documents to be lodged at Masvingo High Court. In exercising my discretion I find in the circumstances that the 8 day delay in filing the application has been satisfactorily explained. See

Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd (2) Trustco Group International (Proprietary) Ltd SC 43/13 at page 14.

I then turn to the merits of the matter. Effectively the applicant seeks an interdict against the first respondent.

It becomes necessary to probe the requirements of an interdict and apply the same to the circumstances of the instant matter.

The requirements of an interdict have long been settled and they are as follows:-

- (a) a clear or *prima facie* right
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted
- (c) that the balance of convenience favours the granting of an interim interdict and
- (d) that the applicant has no other satisfactory remedy

Applicant avers that a *prima facie* right was established in that he proved that he is a joint owner of Enfield Coronation 2 Mine.

A Certificate of Registration was produced by the applicant. It bears a registration and licence number. It reflects that Enfield Syndicate is the registered holder of 7 hectares of gold dump claims named Coronation 2.

The record reflects a second page which has the names Ephraim Tichaona Muzunze and Robert Kagandi as members. Because of the spirited arguments raised suggesting that the Certificate of Registration was irregular. I requested for the original copy of the said Certificate of Registration. I observed on the original copy that the names of the members of the syndicate are endorsed at the back of the said certificate.

The handwriting endorsing the said names appears on the face of it to be similar to the handwriting on the front of the said document. As mentioned earlier, there were spirited efforts by *Ms Chakauya* for the 1st respondent to point at irregularities on the Certificate of Registration (RK1). The document (RK1) is in Form M.M.8 under the Mines and Minerals Act. It bears an official stamp and a signature under the portion of Mining Commissioner. If the said document is as irregular as was pointed out surely the authorities who on the face of it authored it should have been approached by 1st respondent and adduced an affidavit disowning the same. The fact that Enfield Syndicate is the registered holder of mining rights at Coronation 2 Mine, with nothing more would hardly mean much in favour of 1st respondent. It is the endorsement of the late

Ephraim Tichaona Muzunze and applicant's names at the back of the said document that I consider decisive. Why would applicant's name find itself on an official government document. The answer would be because he is connected to the Syndicate. 1st respondent has alleged that the document is irregular and has not given sufficient and cogent reasons for so saying.

RK6 is a letter emanating from the Ministry of Mines and Mining Development under the hand of M. Muzira the Acting Provincial Mining Director for Masvingo. The letter dated 3 June, 2020 details the history concerning the ownership of Coronation 2 Mine. In a nutshell the letter (it seem that the middle name was misspelt) and Robert Kagandi.

By virtue of the two documents read together and other ancillary documents namely RK2 – RK5, I find that applicant has established a *prima facie* right that is to say by being a member of Enfield Syndicate he has a substantial interest in the mining operations, extraction and sale of gold at Coronation 2 Mine.

Applicant avers that 1st respondent has already listed Coronation 2 as belonging to the Estate of his late father, when the said mine is jointly owned. He avers that he may lose his joint ownership permanently if the said Estate is wound up. Further that he stands to lose financially if the interdict is not granted. Flowing therefrom is that 1st respondent may continue to benefit from the gold ore alone to the exclusion of applicant. He avers that he has no other remedy in the circumstances and avers that 1st respondent has no respect for due process as he has taken the law into his own hands. Applicant argues that the balance of convenience favours him as he has always been mining in a defined area.

He further argues that the case he has filed under HC 263/20 will make a final determination on whether or not applicant is a registered joint owner of Coronation 2 Mine.

Specifically because HC 263/20 is endorsed as a reference case on the application and is again cited in the draft order, I requested for the file and perused it. HC 263/20 is a pending matter wherein applicant is applying for a declaratory order as aforementioned.

The respondents in that case are 1st respondent in this case as the 1st respondent. 2nd respondent in this case is also 2nd respondent, 3rd respondent is Marshall Muzira N.O, 4th respondent is the Minister of Mines and Mining Development N.O., 5th respondent is the Chief Mining Commissioner N.O. and 6TH respondent is the Secretary, Mines and Mining Development N.O.

I note in passing that 4th to 6th respondents have already filed a preliminary response to the application. In the case of her submissions *Ms Chakauya* mentioned that there was a syndicate but quickly withdrew the remark. I am sure there was a reason why that remark was made. *Mr Tabana* made a meal out of the remark. For the fact that it was withdrawn I will consider it as a neutral remark. In other words I will not find that *Ms Chakauya* conceded the existence of a syndicate nor refuted its existence.

Ms Chakauya was however of the opinion that mining operations should be stopped for both parties. She seemed to emphasise and concentrate on the requirement of a *prima facie* right.

In the circumstances I find that applicant may suffer financial irreparable harm. If 1st respondent persists with disturbing applicant's operations. The balance of convenience is defined in *Tornbridge Assets Limited and Cut Rag Processors (Private) Limited v Livera Trading (Private) Limited and 3 Others* HH 122-17 at page 7 as follows:-

"The balance of convenience is determined by weighing the prejudice to the applicants if the interim relief is refused against the prejudice to the respondent if it is granted."

See *Nyambi & Ors v Minister of Local Government & Anor* 2012(1) ZLR 559 (H).

In this case if the interim relief is refused applicant will continue to be disturbed in his mining operations to his prejudice, financially and otherwise. On the other hand if 1st respondent stays within his rights he will not be prejudiced for he is the one I have found to be transgressing on applicant's *prima facie* right to mine at Coronation 2.

The pending matter HC 263/20 will bring finality to the wrangle on who owns Coronation 2 Mine.

Ms Chakauya's suggestion that both parties should desist from mining operations is not justified. The application is brought to interdict 1st respondent from interfering with applicants mining operations.

I find that applicant has made out their case and deserve the relief sought.

In the circumstances I order as follows:-

The application is granted as per the draft order.

Rubaya and Chatambudza, applicant's legal practitioners
Muzenda and Chitsama Attorneys, 1st respondent's legal practitioners